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IGNORANCE OF LAW, CRIMINAL CULPABILITY AND MORAL INNOCENCE: STRIKING A BALANCE BETWEEN BLAME AND EXCUSE

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The ignorance of law rule, embodied in the maxim *ignorantia juris non excusat*, occasionally conflicts with the fundamental tenet of the criminal law that the morally innocent should not be penalised. It is argued that this rule needs to be reformulated so that reasonable ignorance of law is not excluded as a relevant consideration in criminal matters. A comparative approach is adopted and the discussion is primarily based on the laws of Australia and England with some reference to Canadian and United States jurisprudence. The Penal Code's apparent unequivocal rejection of ignorance of law as a defence has the consequence that local courts have had almost no opportunity to consider the ignorance of law rule and possible exceptions thereto, apart from merely reaffirming that mistake of law is not a defence. The comparative analysis suggests that the ignorance of law rule, while still applicable, has been whittled by several exceptions, the broad thrust of which is that a person who is reasonably ignorant of the law is in fact morally innocent and not deserving of criminal punishment.

I. INTRODUCTION

Ignorantia juris non excusat is a maxim that is familiar to most lawyers and non-lawyers, although perhaps not in its Latin form. While it is often assumed that this maxim has universal application, closer inspection suggests that the exceptions so far recognised have eroded the maxim to such a point that one can begin to contemplate the possibility of at least a general defence of reasonable mistake or ignorance of law. Indeed, as an American academic put it, " the rule enters the arena a roaring lion but is so cut down by case law that it exits a timid lamb."[1] Many of the continental jurisdictions have recognised a defence of reasonable or unavoidable mistake of law.[2] South Africa has gone a step further and recognised a complete defence of mistake of law, *ie* as long as the accused subjectively

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1 J Hall, *General Principles of Criminal Law*, 2nd ed (Indianapolis: Bobbs-Merrill, 1960) at 323.

2 For example, Germany (Penal Code of 1871, s17); France (Criminal Code of 1992, art 122-3); Austria (Criminal Code, s 9).

held the mistaken belief or was genuinely ignorant of the law that was sufficient, even if the mistake were not reasonable.[3]

The situation in Singapore is of course unique as the criminal law is governed by the Penal Code. The defence of mistake is contained in ss 76 and 79, which explicitly exclude mistake of law as a defence.[4] The case law on ignorance or mistake of law is naturally scant. Nevertheless, there have been some cases where the issue has been raised and the courts have not completely dismissed the exculpatory effect of ignorance or mistake of law. One technical way of recognising a limited defence of ignorance of law within the framework of the Penal Code is to distinguish between ignorance and mistake. Since the Penal Code only excludes mistake of law, it may be arguable that ignorance of law need not be excluded as a defence.[5] Another way of recognising a defence of mistake of law is by interpreting particular *mens rea* requirements as including knowledge of the legality of the conduct. A third way is to revert to the fundamental ideals of justice and fairness in the criminal law, which are opposed to the punishment of the morally innocent. A person who has acted under reasonable or blameless ignorance of law should be treated as morally innocent.[6]

The idea that the morally innocent should not be punished flows from the Kantian thesis that an individual should be treated as an end and not merely as an instrument. An individual has a right, not just a legal right, but a moral right to pursue his or her own liberties without the interference of the State.[7] To justify punishment at the individual level, the accused must be morally blameworthy and deserving of punishment. Otherwise, such punishment is unjust.[8] This requirement of moral blameworthiness has been overlooked, partly due to utilitarianism and partly due to legal positivism. The former treats individuals as instruments and thus justifies punishment if

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3 *S v De Blom* 1977 (3) SA 513 (A).

4 Section 76 reads: "Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and *not by reason of a mistake of law* in good faith believes himself to be, bound by law to do it" (emphasis added). Section 79 is similarly worded.

5 See, Rattanlal and Dhirajlal, *Law of Crimes*, 25th ed (New Delhi: Bharat Law House 2002) at 258, where the authors acknowledge cases making this distinction, but ultimately take the view that the distinction is unworkable in practice. See also, *Weerakoon v Ranhamy* (1921) 23 NLR 33.

6 A Malaysian High Court judge has in fact endorsed such an approach, although some doubt of this view was expressed by the Federal Court judges when the case was appealed. *PP v Koo Cheh Yew & Anor* [1980] 2 MLJ 235.

7 R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 184.

8 See, generally A von Hirsch, *Past or Future Crimes* (New Brunswick: Rutgers University Press, 1985); H L A Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968); P H Robinson & J M Darley, *Justice, Liability and Blame* (Boulder, Colo: Westview Press, 1995).

it benefits society as a whole,[9] while the latter imposes the positivist straightjacket on the doctrine of fault, thus excluding consideration of moral blame or innocence. The ignorance of law rule further compounds the problem.

The doctrine of *mens rea* was designed to ensure agency responsibility and moral blameworthiness. A person could be held guilty only if he or she acted with a culpable mental state. The ignorance of law rule unfortunately, has cut the heart out of this doctrine, for *mens rea* should include not just the intention or knowledge or foresight of the conduct and consequence, but most importantly should include knowledge that the conduct is prohibited. If a person does not know that the conduct is prohibited, it cannot fairly be said that the person ought to be held criminally responsible and punished. Explaining this in the context of insanity, Alan Brudner says:

> Thus to be liable to punishment as a criminal, one must both intend the product of one's act and *know that one's act is outlawed* by the standard of intersubjective reason. This, I submit, is what *mens rea* in the full sense means. In the normal case, however, the full content of *mens rea* is not explicitly at issue, for there is a presumption (which is simply a truism) that rational agents know the wrongfulness of unjustified homicide, coercion, takings, and so on. Thus the only part of *mens rea* normally in question is the intentionality of the deed, not of the wrong: we ask, for example, whether the accused intended to kill the victim, taking for granted that he knew killing another person is wrong. When, however, the presumption of rationality is removed, the full meaning of *mens rea* is engaged. The insane accused will be exonerated either if he did not understand what he was doing or if he could not know that what he was doing was wrong.[10]

Thus, with respect to non-insane persons, the critical indicator of criminal culpability, *ie*, knowledge of the lawfulness of the conduct, is presumed. The presumption of knowledge of law is fictitious and is no longer held.[11] It is argued that a person who has engaged in conduct while reasonably not

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[9] It has in recent years, beginning with Hart, been argued that the justification for the institution of punishment should be treated separately from the justification of punishment at an individual level; the former being appropriately governed by utilitarian principles while the latter being within the province of Kantian retributivism. See, H L A Hart, *supra* note 8.

[10] A Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995) at 238 (emphasis added).

[11] See, *Nathan Brothers v Tong Nam Contractors Ltd* (1959) 25 MLJ 240 at 241, referring to *Evans v Bartlam* [1937] AC 473. See also, J Austin, *Lectures on Jurisprudence*, R Campbell, ed, 5th ed, (London: J Murray, 1885, reprint 1972) vol 1, 481-2, where he stated: "That any system is so knowable, or that any system has even been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary."

knowing that it is against the law is not deserving of punishment. George Fletcher, in one of the most influential treatises on criminal law, takes the view that a person is not morally blameworthy if he or she does not have fair opportunity to avoid the act of wrongdoing.[12] A person who is reasonably mistaken or ignorant of the law is, according to him, not morally blameworthy, or conversely should be treated as morally innocent. As the Canadian Supreme Court put it, "*[m]ens rea* … refers to the guilty mind, the wrongful intention of the accused. Its function in criminal law is to prevent the conviction of the *morally innocent* – those *who do not understand* or intend the consequences of their acts."[13]

Another view of moral innocence that has been considered is that the court should take into account any circumstances of the accused, which suggests that, despite the technical requirement of guilt being satisfied, the accused should not be found guilty. In the Malaysian case of *PP v Koo Cheh Yew & Anor*,[14] the High Court implicitly recognised a defence of ignorance of law by holding that *mens rea* included knowledge of unlawfulness. The case was appealed by the prosecution, and in addition to the questions of public interest identified by the prosecutors, the High Court judge, Arulanandom J added this interesting one:

> In a proceeding against the accused under s 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition, *if all the circumstances of the case point to an innocent mind of the accused*, is the court entitled to take cognisance of this fact before giving verdict?[15]

What Arulanandom J was inviting the Federal Court to do was either to allow a defence of ignorance of law by interpreting *mens rea* as including knowledge of unlawfulness, or alternatively, to view reasonable ignorance of law as a factor that points to the moral innocence of the accused, which should lead to an acquittal despite the presence of the technical requirements for legal guilt.

