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The "finalistic" theory of an act in criminal law (part one)

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I

It is beyond dispute that, according to the general principles of our criminal law, there are three fundamental prerequisites for criminal liability, namely an act, unlawfulness and *mens rea*. (There is possibly a fourth prerequisite, namely that the conduct which is sought to be punished must be covered by an existing criminal sanction – the so-called principle of legality – but this prerequisite can conceivably also be regarded as being incorporated in the requirement of unlawfulness.) This is the scheme used not only in academic literature, but also favoured by our courts, although the courts, influenced by the terminology of English law, are fond of grouping the requirements of an act and of unlawfulness together under the term *actus reus*, which, together with *mens rea*, are then regarded as the two essential requirements for criminal liability.

Secondly, it is clear that in the South African criminal law the requirement of an act is strictly separated from the intention of the wrongdoer: intention, just as negligence, is regarded as a form of *mens rea*, and is thus included in the concept of *mens rea*. More particularly, it is not required that the act of the wrongdoer should necessarily be a *willed* act; it is sufficient if it is merely a voluntary act, by which is generally meant that the conduct of the wrongdoer could have been controlled by his will.

The purpose of this article is to question this concept of the act in criminal law outlined above. This will be done with reference to a radical new theory regarding the act in criminal law which has been developed in German law and which has led to a far-reaching new concept not only of a criminal act, but also of the requirement of *mens rea*. The theory here referred to is the so-called *finale Handlungslehre*, which will here be described as the "finalistic" theory of an act.[1]

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[1] It is difficult to translate the German terms *finale Handlungslehre, Finalität* and *Finalismus*

II

In order properly to understand the finalistic theory of an act, it is necessary to distinguish between the different theories of an act in German criminal law. A knowledge of the causal theory of an act is of special importance here, firstly because the act in the South African criminal law is traditionally described in terms of this theory, and secondly because it is precisely this theory which has been the target of criticism by jurists adhering to the finalistic theory of an act.

The causal theory of an act (which is the first theory to be discussed here) regards the act only from the outside, that is without any reference to the state of mind of the person committing the act. It is only interested in the causal function of the act.[2] A typical definition of the act in criminal law in terms of this theory is usually as follows: the act is any voluntary human conduct whereby some change, perceivable by the senses, is brought about in the outside world by means of the mechanical laws of cause and effect.[3] This conduct need not necessarily be willed, in other words, the change effected in the outside world need not necessarily be the conscious aim of the person acting. It is sufficient that the conduct is voluntary, by which is meant that the bodily movement(s) of the person must be the result of some formation of the will; the content of this will, however, is immaterial – it can, at most, be taken into consideration when the *mens rea* of the person is investigated. The bodily movements of the person must therefore not be the result of some mechanical or psychological coercion;[4] the person acting must have been in a position to avoid the bringing about of the prohibited result if he paid his attention to it.[5] This requirement of voluntariness explains, on the one hand, why negligent acts (which appear on the outside not to be willed acts) are also included within the concept of an act for the purposes of the criminal law, and, on the other hand, why acts committed as a result of an overpowering force (*vis absoluta*) or in a state of automatism, are not included within the concept of an act.

The adherents of the causal theory of an act formulated their concept of

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directly into English. In Harrap's *Standard German and English Dictionary* (1967), *Finalismus* is translated with "finalism", and *Finalität* with "finality". These English terms will be used in this article, and the German adjective *finale* would be translated as "finalistic", in order to distinguish it from "final", which bears another meaning. Jescheck "The doctrine of mens rea in German criminal law – its historical background and present state" 8 *CILSA* (1975) 112 at 113 footnote 2 speaks of the *finale Handlungslehre* as the "purpose-orientated theory of action".

[2] Jescheck *Lehrbuch des Strafrechts, allgemeiner Teil* (2 ed 1972) 166.

[3] Von Liszt *Lehrbuch des deutschen Strafrechts* (25 ed 1927) 152: "Handlung ist willkürliches Verhalten zur Aussenwelt, genauer: Veränderung der Aussenwelt durch willkürliches Verhalten, sei es ein die Veränderung verursachende Tun oder ein sie verursachende Unterlassen"; Radbruch *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem* (1904) 137: "Tat ist für uns das körperliche Verhalten des Täters im Kausalzusammenhange mit dem Erfolge"; Jescheck *supra* n 2 at 165–6; Schönke and Schröder *Strafgesetzbuch* (18 ed 1976) 113; Bockelmann *Strafrecht, allgemeiner Teil* (1973) 45.

[4] Von Liszt *supra* n 3 (8 ed 1897) 120; Welzel *Das deutsche Strafrecht* (11 ed 1969) 39–40; and 1939 *ZStW* 491 at 498; Schmidhäuser 1954 *ZStW* 27 at 28–9.

[5] *Cf* De Wet and Swanepoel *Strafreg* (3 ed 1975) 49–50.

an act for the first time in the previous century, and this formulation is characterised by the strong influence of the natural sciences – something typical of the spirit of the age a century ago (one thinks of Darwin's theory of evolution).[6] This theory is, in fact, sometimes referred to as the "naturalistic theory of an act". The act is always described by nineteenth century jurists in terms of some bodily movement, and more particularly a muscular contraction, or even as a contraction of the motor nerves. This is not only the view of German criminal law scientists such as Beling[7] and von Liszt,[8] but also of jurists belonging to the English-speaking world of that time, such as Austin[9] and Holmes.[10] The intention or aim of the person is, according to this theory, of no relevance whatsoever for the purposes of the concept of an act. It only comes to the fore later when the question has to be answered as to whether the person had *mens rea* or not. In this way a sharp distinction is drawn between the objective requirements of criminal liability (namely the requirements of an act and of unlawfulness – therefore *actus reus*) and the subjective requirement, namely *mens rea*.[11] This sharp distinction between objective and subjective requirements is characteristic not only of the former so-called "classical" criminal law system in Germany,[12] but also of the present system of criminal liability in South Africa and England.

During the past thirty years, this causal theory of an act has increasingly been subjected to criticism by the adherents of the finalistic theory, among whom Hans Welzel has been the most important. In the first place, it is easy to criticize the view of the causal theory that an act is a muscular contraction: such a view is incompatible with the punishment of omissions.[13] Even the first formulators of the causal theory appreciated this difficulty: Beling, in an attempt to overcome the criticism, was prompted into attempting to transform an omission into a positive act (commission) by describing an omission as a "withholding of the motor nerves" (*Zurückhaltung motorischer Nerven*).[14] In the second place, the causal theory cannot be applicable in the case of crimes which are formally defined, that is to say crimes which are not committed by the causation of a prohibited result, but by mere conduct prohibited *per se* by the criminal law (*eg* rape and per-

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[6]Maurach and Zipf *Strafrecht, allgemeiner Teil* (5 ed 1977) 207. Welzel *Naturalismus und Wertphilosophie im Strafrecht* (1935) shows how the whole system of criminal responsibility of Von Liszt is based upon the positivistic philosophies of *ia* Comte and Spencer.

[7]Beling *Die Lehre vom Verbrechen* (1906) 14.

[8]Von Liszt *supra* n 3 (3 ed 1881) 70: "Das Verbrechen ist . . . willkürliche körperliche Bewegung; oder . . . Muskelerregung".

[9]Austin 1 *Lectures on Jurisprudence* (5 ed 1885) Lectures XVIII and XIX, especially pages 414–5. For criticism of Austin's definition, see Hart *Punishment and Responsibility* (1968) 99 *ff*.

[10]Holmes *The Common Law* (1881) 45.

[11]Welzel *Das neue Bild des Strafrechtssystems* (1961) 6; Bockelmann *supra* n 3 at 45.

[12]Jescheck *supra* n 1 at 115; and *supra* n 2 at 155.

[13]Jescheck *supra* n 2 at 155, 166; Maurach-Zipf *supra* n 6 at 208; Schönke-Schröder *supra* n 3 at 113–4; Bockelmann *supra* n 3 at 46.

[14]Beling *supra* n 7 at 15. For criticism of Beling's view, see Jescheck in *Festschrift E Schmidt* 139 143. Von Liszt himself admitted in the 15th edition of his *Lehrbuch* (1905) 132 that an omission is "ein der Kausalität des Tuns analoges Merkmal, nicht aber die Kausalität selbst", and thereby contradicted his own original view.

jury).[15] Furthermore, the naturalistic view of an act as "a change brought about in the outside world which is perceivable by the senses" does not fit all types of crimes. How, for example, is such a "change brought about in the outside world" to be construed in the case of *crimen injuria*, committed by a male person peeping through a window at a female undressing, or in the case of perjury, or in the case of criminal defamation?[16] In the case of the last-mentioned crime this theory is forced to make use of artificialities in order to maintain itself: defamation is namely seen as movements of the throat and the head which produces sound waves which act upon the ear-drums of the hearer and reacts from there on his brain and his nerve-system.[17] All this merely shows how untenable it is to apply the "laws" of a natural science to a human or normative science such as the criminal law. The criminal law deals with the conduct of human beings, who act consciously and with preconception, and whose conduct cannot be equated with blind causal processes. According to the finalistic theory, the causal theory disregards the crucial role played by the human will as the factor which ultimately determines the particular character or structure of an act.[18] In this regard it is particularly difficult to see how the causal theory can be harmonized with the punishment of attempts, where the act is frequently similar to some other apparently innocent act, but where it is nevertheless regarded by the criminal law as a criminal act, merely because of the intention on the part of the person.[19] A further point of criticism against the causal theory is that it is difficult to limit the chain of causality, which apparently stretches back *ad infinitum*. Thus the cause of the death of the victim is not only the stabbing with a knife by the murderer, but also the whole process whereby the murderer had been brought up by his parents. If the act in criminal law is to be described in terms of mechanical causation, it is almost impossible to ascertain the limits of the act: where does the chain of causality begin and where does it end?[20]

In favour of the causal theory of an act, it can be said that it has forced the criminal law to undertake a necessary re-appraisal of the whole concept of causality. This theory also at least has the advantage of fairly easily accommodating crimes of negligence. As will be seen later, this is not the case with the finalistic theory.

III

The causal and the finalistic theories are the most important theories of an

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[15] Bockelmann *supra* n 3 at 46.

[16] Jescheck *supra* n 14 at 143; Maurach–Zipf *supra* n 6 at 208; Bockelmann *supra* n 3 at 46.

[17] Welzel *supra* n 11 at 6–7; Radbruch 1 *Festgabe fur R von Frank* 161.

[18] Welzel *ibid* 7; Jescheck *supra* n 2 at 166, and see especially the noteworthy views of Maurach–Zipf *supra* n 6 at 207–8.

[19] Welzel *ibid* 7, *Strafrecht* 41. In *Um die finale Handlungslehre* (1949) 13, Welzel argues that proof of the viewpoint of the finalistic theory that intention forms part of the *actus reus* can be found in the fact that criminal attempts are *ex hypothesi* always intentional: "Wenn aber die versuchte Tatbestandsverwirklichung nur vorsätzlich möglich ist, wie sollte das bei der vollendeten anders sein?"

[20] Schönke–Schröder *supra* n 3 at 114; Welzel *supra* n 11 at 7–8; Jescheck *supra* n 2 at 166. *Cf* Baumann *Strafrecht, allgemeiner Teil* (1973) 211–2, who endeavours to point out the fallacies of this argument.

act in the dogmatics of German criminal law. Before the finalistic theory is discussed, it is, however, first necessary to refer to a third theory which is sometimes advanced in Germany, namely, the social theory of an act.[21] This theory is particularly linked to the name of Eberhard Schmidt. It was he who, in the last edition of Von Liszt's famous work on criminal law, which appeared in 1932, and which he (Schmidt) had edited, defined the act in criminal law as "a change in the social reality effected by means of voluntary conduct",[22] and thereby introduced the social theory. According to this theory, it is immaterial whether the act brings about a change perceivable by the senses in the outside world; what is of importance, is whether the act has a socially relevant meaning.[23] The act is no longer viewed from the vantage point of the natural sciences. More prominent is the view that the criminal act is a *human* act, which has specific social implications, in the sense that other members of society are also affected by it. This theory, therefore, has a more personal character than the causal theory. Another adherent of the social theory, Maihofer, describes the act as "objectively controllable conduct directed at an objectively controllable social result".[24] Occurrences which are the result of blind causality, are excluded from the concept of an act. The requirement that the act must be controllable, is synonymous with the requirement of voluntariness, and the result of this is that acts committed in a state of automatism (or as a reflex movement), as well as acts committed in circumstances of complete coercion, are not real acts for the purposes of the criminal law.[25]

The great advantage of the social theory of an act is that it can accommodate not only positive acts (*commissiones*) but also omissions.[26] In the case of an omission, there is, judging by social standards, an expectation to act positively, which is not fulfilled. The social theory has, however, not gained as much support as either the previous causal or the later finalistic theory of an act. Criticism against the theory is that the "social significance" of an act for the purposes of the criminal law depends, in the last resort, on legal norms, or the intention of the legislature, and is not derived from sociology.[27] It is difficult to reconcile this theory with the idea of law as an independent science.[28] The theory is also branded as too wide and vague, and unpractical.[29]

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[21] As to this theory generally, see Maihofer "Der soziale Handlungsbegriff" in *Festschrift Schmidt* 156, and the same author's *Der Handlungsbegriff im Verbrechenssystem* (1953) 62 *ff*.