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12 G P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co, 1978) at 510.

13 *R v Theroux* [1993] 2 SCR 5 at 17 *per* McLachlin J (emphasis added).

14 [1980] 2 MLJ 235.

15 [1980] 2 MLJ 235 at 237 (emphasis added). The three questions identified by the Public Prosecutor were:
In a prosecution against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition does a denial by the accused of knowledge of the relevant prohibition order entitle him to an acquittal?
Is not the denial of knowledge under section 135(2) of the Customs Act, 1967, limited only to denial of knowledge as to the facts and not as to the law concerning prohibited goods?
Is it not sufficient for the prosecution to prove that the goods imported were of the description mentioned in the prohibition order in order to show that such importation was contrary to the prohibition?

This article discusses the three strategies for circumventing the ignorance of law rule from a comparative perspective. Given that the Penal Code jurisprudence in this area is necessarily limited, the article draws primarily on the jurisprudence of the common law jurisdictions of Australia, England and Canada. It is argued that ignorance or mistake of law should operate as a defence firstly, where the offence expressly requires knowledge of illegality; and secondly, in a limited category of cases, where the mistake of law is reasonable or blameless. The analysis suggests that in cases of reasonable ignorance or mistake of law, courts should recognise that the accused is morally innocent and should not be subject to criminal sanction.

II. IGNORANCE AND MISTAKE: SAME DIFFERENCE?

Although the two terms, ignorance and mistake are often used interchangeably,[16] they are conceptually different. The distinction is particularly relevant to *mens rea* inquiries because ignorance is an absence of a mental state and raises conceptually different questions when compared to mistake, where there is a positive mental state.[17] Ignorance is a total want of knowledge in reference to the subject matter.[18] Mistake admits of some knowledge, but that knowledge implies a wrong conclusion.[19] These two concepts clearly overlap and it is very difficult to make the distinction in practice.[20] Glanville Williams has argued that no distinction need be drawn between the two as mistake should be treated as a species of ignorance.[21] This view is inaccurate. One can be mistaken without being ignorant and vice versa. For example, if one had consulted the relevant statute on a particular matter and formed an incorrect view of its meaning, one would be mistaken, not ignorant, as to the law. On the other hand, if a statute were passed by Parliament and one contravened it without being aware of it, then one could hardly be said to have acted under a mistake, as one would simply have been ignorant of the law.[22] The distinction is also

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16 G Artz, "Ignorance or Mistake of Law" (1976) 24 American Journal of Comparative Law 646; Anon, "Ignorance or Mistake of the Law" (1978) 37 Maryland Law Review 404; C R M Dlamini, "Ignorance or Mistake of Law as a Defence in Criminal Law" (1987) 50 Tydskrif u'r Hedendaagse Romeins-Hollandse 43.

17 E R Keedy, "Ignorance and Mistake in Criminal Cases" (1908) 22 Harvard Law Review 75; C Howard, *Criminal Law*, 3rd ed (North Ryde: Law Book Co, 1963) at 376-8.

18 See, J Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 13th ed (London: Sweet & Maxwell, 1886) at 159, citing *Canal Bank v Bank of Albany* 1 Hill (NY) 287 (1841).

19 *Hulton v Edgerton* 6 S C 485 at 489 (1875).

20 See, J Austin, *supra* note 11 at 479. With respect to the Penal Code, see, Rattanlal and Dhirajlal, *supra* note 5 at 258, *Weerakoon v Ranhamy* (1921) 23 NLR 33.

21 G L Williams, *Criminal Law: The General Part* (London: Stevens, 1953) at 122.

22 See, D O'Connor, "Mistake and Ignorance in Criminal Cases" (1976) 39 Modern Law Review 644 at 652.

relevant to the defence of honest and reasonable mistake of fact in the context of strict liability offences in certain jurisdictions.[23]

Can we devise a limitation to the ignorantia rule by relying on this distinction and restricting the rule to either ignorance or mistake only? The Latin maxim has been expressed in several ways, including *ignorantia legis neminem excusat*;[24] *ignorantia eorum, quae quis scire tenetur, non excusat*;[25] *ignorantia juris non excusat*;[26] *ignorantia juris haud excusat*;[27] *ignorantia juris, quod quisque tenetur, neminem excusat*.[28] In all of these expressions, the term "ignorantia" is used. The English translation of ignorantia is ignorance.[29] The Latin word for mistake is "erratum".[30] The literal translation therefore suggests that the rule is limited to ignorance and does not apply to mistake. Such a conclusion might be premature. Indeed, an analysis of Blackstone's statement suggests the opposite conclusion to be more likely. Blackstone stated:

> 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.*[31]

Even though the earlier statements of the principle only used the word "ignorance" in relation to the ignorantia doctrine,[32] Blackstone used the terms "ignorance", "error" and "mistake" in his statement of the rule. Error is defined as a "state of being wrong in belief or behaviour."[33] Mistake is similarly defined, and in fact, the two words are treated as synonyms.[34]

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23 See for example, *Clough v Rosevear* (1998) 94 A Crim R 274, where it was held that only a reasonable mistake of fact would serve as a defence to a strict liability offence. Reasonable ignorance of fact would not be sufficient.

24 *R v Mayor of Tewkesbury* (1868) 3 QB 629 at 639 *per* Lush J.

25 M Hale, *History of the Pleas of the Crown* (London: Nutt and Gosling, 1736) vol 1 at 42.

26 *R v Blunt* (1600) 1 St Tr 1450.

27 *Cooper v Phibbs* (1867) LR 2 149 at 170 *per* Lord Westbury.

28 W Blackstone, *Commentaries on the Laws of England*, vol 4 (Oxford: Clarendon Press, 1765-69) at 27.

29 J Morwood (ed), *The Pocket Oxford Latin Dictionary* (1993) at 64.

30 *Ibid* at 259.

31 W Blackstone, *supra* note 28 at 27.

32 See St German, *Dialogue between a Doctor of Divinity and a Student at Law*, T F T Plucknett & J L Barton ed (London: Selden Society, 1974), where the term used in relation both to law and fact is "ignorance"; *Blunt* (1600) 1 St Tr 1450 *per* Popham CJ.

33 *Oxford Advanced Learner's Dictionary*, 4th ed (Oxford: Clarendon Press, 1989, 10th impression 1993) at 407.

34 *Ibid* at 794.

Both error and mistake involve a positive state of mind. Ignorance, on the other hand, is a lack of knowledge or information.

Commentators who have considered the matter are divided on whether ignorance or mistake of law should exclude criminal liability.[35] The academic views may be categorised into three groups:

- those who favour mistake of law as opposed to ignorance of law operating as a defence;
- those who favour ignorance of law as opposed to mistake of law operating as a defence; and
- those who prefer to focus on the culpability of the mistake rather than on the nature of the mistake, *ie* either may be a defence if culpability is negatived.

Edwin Keedy illustrates the first category by arguing that ignorance of law does not negative the criminal mind, whereas mistake of law does.[36] According to Keedy, the criminal mind is one which has the intention to do an act that the law has made criminal. Thus, if A intends to do X, and X is a criminal offence, then despite A's ignorance of the law, "all elements of criminality are present."[37] On the other hand, he argues that if a person acts under a mistake of law, the criminal mind is not present because of the erroneous belief of the accused. This argument belies logic. Unless knowledge of illegality is an element of *mens rea*, which Keedy does not suggest anywhere, there should be no difference between the ignorant accused and the mistaken accused in his analysis. Both intend to do the deed, which the criminal law has made unlawful. Whether they are mistaken or ignorant as to the legality of the conduct is not relevant. Keedy's argument for recognising a mistake of law defence is also limited to offences specifically requiring knowledge of unlawfulness, or to offences where a claim of right is a defence. Most of the cases cited by Keedy are in fact claim of right cases.[38] Keedy's proposition therefore does not operate as a general principle.