[22] See von Liszt *supra* n 3 (26 ed 1932) vol 1 154, and also the footnote at 153.

[23] Schmidt in 1956 *JZ* 190: "Handlung ist willkürliches Verhalten mit einem bestimmten sozialen Sinn"; Jescheck *supra* n 14 at 150–1; Maurach–Zipf *supra* n 6 at 217; Baumann *supra* n 20 at 219; Wessels *Strafrecht, allgemeiner Teil* (5 ed 1975) 17.

[24] Maihofer *supra* n 21 at 156 178.

[25] *Id* 179.

[26] Schönke–Schröder *supra* n 3 at 117; Wessels *supra* n 23 at 16–17; Maihofer *supra* n 21 at 16 *ff*; Jescheck *supra* n 14 at 152 and *supra* n 2 at 168.

[27] Bockelmann *supra* n 3 at 49–50; Baumann *supra* n 20 at 219: "Was sozialerheblich ist, wird jedenfalls auch durch den Tatbestand umrissen. Nichtvorhandensein von Tatbeständen macht sozialerheblich."

[28] *Cf* Bockelmann *supra* n 3 at 50.

[29] Maurach–Zipf *supra* n 6 at 218, and see especially the criticism of Baumann *supra* n 20 at 219.

IV

The finalistic theory of an act represents a radical departure from the two theories of an act discussed above. The basic point of departure of the finalistic theory is that every human act is purpose-orientated, that is, aimed at some specific goal. Because of his knowledge (which he gains by experience) of the causal processes, man is able to appreciate the possible consequences of his conduct in advance. He can select an aim in advance and direct, in a planned way, his conduct towards achieving this end. Man thus subjects the mechanical or causal course of events to his "guiding" or "steering" will.[30] "Finality" (*Finalismus, Finalität*) is the term used to express this idea of an intentional directing of a person's conduct towards the achievement of a previously chosen goal,[31] and finality must be regarded as the opposite of causality. Causality is the product of the mechanical operation of a chain of causes, and the question whether a causal connection exists, is judged objectively *ex post facto*. Finality is the opposite: it is by prognosis that a person calculates his conduct by subjugating the causal processes to his guiding will.[32] Finality is a teleological concept; Professor Welzel often contrasts finality with causality by describing finality as "being able to see", and causality, on the other hand, as "blind".[33] The backbone of the act is the human will, because the idea of finality is derived from the ability of the human *will* to select a goal in advance, and to direct his conduct towards achieving this goal.[34]

The directing and steering of the will towards a specific goal can be separated into three stages. First of all, there is the anticipation of the goal in the person's mind. Secondly, there is the selection of the means necessary to attain the goal and, thirdly, there is the actual achievement of the goal in the outside world.[35]

According to the adherents of the finalistic theory, the concept of an act corresponds with the concept of an act in everyday life,[36] and sometimes this theory is referred to as the "ontological" or "philosophical" theory,[37] in order to contrast it with the causal theory, which can only be a theory of an act peculiar to the law. The peculiar structure of an act can, from an

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[30]Welzel *supra* n 11 at 1 and *supra* n 4 at 33; also Welzel "Studien zum System des Strafrechts" 1939 *ZStW* 491 at 502; Maurach–Zipf *supra* n 6 at 209; Jescheck *supra* n 2 at 161, 166, 226; Mezger *Strafrecht, allgemeiner Teil. Ein Studienbuch* (9 ed 1960) 51.

[31]The word *Finalität* seems to be derived from the Latin *finis*, which means "end", and also expresses the idea of "goal" – Maurach *supra* n 6 (4 ed) 178.

[32]Maurach–Zipf *supra* n 6 at 209; Welzel in 1939 *ZStW* 491 at 502, who adds: "Aber gerade weil die Kausalität Zweckindifferent ist, kann sie in den Dienst der Zweckttätigkeit gestellt werden."

[33]Welzel *supra* n 11 at 1; *supra* n 4 at 33.

[34]Welzel *supra* n 11 at 1; Jescheck *supra* n 2 at 166.

[35]Welzel *supra* n 11 at 1–2; *supra* n 4 at 34–5; Jescheck *supra* n 2 at 166–7; Baumann *supra* n 20 at 212. Baumann points out the following consequence of this classification: if the actor has decided on his goal, but, for some reason or other, this goal is not achieved, there is merely attempt. Conversely, if the physical realisation stretches further than the goal anticipated by the actor, there is (to the extent in which the physical course of events outstrips the actor's anticipation) only causality, but no act.

[36]Maurach *supra* n 6 (4 ed) 187.

[37]*Eg* Schönke–Schröder *supra* n 3 at 114; Mezger *supra* n 30 at 48; Jescheck *supra* n 2 at 160 and *supra* n 14 at 146, 147.

ontological or philosophical point of view, only be explained with reference to the *will* of the person acting. The will is the backbone of the act, and this is denied by the causal theory, according to which it is sufficient that the act is voluntary.[38] By "voluntary" is meant that the person's bodily movements (and the consequences flowing therefrom) are the result of *some or other* willed act, though it is always immaterial exactly *what* the contents of this will is. In short, according to the causal theory it is sufficient *that* something is willed; *what* is willed, is, however, immaterial.[39] In this way the causal theory is merely interested in the outward results of the willed act, that is, the mere causal processes which take place.

If one considers that possibly every human act can be subdivided into a number of subordinate acts, it becomes clear that it is exactly the purpose behind an act which gives it its particular unity or character. If, for example, I dig with a spade in my garden, the act described as "digging" consists of the holding of the spade, the pressing of the spade into the ground with my feet, the turning over of the sod, and, together with all these, all the different movements of the muscles in my body. The act described as "digging", constitutes, however, the unity of which all the abovementioned subordinate acts from a part. My act of digging can, on the other hand, be regarded as merely a component of some wider act, such as "gardening", if, apart from digging, I also *eg* plant, cut and water.