Jerome Hall illustrates the second category by arguing that ignorance of the law should be a defence. Where a person is ignorant of the law, there is no *mens rea* and therefore the accused is not guilty. He argues that a person who has made a mistake of law can be said to be reckless on the ground that

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35 See, E R Keedy, *supra* note 17; G L Williams, *supra* note 21 at 122-4; J Hall, *supra* note 1 at 406-7; H Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) at 256-9; R M Perkins, *Criminal Law*, 2nd ed (Brooklyn: Foundation Press, 1969) at 919-20; D O'Connor, *supra* note 22; M A Rabie, "Aspects of the Distinction Between Ignorance or Mistake of Fact and Ignorance or Mistake of Law in Criminal Law" (1985) 48 Tydskrif u'r Hedendaagse Romeins-Hollandse 332.

36 E R Keedy, *supra* note 17 at 90.

37 *Ibid* at 91. Keedy does recognise though that this position is unfair.

38 *Ibid* at 93-4.

"error implies acquaintance and opportunity to form a correct opinion and that might support a charge of recklessness."[39] However, the opposite argument can equally be made. A person who has actually made an effort to know the law has acted more responsibly than the person who did not even consider the legality of the conduct. The weakness of both Keedy's and Hall's approaches is a failure to judge ignorance or mistake of law from the point of view of the effect on criminal culpability. The focus has been on the nature of the mistake and how that might affect the particular mental state in question.

Commentators who represent the third category recognise that the focus should be on the effect and not on the nature of the mistake. George Fletcher is the classic example of this school of thought.[40] Fletcher advocates an approach to mistake where the focus is on the culpability of the accused. The question is whether the mistake in any way negatives that culpability.[41] The earlier approaches discussed above are limited to technical inquiries about the nature of the mistake and how the mistake may have impacted on the descriptive mental state of the accused. Because these approaches do not evaluate the moral blameworthiness of the accused, they fall victim to ingenious, or sometimes disingenuous, arguments. As seen above, eminent academics have come to diametrically opposing conclusions. By evaluating the mistake in terms of its effect on moral blameworthiness, or conversely, moral innocence rather than being distracted by the nature of the mistake, a defence of reasonable mistake or ignorance of law can be justified. The difficult distinctions between ignorance and mistake, as well as between fact and law, may be avoided.

III. THE IGNORANCE OF LAW RULE AND MANIFEST LACK OF CULPABILITY

Blackstone is generally referred to as an authoritative source for the ignorance of law rule despite the fact that he derived the rule from a flawed understanding of Roman law,[42] and inappropriately relied on a minority

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39 J Hall, *supra* note 1 at 407.

40 G P Fletcher, *supra* note 12. See also the South African writers who have adopted this approach: C R Snyman, *Criminal Law*, 3rd ed (Durban: Butterworths, 1995); J M Burchell & J RL Milton, *Principles of Criminal Law* ((Cape Town: Juta & Co Ltd, 1991, reprint 1994); M A Rabie, *supra* note 35; C R M Dlamini, "Ignorance or Mistake of Law as a Defence in Criminal Law" (1987) 50 Tydskrif u'r Hedendaagse Romeins-Hollandse 43.

41 G P Fletcher, *supra* note 12 at 736-7.

42 It is not necessary here to elaborate on this claim; however, some references are provided which substantiate it. See E R Keedy, *supra* note 17 at 78-9; T C Sandars, *Institutes of Justinian*, 7th ed (Westport, Conn: Greenwood Press, 1922) at 388; V Bolgar, "The Present Function of the Maxim Ignorantia Juris Neminem Excusat – A Comparative Study" (1967) 52 Iowa Law Review 626 at 630-1; F De Zulueta, *The Roman Law of Sale* (Oxford: Clarendon Press, 1945) at 8; L Hall & S Seligman, "Mistake of Law and Mens Rea" (1941) 8 University of Chicago Law Review 641 at 646: "Blackstone was in error in ascribing the origin of the ignorantia rule to the Roman law."

judgment in a civil case as his common law authority.[43] The rule has survived and has been staunchly defended over the centuries. Blackstone originally defended it on the presumption of knowledge of the law, a presumption that is no longer held.[44] Austin defended the rule on the grounds of pragmatism. As he put it, if ignorance of law were permitted as a defence, the courts "would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable."[45] This is not a persuasive defence of an unjust rule and Holmes in fact rejected Austin's rationale for the rule, arguing that "[i]f justice requires the fact to ascertained, the difficulty of doing so is no ground for refusing to try."[46] Holmes justified the rule on purely utilitarian grounds, that to permit the rule would encourage ignorance and public policy demanded that the individual be sacrificed for the general good.[47]

All the traditional rationales for the rule avoid dealing with the fairness of the rule and skirt around the issue by relying on false presumptions and pragmatic considerations. Contemporary scholars are less sanguine about the ignorance of law rule. While not rejecting the rule, their support for it is limited to unreasonable ignorance or mistake. Fletcher, relying heavily on German criminal law, where unavoidable mistake of law is recognised as a defence,[48] supports a reasonable ignorance or mistake of law defence. He argues that a person who has not had fair opportunity to avoid the act of wrongdoing should not be considered morally blameworthy.[49] In some instances, a person who, despite all reasonable efforts, was ignorant or mistaken as to the law cannot be said to have had a fair opportunity to avoid breaking the law and is therefore deserving of an excuse. Andrew Ashworth defends the rule on the basis of an individual's duty to know the law as a responsible citizen. Mere ignorance of law would be a breach of this duty and the accused should not be permitted to plead such ignorance as a defence. However, an accused who has taken reasonable measures to comply with the law and is nevertheless reasonably ignorant or mistaken should be allowed a defence.[50]

Courts are cognizant of the inherent unfairness of the rule and have recognised several exceptions to it. The various exceptions can be grouped into three broad categories:

- the mistake gives rise to a claim of right;

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43 *Brett v Rigden* (1568) 1 Plowd 342, 75 ER 516.
44 See, *supra* note 11.
45 J Austin, *supra* note 11 at 483.
46 O W Holmes, *The Common Law* ((Boston: Little, Brown & Co, 1881, 42nd reprint, 1948) at 48.
47 *Ibid.*
48 *Supra* note 2.
49 G P Fletcher, *supra* note 12 at 510.
50 A Ashworth, *Principles of Criminal Law*, 3rd ed (Oxford: Clarendon Press, 1999) at 245.

- the mistake is relevant to a definitional element of the offence; and
- the mistake creates an estoppel argument.

Claim of right is an exception to the rule that is almost exclusively confined to property offences. It is the classical exception to the ignorance of law rule, recognised since the nineteenth century,[51] and is relevant under the Penal Code.[52] The latter two categories are less established and not specifically referred to in the Penal Code, but have nonetheless been considered in the local context.[53]

IV. Definitional Element of the Offence

Where an offence expressly requires proof of knowledge of illegality, ignorance or mistake of law may well operate to exculpate an accused. Even in the early common law, certain offences required knowledge of illegality. The classic example is perjury, which is not merely swearing to that which is not really the fact, but doing this wilfully and corruptly.[54] Hence, one who testifies to a false fact is not guilty of perjury if the testimony is due to a mistake of law. Another example is extortion, which at common law required that the accused must have "wilfully and corruptly demanded and received other or greater fees than the law allowed.[55] A misunderstanding of the law, which induced a *bona fide* belief in the lawfulness of the fee charged, has been held to establish innocence.[56] In the eighteenth century it was held that a magistrate who committed a person under a *bona fide* mistake of law was not guilty of a crime.[57]

Many modern statutory offences expressly include knowledge of unlawfulness as one of the elements. In some statutes, where such knowledge is not expressly required, courts have implied the need for proof of such knowledge by statutory interpretation. The typical examples are

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51 *R v Hall* (1823) 3 Car & P 409, 172 ER 477; *James v Phelps* (1840) 11 AD & El 483, 113 ER 499; *R v Reed* (1842) Car & M 306, 174 ER 519; *R v Boden* (1844) 1 Car & K 395, 174 ER 863; *R v Leppard* (1864) 4 F & F 41; *R v Wade* (1869) 11 Cox CC 549.

52 Penal Code s 378, Illustration (p); *Suvvari Sanyasi* AIR 1962 SC 586; *Nagappa* (1890) 15 Bom 344; *Hamid Ali Bepari* AIR 1926 Cal 149; *Lim Soon Gong* (1939) 8 MLJ 10; *Lai Chan Ngiang v PP* (1930) 1 JLR 30.

53 *Nathan Brothers v Tong Nam Contractors Ltd* [1959] 1 MLJ 240; *PP v Teo Ai Nee & Anor* [1995] 2 SLR 69.

54 *R v Smith* (1681) 2 Shower KB 165, 89 ER 864. It was held that one who testified that no partnership existed between himself and another man was not guilty of perjury although a legal relation of this nature actually existed, if he gave his testimony in good faith reliance upon advice of counsel that the dealings between the two did not as a matter of law create a partnership.

55 *Runnells v Fletcher* 15 Mass 525 (1819).

56 *US v Highleyman* 26 Fed Cas No 15, 361 (WD Mo) (1876).

57 *R v Jackson* (1737) 1 Term R 653, 99 ER 1302. This was due to the requirement of corruptness, which was interpreted to require knowledge of illegality. A better explanation would be that the magistrate was simply immune from wrongful committals.

statutory offences where the mental element is "wilfully" or "knowingly". Statutes that provide a defence of "without lawful excuse" or "without reasonable excuse" are further examples.

A. *Knowingly*

Where the word "knowingly" or "knowledge" is used in a statute to denote the mental element, some courts have held that the offender's knowledge of the law may be relevant, *ie* mistake of law may negative the mental element of "knowledge". In *Secretary of State for Trade and Industry v Hart*,[58] the accused had acted as an auditor for a company of which he was an officer. Section 13 of the Companies Act 1976 (UK) made it an offence for a disqualified person to act as an auditor. Section 161(2) of the Companies Act 1948 (UK) provided that a disqualified person included any officer of the company. Section 13(5) of the Companies Act 1976 (UK) provided:

> No person shall act as auditor of a company at a time when he knows that he is disqualified for appointment to that office; and if an auditor of a company to his knowledge becomes so disqualified during his term of office he shall thereupon vacate his office and give notice in writing to the company that he has vacated it by reason of such disqualification.

The accused argued that he did not have the *mens rea* required under s 13 because he was ignorant of the statutory provision contained in s 161 of the Companies Act 1948 (UK). The trial judge accepted the accused's argument and the Secretary of State appealed by way of case stated. On appeal, Woolf J held that the phrase "knows that he is disqualified" included knowledge of his legal status. If that knowledge were absent due to mistake or ignorance of law, then *mens rea* was not established. Ormrod LJ, in agreeing with Woolf J stated, "if that means that he is entitled to rely on ignorance of the law as a defence, in contrast to the usual practice and the usual rule, the answer is that the section gives him that right."[59]

Very shortly after *Hart's* case, the House of Lords decided *Grant v Borg*.[60] The accused was charged with knowingly remaining in England beyond the time limited by his leave, contrary to s 24(1)(b)(i) of the Immigration Act 1971 (UK). The House of Lords held that the word "knowingly" in the section was limited to knowledge of the facts and did not include knowledge of the law.[61] However, Lord Russell acknowledged that in some cases the word "knowingly" could include knowledge of lawfulness, thereby allowing a defence of mistake of law. "It is, I suppose,

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58 [1982] 1 All ER 817.

59 *Ibid* at 822.

60 [1982] 2 All ER 257.

61 It should be noted that the House did not consider the decision in *Hart's case* because it had not yet been reported, although the House was aware of the decision.

conceivable that in some circumstances under some statute the requirement of 'knowingly' can embrace a mistake of law."[62]

Grant v Borg can be compared with *Lim Chin Aik v R*,[63] and *Lambert v California*,[64] which had similar fact situations, and concerned unlawful entry or overstaying in a jurisdiction. In the latter two cases ignorance of law was held to be a defence.[65] In the Malaysian case of *Nathan Brothers v Tong Nam Contractors Ltd*,[66] the court had to interpret the meaning of the word "knowingly" in the Control of Rent Ordinance (Cap 242) s 15(1)(h). Although, as the court recognised, this case did not concern the criminal liability of the parties, it was held that "knowingly" included knowledge of the relevant law that was being breached. The court also judicially recognised that there was no presumption that everyone knew the law.[67]

B. *Wilfully*

Iannella v French[68] is the leading Australian authority on the interpretation of the word "wilfully" in a statutory offence. The defendant was charged with and convicted of having "wilfully demanded or wilfully recovered" as rent an irrecoverable amount, contrary to s 56(A)(1) of the Housing Improvement Act 1940-1965 (SA). Among the issues on appeal before the High Court of Australia was the interpretation of s 56(A)(1), and principally the meaning to be attached to the word "wilfully". Section 56(A)(1) provided:

> Any person who, whether as principal or agent or in any other capacity, wilfully demands or wilfully recovers as rent in respect of any house in respect of which a notice fixing the maximum rental thereof is in force under this Part, any sum which by virtue of this Part is irrecoverable, shall be guilty of an offence against this Act.

According to Barwick CJ, the word "wilfully" required "an intention not merely to obtain by the demand a sum of money, ...[but] the intention ... must be to achieve the full consequence of the demand, to obtain as it were, its forbidden fruit." There must be an "actual or imputed consciousness of wrongdoing".[69] If the accused were unaware that he was not entitled to recover that rent, it could not be said that he wilfully did so. His ignorance of the law was relevant to the required mental state. As Barwick CJ stated:

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62 *Supra* note 60 at 260.
63 [1963] AC 160.
64 355 US 225 (1957).
65 See also, *Frailey v Charlton* [1920] 1 KB 147; *R v Franks* [1950] 2 All ER 1172n.
66 (1959) 25 MLJ 240.
67 *Ibid* at 241, referring to *Evans v Bartlam* [1937] AC 473.
68 (1968) 119 CLR 84.
69 *Ibid* at 94.

> *Mens rea* may in some cases, depending as I have said on the context and the 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*. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him.[70]

Windeyer J, who agreed with Barwick CJ, concluded that the word generally connoted acting with knowledge of wrongfulness.[71] Where the wrongfulness hinged on knowledge of the law, the ignorance of law rule had to give way.[72] Both judges were in the minority, but their views are more persuasive than the majority judgments because they appeal to common sense and fairness. The majority essentially equated "wilfully" with intentionally or voluntarily. This rendered the word "wilfully" superfluous since the verbs following "wilfully," by definition, required intention and voluntariness. "Demand" and "recover" are not passive. To demand, one must know and intend to acquire the fruits of the demand. To wilfully demand adds nothing unless wilfully is interpreted in such manner as to define the quality of the demand, as Barwick CJ said, "the forbidden fruit". This view of "wilfully" has been applied in New South Wales, Australia[73] and Canada.[74]

This notion of "forbidden fruit" or moral wrongness has been considered in the Malaysian case of *PP v Koo Cheh Yew & Anor*.[75] The accused were charged with importing prohibited products, in this case pianos from South Africa, which were prohibited as part of the global sanctions against South Africa.[76] The accused argued that they were not aware of the prohibition and had not intended to contravene the law. This was a clear case of ignorance of law and the Sessions Court convicted the accused. On appeal

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70 *Ibid* at 97 (emphasis added).

71 Windeyer J's analysis of "wilfully" makes fascinating reading. He included references to the word "wilfully" in the Bible, to academic writers and to decisions in Australia, England, New Zealand and the United States. See *Iannella v French* (1968) 119 CLR 84 at 104-9.

72 "Ignorance of the law is no excuse. But it is a good defence if [the accused] displaces the evidence relied upon as establishing [the accused's] knowledge of the presence of some essential factual ingredient of the crime charged": *R v Turnbull* (1943) 44 SR (NSW) 108 at 109, referred to with approval in *Iannella v French* (1968) 119 CLR 84 at 109 *per* Windeyer J. See also, for similar statements, *Frailey v Charlton* [1920] 1 KB 147 at 153 *per* Darling J; *Donnelly v Commissioner of Inland Revenue* [1960] NZLR 469 at 472-3 *per* Haslam J.