Precisely the same considerations apply to the concept of an act in the criminal law. The criminal law is only interested in the act as set out in the definition of the crime. In the case of murder, for example, it is the act of "causing the death". "Causing the death" can be subdivided into a number of acts, such as the pointing of the fire-arm, the curving of the finger around the trigger, the discharging of the bullet, and the entering of the bullet into the body of the victim. It is pointless to attempt to isolate one of these acts as the real act of murdering. It is also pointless to regard any of these acts in isolation, without reference to the goal the actor has in mind. That which binds these subordinate acts together into a unity for the purposes of the law, is the will of the actor, or the goal he has in mind.[40] Even the English jurists of the previous century who described the act in naturalistic terms as a muscular contraction (such as Austin,[41] Holmes[42] and Salmond[43]) have already appreciated the fact that the muscular contraction alone cannot suffice as a description of the act. According to them, the circumstances and consequences surrounding the act must also be considered. This explanation is, however, not entirely satisfactory. A legion of circumstances surrounds every act, and a legion of consequences results from an act. Where is one to draw the line between the circumstances and consequences which are

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[38] Welzel *supra* n 11 at 3.
[39] Maurach–Zipf *supra* n 6 at 206; Welzel *supra* n 4 at 39; Radbruch *Handlungsbegriff* 130; Schönke–Schröder *supra* n 3 at 113, and see above footnotes 4 and 5.
[40] Cf Welzel *supra* n 11 at 4.
[41] *Id* 415 (Lecture XVIII).
[42] *Id* 46.
[43] Salmond *Jurisprudence* (12 ed 1966) 353–4 (the first edition of this work appeared in 1902). *Cf* also Fitzgerald "Voluntary and Involuntary Acts" in Guest (ed) *Oxford Essays on Jurisprudence* (1961) 9.

relevant, and those which do not enter into the picture? The view that the unity and true structure of the act is only deducible from the goal the actor has in mind, is much more recommendable. This directing of the will is the backbone of the act, or, put differently, each act is the manifestation of the will.[44]

V

The directing of his will upon a certain goal by the actor, is nothing else than his intention.[45] This point has had a radical effect upon the system of general principles in the criminal law, because this means that the intention of the actor forms part of the *actus reus*. This conclusion is a natural outcome of the concept of an act by the adherents of the finalistic theory: all acts are *per definitionem* intentional acts. Even in the case of crimes requiring mere negligence, there is, according to this theory, still an intentional act. The driver who fails to devote his attention to the road and collides with a pedestrian, killing him, was also performing an intentional act, namely driving the motorcar to a certain destination. He is guilty of culpable homicide because he failed, in the course of his willful driving of the motor-car, to comply with the required standard of care. It is the careless performance of an intentional act which is penalized here (according to Professor Welzel).[46]

At this stage the question can legitimately be raised: if intention forms part of the *actus reus*, what remains of the requirement of *mens rea* or fault? According to the traditional scheme of the requirements for criminal responsibility in South Africa (as well as according to the classical theory of criminal law in Germany), intention, just as negligence, is an element of *mens rea*. The concept of *mens rea* in this traditional system can be described as a psychological concept, because all the requirements which have to do with the psyche of the offender are collected under this concept; *mens rea* is seen as the psychological link between the actor and his deed.[47] The finalistic theory has clearly revealed the peculiar dual character of intention in the traditional system. In this (latter) system intention can never have the meaning of "natural" or "ordinary" intention – that which the ordinary layman understands under this term. For the traditionalists, intention is always equivalent to malice, or "wicked intention": it is not sufficient that a person's will is directed towards a particular result (natural intention); apart from this, the person must also have knowledge of the unlawfulness of his act. Furthermore, in order to form the intention he must be endowed with

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[44]The finalistic theory emphasises that there is no "neutral" act or "Handlung an sich". There is only an act of murder, act of cutting, act of stabbing, etc. This structure or contents of the act is derived from the purpose with which the act is committed. See Welzel *supra* n 11 at 4, *supra* n 4 at 36, Baumann *supra* n 20 at 214.

[45]Jescheck *supra* n 2 at 161; Busch *Moderne Wandlungen der Verbrechenslehre* (1949) 8; Welzel in 1939 *ZStW* 491 at 505, *Um die finale Handlungslehre* (1949) 9, 22.

[46]Welzel *supra* n 11 at 65–6, *supra* n 4 at 129–130, *Um die finale Handlungslehre* 19–20; Maurach–Zipf *supra* n 6 at 206, 210–11.

[47]Jescheck *supra* n 2 at 313; Von Liszt *supra* n 2 (8 ed 1897) 154: "Schuld ist jene subjektive Beziehung des Thäters zu dem eingetretenen . . . rechtswidrigen Erfolg"; Baumann *supra* n 20 at 376.

certain mental capabilities – he must be said to have "criminal capacity" (*toerekeningsvatbaarheid*). It is for this reason that an author such as Professor De Wet, in his book on criminal law, differentiates between "coloured" and "colourless" intention; for the purposes of the criminal law intention must always mean "coloured intention" (which means that knowledge of unlawfulness is included within the concept of intention).[48]

It is clear that this last-mentioned concept of intention differs from what is understood by "intention" in everyday life. It is an artificial concept, peculiar to criminal law, or rather, peculiar to the traditional system of an act and the psychological concept of *mens rea*. If somebody acts without being aware that he is acting unlawfully (A slaughters a slaughter animal without the necessary permit, being ignorant of the fact that a permit is required by law), or acts while lacking criminal capacity (due to youth or mental illness), he cannot, according to the psychological theory of *mens rea*, be said to act intentionally. This is illogical, and in conflict with the experience in day-to-day life (A has, after all, slaughtered the animal intentionally, and a young child and a mentally ill person can also act with intention).[49] The supporters of the finalistic theory of an act claim to work with a concept of intention which is devoid of any artificiality, and this is all the more desirable if one considers that the criminal law is nearer to everyday life than most other branches of the law.[50]

This does not mean that in a system which works with the finalistic theory, no knowledge of the unlawfulness of the act is required. Knowledge of unlawfulness still remains a cardinal requirement of criminal guilt, yet not as an element of intention (which forms part of the *actus reus*), but as an element of a different concept of *mens rea*, namely the normative concept of *mens rea*. □

(*To be continued.*)

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[48] De Wet and Swanepoel *supra* n 5 at 146 (footnote 248), 147 and 150.

[49] Jescheck *supra* n 2 at 313; Welzel in 1939 *ZStW* 491 at 504; Busch *supra* n 45 at 35: "Man gibt zu, dass das Vermögen, einen Willen zu bilden, nicht vor den Zurechnungsfähigkeit abhängig ist." Helen Silving *Constituent Elements of Crime* (1967) 241–2 criticizes the view that an insane person cannot form intention, describing this assumption as "probably a remnant of historical notions of criminal intent as a 'vicious mind' or 'vicious will'". She points out that modern psychiatry has shown that an insane person, including a schizophrenic patient and a psychotic person "may possess an 'intent' with regard to a precipitating event, if by 'intent' we mean a psychological reality and not a legal construct".