73 *Environment Protection Authority v N* (1992) 26 NSWLR 352.

74 *R v Docherty* [1989] 2 SCR 941.

75 [1980] 2 MLJ 235.

76 Ironically had the accused been prosecuted under South African criminal law, they would not have been found guilty as ignorance of law was by this time a defence in South Africa! See, text and citation *supra* note 3.

to the High Court, the convictions were set aside on the ground that the accused did not have the necessary guilty mind. In a sophisticated analysis of *mens rea*, Arulanandom J held that in addition to showing that a person intended to import the prohibited goods, it had to be shown that the person knew or at least ought to have known of the prohibition. A distinction was drawn between a mind and a guilty mind, *ie* it was not sufficient merely to show *mens rea*, but it had to be shown that the *mens* was *rea*.[77] Arulanandom J's analysis is extraordinarily insightful. He has put his judicial finger right on the pulse of criminal culpability. There has to be proof of moral blameworthiness in addition to proof of the technical elements of criminality, which includes the subjective mental state. Recall the critical question raised byArulanandom J:

> In a proceeding against the accused under s 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition, *if all the circumstances of the case point to an innocent mind of the accused*, is the court entitled to take cognisance of this fact before giving verdict?[78]

This question goes to the heart of the issue of criminal guilt. Even if all the technical indicators of criminal liability are present, should an accused be excused if the evidence suggests an absence of moral blameworthiness, or to put it another way, if the evidence suggests that the accused is morally innocent? It is suggested that in cases where an accused is reasonably ignorant of the law, such a person is indeed morally innocent and should not be found criminally liable. A majority in the Federal Court however, disagreed with the High Court judge and held that the ignorance of law rule had long been settled. The majority did acknowledge one exception, based on the line of authority found in cases such as *R v Bailey*[79] and *Lim Chin Aik v The Queen*[80] that where it is not reasonably possible for a person to discover the law, for example, if it has not been published or gazetted, then such ignorance of law may serve as a defence. The majority held that this case was not similar to *Lim Chin Aik* and therefore the accused's ignorance of law should not have assisted them.[81]

The Lord President dissented and held that reasonable ignorance of law could be a defence in such a case, and significantly, answered the additional question of public interest put by Arulanandom J in the affirmative. Thus,

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77 This splitting of *mens rea* into two concepts is seen even in the early twentieth century in Lord Birkenhead's opinion in *DPP v Beard* [1920] AC 479 at 504 where he stated, "…a person cannot be convicted of a crime unless the *mens* was *rea*."

78 [1980] 2 MLJ 235 at 237 (emphasis added).

79 (1800) Russ & Ry 1, 168 ER 651.

80 [1963] MLJ 50, AC 160.

81 Since this was an academic appeal, the accused's acquittal was not affected by the Federal Court's ruling.

even if the technical indicators of criminal guilt are present a court should not preclude itself from considering the accused's moral innocence, even if that moral innocence manifests itself by way of reasonable ignorance of law. Cases where the accused had reasonably relied on official advice, which turned out to be incorrect, provide a vivid illustration of how the ignorance of law rule clashes with the fundamental principle of not punishing the morally innocent. In these cases, while the courts are still constrained by the ignorance of law rule, they have attempted to ameliorate the harshness of the law either by recognising an exception to the ignorance of law rule, or by treating the accused's reasonable reliance on the law or official advice as evidence of due diligence or reasonable conduct. In some cases, courts have granted an absolute discharge.

V. Reasonable Reliance on Official Advice: A Comparative Analysis

Reasonable reliance on official advice was first recognised as an exception to the ignorance of law rule in the American case of *Long v State*,[82] decided over fifty years ago:

> It is difficult to conceive what more could be reasonably expected of a 'model citizen' than that he guide his conduct by 'the law' ascertained in good faith, not merely by efforts which might seem adequate to a person in his situation, but by efforts as well designed to accomplish ascertainment as any available under our system.[83]

This defence of reasonable reliance on official advice, or officially induced error of law, was included in the Model Penal Code 1963 (US). Section 2.04(3) provides:

> A belief that conduct does not legally constitute an offence is a defence to a prosecution for that offence based upon such conduct when:
> (a) the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
> (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) statute or other enactment; (ii) judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law

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82 65 A (2d) 489 (1949).
83 *Ibid* at 498 *per* Pearson J.

> with the responsibility for the interpretation, administration or enforcement of the law defining the offence.[84]

The non-publication of laws defence in paragraph (a) is an exception to the ignorance of law rule that is generally recognised in most common law jurisdictions.[85] In England the Statutory Instruments Act 1946 (UK) provides that in proceedings for an offence under a statutory instrument, it is a defence to prove that the instrument had not been issued by Her Majesty's Stationery Office, unless reasonable steps had been taken to bring its purport to the notice of those affected.[86] Ignorance of law due to non-publication of delegated legislation has been held to be a defence.[87] Even over a century ago it was said that, "before a continuous act or proceeding, originally not unlawful, can be treated as unlawful ... a reasonable time must be allowed for its discontinuance ... [ignorance of law] may ... be taken into account."[88] In two Australian jurisdictions, ignorance of a non-published statutory instrument is a defence.[89] As Thomas Hobbes wrote, "[t]he want of means to know the law totally excuseth. For the law whereof a man has no means to inform himself, is not obligatory."[90]

Section 2.04(3)(b) is slightly more controversial and provides the "reliance on official advice" exception to the ignorantia rule. The defence has been applied by several courts in the United States.[91] The Model Penal Code 1963 (US) restricts the reasonable reliance defence to official advice only. It excludes advice provided by lawyers. The common law in some jurisdictions in the United States permits reasonable reliance on lawyers to be used as a defence in some cases,[92] although support for this view is not

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84 This provision has been approved at the Federal level in the case of *US v Barker* 546 F 2d 940 (1976).

85 In the United States it was first recognised in *Lambert v California* 355 US 225 (1957).

86 See *Simmonds v Newell, Defiant Cycle Co v Same* [1953] 1 WLR 826.

87 *Johnson v Sargant & Sons* [1918] 1 KB 101 *per* Bailhache J; *Lim Chin Aik v R* [1963] AC 160.

88 *Burns v Nowell* (1880) 5 QBD at 454 (CA).

89 See *Criminal Code* 1983 (NT) s 30 and *Criminal Code* (Qld) s 22(3). See also *Model Criminal Code* 1995 (Cth) s 308.

90 T Hobbes, *Leviathon* (London: Sweet & Maxwell, 1968) 196. Locally, see *Nathan Brothers v Tong Nam Contractors Ltd* [1959] 1 MLJ 240; *PP v Koo Cheh Yew & Anor* [1980] 2 MLJ 235.

91 *State v Godwin* 31 SE 221 (1898); *Claybrook v State* 164 Tenn 440 (1932); *State v O'Neill* 147 Iowa 513 (1910); *State v Striggles* 210 NW 137 (1926); *United States v Mancuso* 139 F 2d 90 (1943); *Leon v US* 136 A 2d 588 (1957); *Raley v Ohio* 360 US 423 (1959); *James v US* 366 US 213 (1961); *Cox v Louisiana* 379 US 559 (1965); *US v Laub* 385 US 475 (1967); *US v Kriger* 297 F Supp 339 (1969); *US v Pennsylvania Industrial Chemical Corp* 411 US 655 (1973); *US v Upton* 502 F Supp 1193 (1980); *US v Duggan* 743 F 2d 59 (1984).

92 See for example *Long v State* 65 A 2d 489 (1949); *People v Ferguson* 24 P 2d 965 (1933); *State v Downs* 63 Wis 2d 75 (1974). (In this case the advice was provided by a government lawyer, so it could be treated as a case of official rather than legal advice).

universal.[93] All the categories in s 2.04 involve official or quasi official advice, including judicial decisions.