[50] Maurach–Zipf *supra* n 6 at 210. A fundamental criticism against the whole psychological concept of *mens rea* is that there is no place within this concept for negligence. Negligence, and especially unconscious negligence, is no psychological relation between the actor and his act. See Radbruch in 1904 *ZStW* 333 345; Baumann *supra* n 20 at 377, Bertelsmann "The essence of *mens rea*" 1974 *Acta Juridica* 34 at 36.

The "finalistic" theory of an act in criminal law (part two)

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VI

The central idea behind the normative concept of *mens rea* is that *mens rea* is a reproach. Herein lies the difference between the normative and the psychological concepts of *mens rea*: the latter regards *mens rea* as merely a description of the actor's state of mind. The ground of the reproach is the fact that the person has acted contrary to the legal norms, despite the fact that he was able to act in accordance with these norms.[51] The element of *mens rea*, or the reproach, is an expression of a value-judgment of the wrongdoer's conduct (and by implication of his will). Hence the description of the *mens rea*-element as "normative".[52] *Mens rea* or "reproach" expresses a relation between the

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[51] Welzel *supra* n 19 at 24, 26, *supra* n 4 at 138, *supra* n 11 at 39, 40, 45; Jescheck *supra* n 2 at 320–1.

[52] Credit for exposing the normative character of *mens rea* must be given especially to Reinhard Frank and Graf zu Dohna. See Frank *Über den Aufbau des Schuldbegriffs* (1907) 11. Dohna sharply distinguished between the object of the value-judgment (namely the act and the intention) and the value-judgment itself. Just as unlawfulness is an evaluation of the act, so, according to him, is *mens rea* an evaluation of the intention or will to act – see his *Der Aufbau der Verbrechenslehre* (2 ed 1941) especially at 32. By substituting the normative concept in the place of the psychological concept of *mens rea*, the former so-called objective elements of liability, namely the act and unlawfulness, gradually assumed a more subjective character: intention became part of the act, and it was more and more realised that the circumstances in which the act is unlawful (*Tatbestand*) also include subjective considerations. For bribery, *eg*, to be unlawful, the advantage must be given to the state official *in order to induce him* to act in a certain way; in the case of theft by appropriation it is impossible to separate the act and the intention (intention to appropriate) from each other: the act of appropriation is precisely such because it is committed with the intention to appropriate. Furthermore, medical treatment, even without the consent of the patient, can be a ground of justification merely because of the *intention* with which it is performed. As to the so-called *subjektiven Tatbestandsmerkmale* see Jescheck *supra* n 2 at 235 ff, *supra* n 1 at 116; Welzel *supra* n 4 at 140; Bockelman *supra* n 3 at 46; Busch *supra* n 45 at 6. On the other hand, it is understandable that the finalistic theory has been criticised as "emptying" the concept of *mens rea* – *cf* Welzel *supra* n 11 at 43. For criticism of the view that *mens rea* is a re-

wrongdoer personally and the legal order in society – it is an evaluation of the offender's conduct by the legal order, personified by the judge or magistrate. The object of the reproach is the unlawful act of the offender, and more particularly the unlawful manifestation of his will.[53] Intention is not an element of the reproach, but rather the object of the reproach levelled against the wrongdoer.[54] Just as the idea of "praise" expresses a relation between that which a person has done and that which he was personally capable of achieving, so the idea of "reproach" or "blame" expresses the relation between a person's real conduct and his potential conduct, in the light of his personal knowledge and capabilities.[55] The conduct of the offender can only be valued negatively by the legal order if the following requirements regarding his personal knowledge and capabilities are complied with: in the first place he must have criminal capacity, and in the second place he must have knowledge of the unlawful character of his act. Thirdly, the offender should not have acted under coercion (*vis compulsiva*) in those circumstances in which coercion operates as a ground excluding *mens rea* and not as a ground excluding unlawfulness. One such a case is where A threatens to kill B if B does not kill C. If, as a result of this threat, B does kill C, he cannot be reproached for acting as he did, even though he had criminal capacity, and even though he was aware of the unlawfulness of his conduct.[56]

The requirement that the actor must have criminal capacity (*toerekeningsvatbaarheid*) in order to act with *mens rea*, hardly needs any explanation. It is clear that a child under the age of seven years or a mentally ill person who commits an unlawful act cannot be reproached for what he does, because he lacks the mental capability of distinguishing between right and wrong, or (even if he is capable of making such a distinction) of directing his conduct in accordance with this insight.

The reproach inherent in *mens rea* is, however, not directed against a person's psychological attributes *in abstracto*. The reproach is directed against a person in respect of a concrete act which he has performed, and therefore the offender can only be blamed if it further appears that, as regards this concrete act, he knew that his act was unlawful.[57] This knowledge of unlaw-

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proach, see Nowakowski 1954 *Juristische Blätter* 138; Baumann *supra* n 20 at 378–380. As to the difference between the psychological and the normative concepts of *mens rea*, see further Bertelsmann *supra* n 50 at 35–37.

[53] Welzel *supra* n 11 at 40; *supra* n 4 at 139, 157; 1939 *ZStW* 491 at 504; Jescheck *supra* n 2 at 319: "Gegenstand des Schuldurteils ist die rechtswidrige Tat mit Rücksicht auf die in ihr aktualisierte rechtlich missbilligte Gesinnung"; Busch *supra* n 45 at 12 ff, 35: "Das Wesen der Schuld [ist] pflichtwidrige Willensbestimmung." Welzel's formulation of the object of the reproach is such that the object is in the first place the will, which, however, must always manifest itself in an act.

[54] Welzel *supra* n 19 at 24; *supra* n 11 at 40: "Darum ist die frühere . . . Ansicht, die Schuld sei ein bestimmter Seelenzustand . . . unrichtig. Ein Seelenzustand kann (mehr oder minder) Schuld *haben*, aber er kann nicht (mehr oder minder) Schuld sein."

[55] Welzel *supra* n 11 at 40, 45; *supra* n 4 at 139.

[56] Jescheck *supra* n 2 at 321–2, 358, 360 ff; *id supra* n 1 at 117; Frank *supra* n 52 at 12; Welzel *supra* n 4 at 141.

[57] Welzel *supra* n 11 at 58 ff; *supra* n 4 at 157 ff; Jescheck *supra* n 2 at 339. According to Welzel, the reproach of *mens rea* can exist even though a person did not have actual

fulness is not synonymous with the idea of reproach, but rather its *raison d'être*: the offender could have refrained from his unlawful act because he had criminal capacity and because he knew that his act was unlawful. This he did not do, and therefore he is reproached for his unlawful act. His knowledge of the unlawfulness of his act should have acted as countermotive withholding him from his act; nevertheless he proceeded. This is the ground of the reproach.[58] *Mens rea* can therefore also be seen as expressing the idea of "the avoidability of the unlawful act".