The defence of reliance on official advice has significant academic support,[94] and qualified judicial support in England, Australia and Canada. The philosophy behind this exception is that it is not fair for the state to prosecute individuals when it has misled them, or has not notified them of the law. The academic theory is based on an estoppel argument, *ie* the state is estopped from prosecuting because it is at fault for misleading or not informing the citizens. Andrew Ashworth was one of the early commentators to consider this exception to the ignorance of law rule on the basis of a criminal estoppel.[95] His justification was based on the notion of duties of citizenship where every citizen is under a duty to be familiar with the law.[96] By taking reasonable steps to ascertain the law, the citizen would have discharged his or her duty and therefore any reasonable mistake or ignorance of law should exculpate such a person.

There are two difficulties with Ashworth's estoppel theory. First, to be fair, the corollary of a duty of citizenship should be a duty on the part of the state to take reasonable steps to educate and inform the citizens as to the law and their legal responsibilities.[97] The courts have not recognised this duty.[98] Secondly, and more importantly, the estoppel approach transfers the focus away from the accused's culpability, and instead focuses on the state's responsibility. It deflects attention from criminal culpability to

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93 See for example, *Hopkins v State* 193 Md 489 (1950).

94 B E Armacost, "Qualified Immunity: Ignorance Excused" (1998) 51 Vanderbilt Law Review 583; M Briggs, "Officially Induced Error of Law" (1995) 16 New Zealand Universities Law Review 403; S Yeo, "Mistakenly Obeying Unlawful Superior Orders" (1993-94) 5-6 Bond Law Review 1; G L Williams, "The Draft Code and Reliance upon Official Statements" (1989) 9 Legal Studies 117; R Ward, "Officially Induced Error of Law" (1988) 52 Saskatchewan Law Review 89; W J Brookbanks, "Recent Developments in the Doctrine of Mistake of Law" (1987) 11 Criminal Law Journal 195; N S Kastner, "Mistake of Law and the Defence of Officially Induced Error" (1986) 28 Criminal Law Quarterly 308; A T H Smith, "Error and Mistake of Law in Anglo-American Criminal Law" (1984) 14 Anglo-American Law Review 3; P G Barton, "Officially Induced Error of Law as a Criminal Defence: A Preliminary Look" (1980) 22 Criminal Law Quarterly 314; T Arnold, "State Induced Error of Law, Criminal Liability and *Dunn v The Queen*: A Recent Non Development in Criminal Law" (1978) 4 Dalhousie Law Journal 559; P S Cremer, "The Ironies of Law Reform: A History of Reliance on Officials as a Defence in American Criminal Law" (1978) 14 California Western Law Review 48.

95 A Ashworth, "Excusable Mistake of Law" [1974] Criminal Law Review 652.

96 A Ashworth, *supra* note 50 at 244.

97 See, D N Husak, "Ignorance and Duties of Citizenship" (1994) 14 Legal Studies 105.

98 *Cooper v Halls* [1968] 1 WLR 360. But see *James v Cavey* [1967] 2 QB 676 where the regulation was mandatory and therefore the authority's failure to provide information led to the charge being dismissed. See also the Scottish case of *MacLeod v Hamilton* (1965) SLT 305.

procedural fairness.[99] If the prosecuting authority has not done anything inequitable, then it is not estopped from proceeding. For this reason, this defence is limited to reliance on state officials. Reliance on lawyers or even the courts is not sufficient since lawyers and courts are not part of the executive arm of government. Although Ashworth intended the criminal estoppel theory to extend to reliance on legal advice and diligent attempts to discover the law,[100] the theory, properly applied, does not allow this because of its emphasis on the role of the state. If the emphasis were shifted to the culpability of the accused, then it is possible that reasonable reliance on the law, whether induced by officials or not, may operate as a defence.

English and Australian courts are reluctant to accept officially induced error as an exception to the ignorance of law rule. What the courts have done, is to use officially induced error in an evidentiary sense to negate the existence of a particular mental state, which may require knowledge of unlawfulness, such as wilfulness; or to provide a defence where the statute creating the offence requires that the conduct be done without lawful excuse; or to give rise to a claim of right defence; or to give rise to a mistake of civil law defence. Alternatively, the courts artificially categorise the belief as a mistake of fact to permit a defence.

A brief comparative survey of the law in England, Australia and Canada reveals the reluctance of the court to accept this defence. In most cases where the defence is raised, the courts reject it due to the ignorance of law rule, but invariably impose minimal punishment, or in some cases grant an absolute discharge. This reflects the moral innocence of the accused.

A. *England*

Reasonable reliance on official advice was pleaded as far back as the middle of the nineteenth century in *Cooper v Simmons*.[101] An apprentice left his apprenticeship after the death of his master. He believed he was entitled to do this, having received legal advice to that effect. The advice was erroneous and the apprentice was convicted notwithstanding his reasonable reliance on the advice. While there is no English case accepting reasonable reliance on official advice as an exception to the ignorance of law rule, several courts have approved of the principle. In *R v Arrowsmith*,[102] the accused was charged under the Incitement to Disaffection Act 1934 (UK) for attempting to influence a soldier into deserting the army. The accused argued that she believed that her actions were not unlawful because she had

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[99] See A T H Smith, "Error and Mistake of Law in Anglo-American Criminal Law" (1984) 14 Anglo-American Law Review 3 at 9, where Smith identifies the two rationales for the exception to the ignorance of law rule in America as the estoppel rationale and the culpability rationale.

[100] A Ashworth, *supra* note 50 at 661.

[101] (1862) 7 H & N 707.

[102] (1975) 1 QB 678.

been previously charged with the same offence and the Director of Public Prosecutions had advised that charges would not be laid for her conduct.

Lawton LJ rejected this argument and stated: "[A] belief that she would not be prosecuted, in our judgment, would have been no defence in law at all."[103] However, Lawton LJ referred, with approval, to Ashworth's article[104] and to a Canadian case[105] cited by Ashworth, which favoured a defence of mistake of law on the basis of reasonable reliance. Lawton LJ distinguished this case on the basis that the belief here did not go to the illegality of the offence but was simply a mistaken belief as to a prosecutorial discretion. Had the court accepted that the mistake went to the illegality of the conduct and that it was induced by the official advice, it is possible that the accused may have been acquitted.

Arrowsmith's case bears comparison with the South African case of *S v L*.[106] In that case a woman was convicted in a magistrate's court of contravening the Sexual Offences Act 23 of 1957 (South Africa) by unlawfully, wilfully and openly exhibiting herself in an indecent manner by sunbathing and bathing at a public beach. The accused's argument was that she believed that there was an official policy of not prosecuting such cases unless a complaint was made, and that she would only be prosecuted if she refused to cover up. The Court of Appeal overturned the conviction on the ground that the accused's mental state, as a result of her mistaken belief, was not sufficiently blameworthy to warrant conviction. Instead of being distracted by the nature of the mistake, the court evaluated the effect of the mistake on the culpability of the accused.

Cases involving the statutory defence of "with lawful excuse" often raised the issue of reasonable reliance on official advice. *Cambridgeshire and Isle of Ely County Council v Rust*[107] involved an accused who was charged under the Highways Act 1959 (UK) with wilful obstruction of a highway without lawful excuse or authority. The accused had been operating stalls by the highway for several years with the local council's permission.[108] The accused had obtained advice from the council as well as from a policeman and had even been paying the council rates for his stall. The trial court acquitted the accused on the ground that the steps taken by the accused had given him a lawful excuse. The case was overturned on appeal with the court holding that the excuse had to be in fact lawful. Since it was clearly unlawful to obstruct the highway, the accused's belief that his conduct was lawful was no defence. This suggests that the "lawful excuse" element went to the *actus reus* and not the *mens rea* of the offence.

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103 *Ibid* at 689.
104 A Ashworth, *supra* note 50.
105 *Prairie Schooner News Ltd and Powers* (1970) 1 CCC (2d) 251.
106 1991 (2) SACR 329 (C).
107 [1972] 2 QB 426.
108 See also *Redbridge London Borough Council v Jaques* [1970] 1 WLR 1604.

However, in *Brook v Ashton*,[109] a case dealing with a charge under the same Act, the court treated the "lawful excuse" element as part of the *mens rea* and not the *actus reus* of the offence. The court, relying on two nineteenth century cases held that mistake of fact could give rise to a lawful excuse.[110]

B. *Australia*

Australian courts are as reluctant as their English counterparts to permit a defence of reasonable reliance on the law. While the issue has not been dealt with by the High Court, it has arisen in the state courts. In the South Australian case of *Power v Huffa*,[111] the accused was demonstrating in public and was requested by police to cease her activities. During the demonstration the accused telephoned the federal minister for Aboriginal Affairs who told her to remain where she was. She was prosecuted and argued that she had relied on the minister's advice and was therefore acting under lawful authority. The court held that the minister's advice could not substitute for the law as the minister had no power to authorise the defendant to do what she did. The accused's reliance on the advice gave rise to an erroneous belief in lawfulness, and because the mistake was one of law, it could not give rise to a defence.

The South Australian Supreme Court in *Power v Huffa* held that if the mistake were one of fact, then the mistaken belief in lawful authority would have been available to the accused. The fact that the three judges in the case had separate views as to the characterisation of the mistake as one of fact or law further demonstrates the unsatisfactory state of the law. Criminal liability should not depend on such impractical distinctions. The facts in *Power v Huffa* were very similar to those in the American case of *Cox v Louisiana*.[112] In that case the accused had been given permission by the Chief of Police to demonstrate near a courthouse although the law prohibited such demonstrations. The United States Supreme Court allowed the defence of reasonable reliance on official advice even though the accused's belief was effectively a mistake of law.

In 1980 the South Australian Supreme Court again considered the reasonable reliance defence in *Wormald v Gioia*.[113] The accused was charged with a breach of a local planning regulation. She argued that she had received erroneous advice from the council. The magistrate acquitted her on the basis of estoppel. On appeal, the Supreme Court referred to

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[109] [1974] Criminal Law Review 105.
[110] *Roberts v Inverness Local Authority* (1889) 27 Sc LR 198; *Dickins v Gill* [1896] 2 QB 310.
[111] (1976) 14 SASR 337.
[112] 379 US 559 (1965).
[113] [1980] 26 SASR 238.

various English decisions on criminal estoppel due to erroneous advice.[114] While the English cases were not consistent, the court in *Wormald v Gioia* took the view that the official's advice was one as to law. Notwithstanding the fact that it was an official who had given incorrect advice, the court held that "estoppel cannot override the law of the land."[115] The court reversed the acquittal but imposed no penalty to reflect the moral innocence of the accused.

In the Queensland case of *Olsen v Grain Sorghum Marketing Board; ex parte Olsen*,[116] both reliance on legal advice and reliance on a court decision failed to assist the accused. The Primary Producers' Organisation and Marketing Acts 1926-1957 (Qld) prohibited the purchase of grain sorghum from any person other than the relevant marketing board. The accused contrived to avoid this restriction by transporting the grain through New South Wales. The accused believed that this would bring their activities within interstate trade and therefore afford the protection of s 92 of the Constitution, which provides that trade, commerce and intercourse between the states shall be absolutely free. This belief was based on legal advice and also on a Queensland Supreme Court decision in which it was held that such activity did trigger the s 92 protection.[117]

Unfortunately for the accused, the case upon which they had relied was appealed to the High Court, which reversed the Queensland decision.[118] This occurred after the accused had carried out their transaction. The Queensland Supreme Court in *Olsen's* case held that the accused's reliance on legal advice and on the court decision amounted to no more than a mistake of law and therefore afforded no defence. While it may be argued that, at the time the accused acted, they had not been acting under a mistake of law, the declaratory theory of law effectively gives retrospective application to all judicial decisions.[119] Thus, the High Court decision was law even before it was made! This declaratory theory of law is as curious as the presumption that everyone knows the law, but in the realms of *ignorantia juris non excusat*, everything is just "curiouser and curiouser." As Jerome Hall said, "when an individual's conduct conforms to the decisions of the highest court, the claim that he acted 'in ignorance of the law' is almost fantastic." [120]

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[114] *Southend-on Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416; *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222; *Wells v Minister of Housing and Local Government* [1967] 1 WLR 1000; *Norfolk County Council v Secretary of State for the Environment* [1973] 1 WLR 1400.

[115] *Wormald v Gioia* (1980) 26 SASR 238 at 242 *per* Mitchell J.

[116] [1962] Qd R 580.

[117] *Bonnie Doone Trading Co (NSW) Pty Ltd v Egg Marketing Board* [1962] Qd R 301.

[118] *Egg Marketing Board v Bonnie Doone Trading Co (NSW) Pty Ltd* (1962) 107 CLR 27.

[119] See G L Williams, "The Draft Code and Reliance Upon Official Statements" (1989) 9 Legal Studies 177 at 178-80 for a criticism of the declaratory theory of law.

[120] See J Hall, *supra* note 1 at 389.

The unfairness of rejecting reasonable reliance on judicial decisions as a defence is clearly illustrated by the facts of the Canadian case of *R v Campbell*.[121] The accused sought advice as to the legality of performing a striptease dance at a nightclub and was advised that the Supreme Court of Alberta, in the case of *R v Johnson*,[122] had ruled that such conduct was legal. The accused relied on this advice but was then charged with an offence. Before her trial, the Alberta Supreme Court Appellate Division reversed the decision in *Johnson*.[123] Campbell's appeal was therefore based on a mistake of law and she was convicted. *Johnson's* case was further appealed to the Supreme Court of Canada, which reversed the Appellate Division's ruling.[124] Thus, Campbell had not, at the end of the day, been mistaken as to the law at all! Although convicted, she was given an absolute discharge.

Recent New South Wales decisions highlight the tension between the ignorance of law rule and the plea of reasonable reliance on official advice. In *Pollard v Commonwealth DPP*,[125] the accused was charged under s 227(2)(b) of the Companies (New South Wales) Code which prohibited a person who had been found guilty of offences involving fraud or dishonesty from being directly or indirectly concerned with the management of a corporation. The defendant had been convicted of an offence under s 178BB of the Crimes Act 1900 (NSW) which provided:

> Whosoever, with intent to obtain for himself or another person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) which he knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular shall be liable to imprisonment for 5 years.

The accused had pleaded guilty to the charges under s 178BB but argued that he was not guilty under s 227(2)(b) of the Companies (New South Wales) Code because he believed that the s 178BB offence was not one that involved fraud or dishonesty. He had received advice from a solicitor that he could be involved in the management of a corporation. His defence was

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121 [1973] 2 WWR 246. See also, *Dunn v The Queen* (1977) 21 NSR (2d) 334; see discussion in P G Barton, *supra* note 94 at 323-5.
122 [1972] 3 WWR 226.
123 [1972] 5 WWR 638.
124 (1973) 23 CRNS 273.
125 (1992) 28 NSWLR 659.

rejected on the grounds that it was a mistake of law.[126] The court also expressly rejected any defence of reasonable reliance on legal advice when it stated, "… the argument of the plaintiff based upon the acting upon the advice of the solicitor should be rejected. ... [I]ncorrect legal advice in relation [to known facts] would be a mistake of law."[127]

While the New South Wales Supreme Court, in deference to the ignorance of law rule, has rejected reliance on official advice as a defence, the court, in a separate decision, has expressed its concern as to the fairness of such an approach. As Smart J said, "[c]onsiderations of fairness occasion difficulty in regarding a person as guilty of an offence where he has acted on substantial, reasonable and honest legal advice."[128]

C. *Canada*

The 1970s saw the introduction of two mistake defences into the Canadian criminal law. In 1978 the Supreme Court of Canada, in the case of *R v City of Sault Ste Marie*,[129] recognised a due diligence defence. In 1974 the Nova Scotia County Court, in the case of *R v Maclean*,[130] recognised a defence of officially induced error. The due diligence defence in *Sault Ste Marie* was developed as an extension of the Australian honest and reasonable mistake of fact defence.[131] It was, however, limited to strict liability offences that were of a purely regulatory nature. In 1980 the Supreme Court of Canada decided *Molis v R*,[132] where mistake of law was excluded from the due diligence defence. In 1982, the Supreme Court in *R v Macdougall*[133] recognised that officially induced error existed as a defence that was separate from due diligence. The officially induced error defence was held to include mistake of law.[134]

MacDougall concerned a charge of driving while disqualified. The accused was mistaken as to whether his licence was actually revoked at the time he was arrested.[135] The mistake arose as a result of an administrative error in notifying the accused. While the Supreme Court of Canada found

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126 Note that the offence in question was a strict liability offence and therefore the defence pleaded was based on the honest and reasonable mistake of fact defence; first recognised in *Proudman v Dayman* (1941) 67 CLR 536 and reaffirmed by the High Court of Australia in *He Kaw Teh v R* (1985) 157 CLR 523.