Knowledge of unlawfulness is, according to the finalistic theory, not part of intention, but part of *mens rea*. This concept regarding the place of knowledge of unlawfulness in criminal law is known as the *Schuldtheorie*, and is the opposite of the *Vorsatztheorie* (intention theory), which regards knowledge of unlawfulness only as part of intention (intention here in the meaning of a form of *mens rea*).[59] By "knowledge of unlawfulness", as the term has been used thus far, is understood knowledge of the fact that the act, in the circumstances in which it is performed, is prohibited by the law. According to the *Schuldtheorie*, a difference is drawn between avoidable and unavoidable ignorance of the law. Unavoidable ignorance excludes *mens rea*, but not avoidable ignorance – the offender is only punished more leniently in this case. Since 1975 this rule is also embodied in the German Penal Code (section 17).

VII

The finalistic theory of an act is today followed in some form or other by most German criminal lawyers. The most important criticism against this theory will, however, now shortly be dealt with.[60]

In the first place, the opponents of the theory allege that certain of our acts which, because of frequent repetition, have acquired an almost automatic character, such as walking, writing, and driving a motor-car, as well as impulsive acts and acts committed in a rage, do not fit into the finalistic theory, because there are, in these cases, no preconception of some specific goal by the person who acts.[61] This criticism, although not without substance, is, however, not completely convincing. The finalistic theory does not deny that in the cases of genuine automatism (somnambulism, epileptic fit) there is, in reality, no act at all for the purposes of the criminal law. Acts such as walking, writing and dancing are only "automatic" in the sense that

knowledge of unlawfulness, if it is obvious that he *could* have had it. This is plainly so in the case of crimes of negligence, but not, it is submitted, in the case of crimes requiring intention.

[58] Welzel *supra* n 11 at 66–67; Jescheck *supra* n 2 at 339.

[59] Welzel *Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre* (1953) 12 ff; *id supra* n 11 at 62; Jescheck *supra* n 2 at 339. According to the *Schuldtheorie*, intention is therefore not *part* of the reproach, but the *object* thereof – Welzel *supra* n 11 at 64.

[60] For penetrating criticism of the theory, see Roxin *Strafrechtliche Grundlagenprobleme* (1973) 72 ff. The same article is printed in 1962 *ZStW* 515. See also the criticism of Schönke–Schröder *supra* n 3 at 115–6 and Michaelowa *Reflexbewegung, Handlung, Vorsatz* (1972) 47 ff.

[61] Baumann *supra* n 20 at 196, 213; Schönke–Schröder *supra* n 3 at 115; Jescheck *supra* n 14 at 147–8, *supra* n 2 at 167.

the actor need not concentrate like a small child on every single movement of his limbs when he performs the particular act. It still remains, however, a finalistic act, performed with a particular aim in mind.[62]

A second point of criticism against the finalistic theory is that there is no room for *dolus eventualis* in the criminal law once it is assumed that intention is the same thing as finality.[63] This criticism, it is submitted, is also invalid. When a person decides upon his ultimate goal and chooses his means for achieving this goal, he also considers the subsidiary or other accompanying consequences flowing from his act. A consideration of these subsidiary consequences may induce him either to abandon his proposed act, or to "steer" his conduct in such a way as to prevent these consequences from materializing, or, thirdly, he may decide simply to act recklessly, not caring whether these consequences (which he foresees as a possibility) result from his conduct or not. In this latter case the direction of his will, or his intention encompasses both his ultimate goal and the subsidiary consequences.[64] *Dolus eventualis* is therefore not irreconcilable with the finalistic theory.

Of much more importance is the criticism against the finalistic theory that negligent acts do not fit into it, and secondly that there is no room within this theory for omissions.[65] It is difficult for the finalistic theory to meet the criticism on these points. Regarding crimes of negligence, the critics allege – and quite correctly – that the person acting had neither intended the unlawful consequences nor even taken them into consideration.[66] The answer of the adherents of the finalistic theory is that even in the case of crimes of negligence, there still is a purpose-orientated act, although in these cases the purpose of the offender is irrelevant, because it lies outside the definition of the crime. The driver of a motor-car which collides with a pedestrian, killing him, is also performing an intentional act, namely to reach a certain destination with his motor-car, or to "cut" a curve in the road. The driver is liable for culpable homicide because he did not perform his (intentional) act with the required degree of care. According to the adherents of the finalis-

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[62]Welzel *supra* n 4 at 37; *id supra* n 11 at 4: "Ferner wird durch die Tatsache, dass viele unserer Körperbewegungen infolge ständiger Übung automatisiert sind, die finale Steuerung einer Handlung nicht beeinträchtigt, sondern im Gegenteil unterstürzt."

[63]Baumann *supra* n 20 at 194, 217; Schönke–Schröder *supra* n 3 at 116–7; Schmidhäuser "Willkürlichkeit und Finalität als Unrechtsmerkmal in Strafrechtssystem" 1954 *ZStW* 34 ff.

[64]Welzel *supra* n 11 at 2, 3; Jescheck *supra* n 2 at 226; Maurach–Zipf *supra* n 6 at 211–2.

[65]There is also the more fundamental criticism of Baumann *supra* n 20 at 190, 196–7, namely that the concept of an act in criminal law should be a *legal* concept, and not, as the "finalists" allege, a "natural" or philosophical concept, because (a) the act in criminal law must also refer to *omissiones*, and (b) the concept of an act in criminal law ought to be the same as in the civil law, where an artificial, and not a "natural", concept is applied: "Wäre, wie die finale Handlungslehre behauptet, der Handlungsbegriff dem Recht vorgegeben, so müsste das in gleicher Weise für das Gebiet des Zivilrechts und schliesslich für alle Rechtsgebiete gelten" (197).

[66]Mezger *supra* n 30 at 52; Rittler 1955 *Juristische Blätter* 614; Nowakowski 1954 *Juristische Blätter* 136 and 1958 *JZ* 338 *ff*; Baumann *supra* n 20 at 197, 215–6; Bockelmann *supra* n 3 at 48–9; Kaufmann 1967 *JuS* 145; Maihofer *supra* n 21 at 50; Jescheck *supra* n 14 at 148; *id supra* n 2 at 167.

tic theory, it is, in the case of crimes requiring intention, the achieving of the prohibited result which is valued negatively, whereas, in the case of crimes of negligence, it is the manner in which the act is performed, which is valued negatively and penalised.[67] The fact remains, however, that the careless performance of an act has nothing to do with its "finality", and that the undesired consequences resulting from the act lies outside the purpose which the person acting has in mind.[68] Quite apart from this, there are cases of negligence where the negligence is not based on the *way* in which the act is performed, but is based solely on the fact that the person acted in circumstances where he should not have acted at all, as in the case of the nurse who gives a patient an injection which he should never have received.[69]

The criticism against the finalistic theory of an act which proclaims that it fails to make provision for criminal omissions, is also of paramount importance. If a person, in order to bring about a certain result, intentionally withholds himself from any act, the theory can perhaps still be applied: it can namely be argued that the person intended the prohibited result and so "steered" his conduct as to cause the result.[70] But what about unintentional omissions, *eg* where a person had merely been forgetful? In such a case there is no conscious anticipation of a certain end-result.[71] The adherents of the finalistic theory try to answer this criticism by alleging that while, in the case of positive acts, there is actual finality, in the case of omissions there is only potential finality.[72] They furthermore argue that even in the case of unintentional omissions, a positive will to act can be construed: other than in the case of intentional acts or omissions, the will is not directed at a goal falling within the description of the crime, but at a goal falling outside it.[73] This argument, it is submitted, cannot be supported. To allege that the signal operator at the railway crossing who fell asleep, performed an intentional act (namely the "falling asleep"), is an artificial construction which is too far-fetched. It overburdens the concept of intention. It must be admitted that, viewed realistically, there is no exercise of the will and no preconception of an intended result in the case of unconscious or negligent omissions.

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[67] See the authorities referred to *supra* n 46. Another argument of the "finalists" is that, in the case of crimes of negligence, there is always at least potential finality (Welzel *Um die finale Handlungslehre* 17). The criticism of this viewpoint is that the concept of an act is thereby overburdened, because an element of evaluation – something which only belongs to *mens rea* – is thereby incorporated into the concept of an act (Maurach–Zipf *supra* n 6 at 212).

[68] Schönke–Schröder *supra* n 3 at 115; Maurach–Zipf *supra* n 6 at 212; Jescheck *supra* n 14 at 149; *id supra* n 2 at 167–8; Baumann *supra* n 20 at 216: "Die finale Steuerung ist hier rechtlich ohne Relevanz und damit auch für den Handlungsbegriff unergiebig"; *cf* Kaufmann 1967 *JuS* 145 at 150: "Die Sorgfaltspflichtverletzung lässt sich nicht an das Finalgefüge der Handlung anknüpfen, sie ist darin überhaupt nicht angelegt."

[69] Jescheck *supra* n 2 at 168.

[70] Maurach *supra* n 6 (4 ed) 186.

[71] Jescheck *supra* n 14 at 149; *id supra* n 2 at 167; Schönke–Schröder *supra* 3 at 115; Bockelmann *supra* 3 at 48–9; Michaelowa *supra* n 60 at 34.

[72] Welzel *supra* n 4 at 200, 201; Maurach *supra* n 6 (4 ed) 586; Baumann *supra* n 20 at 203, 218.

[73] Maurach *supra* n 6 (4 ed) 586.

VIII

Having discussed the different theories of an act and the criticism which may be levelled against each theory, it is, in conclusion, fitting shortly to adopt an own standpoint in regard to these theories, and to draw certain conclusions.

It is submitted that the criticism against the causal theory of an act is completely convincing. The act in criminal law is, and remains, a *human* act, and therefore it is inadequate to describe it in terms of blind causal processes, without any reference to the decisive will of the person who acts. Once it is accepted that the true structure and unity of the act can only be obtained by referring to the actor's will or intention, it follows that the normative, and not the psychological, concept of *mens rea* should be accepted as correct. After all, intention cannot be required twice (in the element of an act, and in the element of *mens rea*) for liability. It is interesting to note that, while the idea that intention forms part of the requirement of an act sounds foreign to South African law, the idea that *mens rea* consists solely of a reproach (normative concept of *mens rea*) may sound much more familiar in our country.[74] As indicated above, however, the causal theory of an act, and the purely psychological concept of *mens rea* (which goes hand-in-hand with each other) are not reconcilable with the idea that *mens rea* is solely a reproach (normative concept of *mens rea*). *Mens rea* in its meaning of blame or reproach is a moral element of criminal liability, and amounts to an external evaluation of the act – and by implication, therefore, of the will – of the offender. The state of mind or the intention is "in the head of the offender", but the *mens rea*, the reproach for the wrongful act, is "in the head of the judge". It is therefore confusing to describe *mens rea* as "a blameworthy state of mind". The intention, or the direction of the will, is the object of the reproach, but not the reproach itself. To regard *mens rea* as both a reproach and at the same time a state of mind, leads to an artificial and unsatisfactory distinction between "coloured" and "colourless" intention.[75] It should also be noted that, according to the normative theory of

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[74] The fact that the finalistic theory ought, after all, not to appear so foreign to South African legal thought, is proved by the contents of two recent articles on *mens rea* in the *South African Law Journal*, in which the two authors come to conclusions which remarkably coincide with essential aspects of the finalistic theory, and especially with the normative concept of *mens rea*. DA Botha in "What precisely does constitute *mens rea*?" 1975 *SALJ* 380 is of opinion that intention does not form part of *mens rea*, but of the requirement of a "voluntary act" (382–3), and that *mens rea*, in the case of intentional crimes, consists only of knowledge of unlawfulness. According to Botha (383) there is a difference between "intentionality" and "intention". "Intentionality", according to him, apparently means the direction of the will which is characteristic of all acts. Botha should only have gone further, and also regarded criminal capacity as part of *mens rea*. NJ Van der Merwe in "Die verband tussen *mens rea* en skuld" 1976 *SALJ* 280 argues that the essence of *mens rea* is not some state of mind, but a reproach: "'n Waarde-oordeel van buite oor die subjektiewe *mens* gee dus die deurslag by die bepaling van skuld" (282). Unfortunately Van der Merwe still regards the will as a component of "die skuldverwyt *dolus*", and not (as Botha) as included within the requirement of an act.

[75] *Cf* De Wet and Swanepoel *supra* n 5 at 146 (footnote 248), 147. The artificiality of this view is particularly apparent in the explanation by De Wet and Swanepoel 150 of the acquittal in *Smith* 17 SC 561, a case in which a soldier shot and killed a man in cold

mens rea, criminal capacity is not a *prerequisite* for *mens rea* (as is sometimes alleged),[76] but an element thereof.