127 (1992) 28 NSWLR 659 at 677-8 *per* Abadee J.

128 *Griffin v Marsh* (1994) 34 NSWLR 104 at 122-3.

129 [1978] 2 SCR 1299.

130 (1974) 17 CCC (2d) 84.

131 See *supra* note 126.

132 [1980] 2 SCR 356.

133 [1982] 2 SCR 605.

134 See the earlier decision of O'Hearn J in *R v Flemming* (1981) 43 NSR (2d) 249 where the phrase "officially induced error" was first used.

135 See also *R v Prue; R v Baril* [1979] 2 SCR 547; *R v Pontes* [1995] 3 SCR 44.

against the accused on the facts, it approved of the officially induced error of law defence:

> It is not difficult to envisage a situation in which an offence could be committed under a mistake of law arising because of, and therefore induced by, 'officially induced error', and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying [the defence]. In the present case, however, there is no evidence that the accused was misled by an error on the part of the Registrar.[136]

Thus, the Supreme Court endorsed the approach that officially induced error of law is separate from the due diligence defence and operates as an exception to the ignorance of law rule. The only problem was that Ritchie J appeared to require that not only must the accused be in error, but that error must be induced by an error on the part of the official. Later cases that have applied, or considered this defence, did not apply Ritchie J's test[137] until 1995, when the Supreme Court of Canada decided *R v Jorgenson*.[138]

Jorgenson was charged under s 163(2)(a) of the Criminal Code for knowingly selling obscene material without lawful justification or excuse. His defence was that he did not know that the material was obscene and that he had relied on the Ontario Film Review Board's approval of the material. The Supreme Court of Canada allowed Jorgenson's appeal on the basis that the Crown had not proved that Jorgenson had knowledge that the material was obscene. While the court was unanimous in its outcome, Lamer CJC delivered a separate judgment in which he made some observations on the officially induced error defence. The other judges did not consider this defence.

Lamer CJC confirmed that due diligence and officially induced error were separate from each other. However, he held that officially induced error should not operate as a defence leading to an acquittal, rather it should only lead to a judicial stay of proceedings. In his view, this defence did not go to the culpability of the accused's actions. Lamer CJC treated officially induced error as a procedural matter, comparing it with entrapment and holding to the view that ignorance of law was in itself blameworthy. The justification for officially induced error of law as a procedural defence clearly lies in the estoppel theory and not in any culpability theory. As he put it, "... the state has done something which disentitles it to a

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136 [1982] 2 SCR 605 at 613 *per* Ritchie J.

137 *R v Gruber* [1982] 1 WWR 197; *R v Moise* [1984] 2 CNLR 149; *R v Robertson* (1984) 43 CR (3d) 39; *R v Ross* (1985) 14 WCB 436; *R v Camcoil Thermal Corp* (1986) 27 CCC (3d); *R v Provincial Foods Inc* (1992) 111 NSR (2d) 420; *R v Forster* [1992] 1 SCR 339; *R v Dubeau* (1993) 80 CCC (3d) 54; *R v Erotica Video Exchange Ltd* (1994) 163 AR 181 295; *R v Pontes* [1995] 3 SCR 44.

138 [1995] 43 CR (4th) 137.

conviction."[139] This of course, is precisely the argument made by Ashworth twenty years earlier. It should be noted that the Law Reform Commission of Canada has recommended an amendment of the Criminal Code to recognise officially induced error of law as an exception to the ignorance of law rule.[140]

While there is no local authority recognising reasonable reliance on official advice as a defence, it was indirectly considered in the case of *PP v Teo Ai Nee & Anor*.[141] The accused were charged with exposing for sale and possession of infringing copies of sound recordings under ss 136(1)(b) and 136(2)(a) of the Copyright Act (Cap 63, 1988 Ed) read with s34. As part of their defence it was argued that they had obtained assurances from the suppliers that the goods supplied could be legally imported into Singapore without breaching the Copyright Act. The accused had also obtained advice from a qualified intellectual and property lawyer on the legality of their importation. On that basis they argued that they did not know, nor could reasonably know that the imported articles infringed the Copyright Act. It turned out that the assurance and the legal advice provided was wrong in law, and thus effectively the accused's claim was in part based on a mistake of law brought about by reliance on official advice.

The accused were acquitted and on appeal Yong Pung How CJ, while reaffirming that mistake of law was not a defence, held that the accused's reliance on legal advice was relevant to their criminal culpability:

> The strongest evidence in favour of the respondents that they had acted reasonably and honestly was the fact that they had taken oral and written assurances of the legitimacy of their imports from their suppliers, and had also taken legal advice on the matter from a qualified source, an IFPI representative, on the legitimacy of such imports into Singapore and Malaysia. In the absence of any facts which could lead the respondents to suspect that their supplier could be supplying them with infringing copies, and in circumstances which were consistent with the mode in which such advice was given out by IFPI to suppliers, they had placed considerable reliance on the advice from DW4, *though such advice was, in retrospect, misplaced (based on the law as it then stood)*.[142]

Thus, while ignorance of law is still not an excuse, it does seem to be relevant in an indirect way in establishing whether a person has acted in such a way that he or she is morally innocent and therefore not deserving of punishment. While the ignorance of law rule prevented reasonable reliance

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139 *Ibid* at 157.

140 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 30 (1986) vol 1 at 31.

141 [1995] 2 SLR 69.

142 *Ibid* at 101 (emphasis added).

on official advice being a defence, courts in England,[143] Australia,[144] Canada[145] and even Singapore[146] have recognised that such accused are often morally innocent. Because of their moral innocence, an absolute discharge was given in several cases. However, an absolute discharge is not the same as an acquittal. To return to the American judgment quoted earlier:

> We are not impressed with the suggestion that a mistake under such circumstances should aid the defendant only in inducing more lenient punishment by a court, or executive clemency after conviction. The circumstances seem so directly related to the defendant's behaviour upon which the criminal charge is based as to constitute an integral part of that behaviour, for purposes of evaluating it. ... We think such circumstances should *entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace*.[147]

VI. CONCLUSION

It has been argued that ignorance or mistake of law should operate as a defence if it negates any apparent moral blameworthiness of the accused, or to put it another way, if it suggests that the accused is morally innocent. Such a defence could be justified by an extension of the subjective *mens rea* doctrine. Where knowledge of illegality is expressly made a requirement of an offence, ignorance or mistake of law currently operates as a defence as it negates *mens rea*. However, it should go beyond such limited offences. If it were held as a general principle that knowledge of illegality, like voluntariness, is an implied requirement of all offences, there is scope for mistake of law to operate as a general defence. It would also recognise that criminal culpability is not based solely on the existence of a prescribed mental state, but on a culpable mental state. The balance between safeguarding the morally innocent and requiring citizens to be familiar with the laws in order to comply with them, is struck by requiring that the ignorance of law be reasonable before it operates to exculpate the accused. Thus, beyond inquiring whether the accused intended or was reckless or was aware of the relevant facts, the inquiry should include whether the accused knew or ought to have known that the conduct to be engaged in was against the law. If the accused were reasonably ignorant or mistaken as to the law, then such a person should be viewed as morally innocent and avoid criminal liability.

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143 *Surrey County Council v Battersby* [1965] 2 QB 194.
144 *Wormald v Gioia* [1980] 26 SASR 238.
145 *R v Campbell* [1973] 2 WWW 246.
146 *PP v Teo Ai Nee & Anor* [1995] 2 SLR 69.
147 *Long v State* 65 A (2d) 489 at 498 (1949) (emphasis added).