The finalistic concept of an act, and the system of criminal responsibility flowing therefrom, cannot, however, according to my opinion, operate as a general, all-embracing system applicable to all types of crimes, that is to say, intentional as well as negligent crimes, *commissiones* as well as *omissiones*.[77] The fact that crimes of negligence and crimes of omission do not fit into the finalistic theory, has been pointed out above. It follows that the finalistic theory can only operate in the case of crimes requiring intention, and that crimes requiring negligence, as well as omissions, require separate treatment. As regards omissions, they actually constitute a form of liability all of their own. From a purely theoretical point of view, it is not correct to speak of an omission as an "act",[78] and, in my opinion, an omission must, both according to the causal and the finalistic theories, be regarded as something different than an act. The social theory of an act, which regards the act in criminal law as socially relevant human conduct, can, however, serve as a basis for liability in these cases of failure to act positively, as there is here, according to the social norms, customs and rules, a duty or expectation to act positively.[79] In the case of crimes of negligence, there is an act, which is purpose-orientated or willed. In the case of these crimes, however, the aim of the person is irrelevant. For the purposes of liability it is here sufficient that the act is committed voluntarily, that is to say, that the conduct of the wrongdoer can be controlled by his will.

According to the abovementioned conclusion, not one of the different theories of an act can serve as a general theory applying to all types of crimes (intentional and negligent crimes as well as omissions). Criminal law is a human and a normative science, and the different forms of conduct which may constitute a crime, do not always reveal the same structure. Criminal law is more than just a logical system of concepts. Any overdogmatization of the grounds of liability, any over-eagerness to maintain a unitary system

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blood on instructions from an officer. It is stated: "Smith . . . het hom doelbewus doodgeskiet. En tog was daar nie opset nie . . " The correct view is rather that Smith *did* have the intention, but that he cannot be reproached for having done what he did. De Wet and Swanepoel's view of *mens rea* as "'n laakbare gesindheid" (99), that is to say, as both a state of mind and a reproach, is identical with that of Baumann (*supra* n 20 at 380).

[76]This was the view in the former classical system of criminal law in Germany – Jescheck *supra* 2 at 155. It also seems to be the opinion of De Wet and Swanepoel *supra* n 5 at 106, where it is stated: "Die toerekeningsvatbaarheidsvraag . . . is 'n selfstandige vraag naas die vraag of die persoon met die een of ander gesindheid gehandel het."

[77]This is also the opinion of Maihofer *supra* n 21 at 55; Schönke–Schröder *supra* n 3 at 118; Bockelmann *supra* n 3 at 43–4, 49. *Cf* also Jescheck *supra* n 2 at 162 and, as regards crimes of negligence more in particular, see also Kaufmann 1967 *JuS* 145 at 150 and Busch *supra* n 45 at 34–5.

[78]Welzel *supra* n 4 at 200. The conclusion of Radbruch *supra* n 3 at 140, already made in 1904, that a positive act and an omission cannot form part of a common, greater unitary concept, just as A and non-A cannot be reconciled with each other, has over the years constantly influenced German criminal law dogmatics.

[79]This is also the opinion of Jescheck *supra* 2 at 168–9.

at all costs, must necessarily lead, at one stage or another, to unscientific compromises.

If one wants to define the act in criminal law, it is therefore necessary to employ an alternative at some or other place in the definition. A definition which will do justice to that which is of value in all the different concepts of an act mentioned above, can, according to my opinion, read as follows: an act (for the purposes of the criminal law) is human and socially relevant conduct, directed by the will and aimed at a certain end-result which either may, or may not, coincide with the prohibited act or result. If the words "socially relevant" and "either may, or may not" did not appear in the definition, it would only have reflected the finalistic concept of an act. The words "socially relevant" acknowledge the role of the social theory, and explain the liability for omissions. The words "either may, or may not" were inserted so that the definition also covers crimes of negligence.

The ideas of the finalistic theory of an act regarding the act and *mens rea*, is, of course, foreign to the traditional view of these elements of liability in the South African law. It would, however, be naïve to plead here that the finalistic concept of an act, and everything it enhances, should (at least as far as intentional crimes are concerned) be introduced into the South African positive law, simply because the traditional concept of the act and of *mens rea*, and the relationship between these two elements, are already too deeply engraved in our law. It must be remembered that the different theories of an act and of *mens rea* discussed above, are only of importance for the purposes of the systematic description of criminal liability. It has no, or little, direct bearing on criminal law practice, in the sense that the acceptance of the one theory will lead to a conviction, whilst the acceptance of the other will lead to an acquittal. (The mere fact that the courts in Germany have, over the last thirty years, almost never adopted a viewpoint in favour of any particular theory of an act, is proof of the purely dogmatic character of the different theories.)

Although it is safe to assume that *mens rea*, as the concept is understood in South African law, refers to both the wrongdoer's intention and the reprehensibility of his conduct, the latter aspect of *mens rea* has not always received the attention it deserves. If full weight is given to this normative aspect of *mens rea*, it follows, firstly, that criminal capacity (*toerekeningsvatbaarheid*) should be regarded as part and parcel of *mens rea*. A second result is that the view that ignorance of the law is no excuse, is untenable, being irreconcilable with the normative character of *mens rea*.[80] A third result flowing from the appreciation of the normative character of *mens rea*, is a better understanding of the reasons why a person can sometimes have an intention to kill, but nevertheless not be guilty of murder, as in (a) cases of

[80] The rule that ignorance of the law can never be an excuse, has recently been held by the Appeal Court not to from part of the South African law any more. See *De Blom* 1977 3 SA 513 (A). The *ratio* of the court in this commendable judgment (see 532) is couched in terms emphasising the element of *blameworthiness* in *mens rea*. *Cf* note in 1977 *SACC* 294.

compulsion,[81] and (b) where an attacked person exceeds the bounds of self-defence.

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[81] It is submitted that where a court allows compulsion to succeed on a murder charge (as in *Goliath* 1972 3 SA 1 (A)) the reason for the success of the defence ought to be the absence of *mens rea*: there is no blameworthiness attached to the intentional killing of an innocent person, which is an unlawful act (see 35D of *Goliath*'s case *supra*, where Wessels JA says: "Waar dit beweer word dat 'n beskuldigde 'opsetlik' dood veroorsaak het, slaan dit nie bloot op die meganiese doelgerigtheid waarmee die dader gehandel het nie, maar op die laakbare gesindheid (*dolus*) wat sy doelgerigte handeling aankleef"). This *does* have practical consequences: the person attacked may now defend himself in self-defence, because the attack is unlawful, though without *mens rea*. If the compulsion only excluded the unlawfulness of the attack, the victim's defence of his life could not be regarded as self-defence, as the latter defence does not operate against a *lawful* attack.