

Theories of punishment [ARC]

- 1.) **Absolute theory** (retributive theory)
 - Punishment is an end in itself
 - Just dessert
 - Retrospective
 - Equal proportion between degree of punishment and degree of harm
 - Expression of society’s condemnation of crime (not to punish is to condone – may lead to vigilantism)
 - Retribution explains culpability requirement (presupposes that man has free will – can be held responsible)

Retribution: restoring of legal balance which has been disturbed by commission of the crime. Punishment is the payment of the account which, criminal owes to society

Retribution	Vengeance
Modern writers: restoring of legal balance	An eye for an eye; old testament; <i>lex talionis</i>

- 2.) **Relative theory** [PDR]
 - Punishment is only a means to a secondary end/purpose
 - Looks to the future
- a.) **Preventive theory**
 - Purpose: preventing crime
 - Can overlap with other relative theories (deter/reform = prevent)
 - Before this theory can be applied, there must be a real possibility that the offender will again commit a crime (previous convictions?)
- b.) **Deterrent theory** [IG]
 - Purpose: deterring individual/society from committing crime
- i.) **Individual deterrence**
 - Teach individual lesson to deter him from committing crimes in future
 - Undermined by high % of recidivists
- ii.) **General deterrence**
 - Deter society as a whole from committing crime
 - Efficacy of theory does not only depend on severity of punishment – also probability that offender will be caught, convicted and serve sentence
 - Criticism: (1) assumes man rationally weighs action before doing; (2) cannot be proved; (3) permits disproportionate punishment

- c.) **Reformative theory** (rehabilitation theory)
 - Purpose: reforming the criminal
 - Emphasis on person/personality of offender who commits crime due to personality defect/psychological factor flowing from background
 - Criticism: (1) length of rehab; (2) disproportionate punishment; (3) effective only on young offenders; (4) ideal, not reality; (5) not necessary to wait for commission of crime; (6) depersonalises offender, undermines culpability
- 3.) **Combination theory**
 - Courts apply combination of theories
 - Retributive theory indispensable – only theory that requires proportional relationship bet harm and punishment

3 factors courts must take into account when sentencing (Zinn):

- 1.) Crime – degree of harm/seriousness of violation (retributive theory);
- 2.) Criminal – personal circumstances of offender (reformative theory); and
- 3.) Interests of society – society must be protected (preventive), community must be deterred (general deterrence), righteous indignation of society must be given expression (retributive)

4 elements of criminal liability: [ADUC]

- 1.) **Act or conduct** – act or omission; voluntary
- 2.) **Compliance with the Definitional elements of the crime**
- 3.) **Unlawfulness** – contrary to law = definitional elements + absence of ground of justification
- 4.) **Culpability**
 - a.) Criminal capacity – mental abilities:
 - i.) Appreciate wrongfulness of his act
 - ii.) Act in accordance with appreciation
 - b.) Intention/negligence

Sequence must be followed when investigating presence of elements: A + D + U + C = liability

Crimes v Delicts

Crimes	Delicts
Public interests	Private interests
Public law	Private law
State prosecutes	Private party institutes action
Punishment by state	Damages to injured party
State prosecutes irrespective of indl’s desires	Injured party chooses to claim damages or not
Criminal procedure	Civil procedure

THE PRINCIPLE OF LEGALITY

Nullum crimen sine lege – no crime without a legal provision

Definition of the principle of legality [CRC-BWS]

Sec 35(3)(l) of the Constitution: An accused may

- 1.) not be **Convicted** of a crime –
 - a.) unless the type of conduct with which he is charged has been **Recognised by the law as a crime**
 - b.) In **Clear terms**
 - c.) **Before** the conduct took place
 - d.) **Without it being necessary to interpret** the words in the definition of the crime **Broadly**; and
- 2.) If convicted, not be **Sentenced** unless the sentence also complies with the four requirements in 1(a)-(d)

Rules embodied in the principle [APCSN]

- 1.) **Ius Acceptum** – recognised by law as crime
- 2.) **Ius Praevium** – at time of commission
- 3.) **Ius Certum** – in clear terms
- 4.) **Ius Strictum** – interpreted strictly
- 5.) **Nulla poena sine lege** – sentence must comply

Conduct must be recognised by law as a crime (*ius acceptum*)

- Implied by sec 35(3)(l)

Common-law crimes

- No provision in common law, no crime
- Court has no legislative powers

Masiya: in a constitutional democracy such as ours, the legislature, and not the courts, has the major responsibility for law reform.

Statutory crimes – Act must declare:

- 1.) Which particular type of conduct is a crime; and
- 2.) What the punishment court must impose

Interpret in favour of accused – only a crime if it appears unambiguously from the wording of the Act that it is

Legal norm: provision in Act creating a legal rule which does not simultaneously create a crime

Criminal norm: provision in Act that makes it clear that certain conduct constitutes a crime

Criminal sanction: provision in Act stipulating what punishment a court must impose after conviction

S v Francis: accused charged with having absconded from rehabilitation centre. Court cited Snyman’s distinction between legal norm, criminal norm and criminal sanction and found that no crime was created under new Act. Hence, accused acquitted.

For Act to create crime, must be clear that provision contains criminal norm. If provision creates only criminal norm but no criminal sanction, presumed that punishment in discretion of court. Ideally, leg should stipulate max punishment for crime. If only criminal sanction, court accepts that leg intended to create a crime.

Crimes should not be created with retrospective effect (*ius praevium*)

- Nobody should be convicted of crime unless it was recognised by law as a crime **at the moment it took place**
- Creation of crime with retrospective effect not legal (*ex post facto* legislation)
- Sec 35(3)(l) expressly sets out *ius praevium* rule

Masiya: CC ruled that extended definition of rape does not apply to accused because of *ius praevium* rule. Prospective application only. Hence, accused’s act of anal rape amounted to conviction for indecent assault only.

Crimes ought to be formulated clearly (*ius certum*)

- Must not be formulated vaguely/unclearly
- No express provision in Constitution but sec 35(3) can be interpreted to cover it as well

Provisions creating crimes must be interpreted strictly (*ius strictum*)

- Crime-creating provisions interpreted strictly
- Where doubt exists concerning interpretation, accused must be given benefit of the doubt
- Court is not authorised to extend crime’s field of application to the detriment of the accused

Masiya: extension of definition of rape. Court may extend field of application in exceptional circumstances; to promote the values enshrined in the Constitution. Principle of legality not a bar to development of common law to conform with BoR. However, prospective only.

Mshumpa: father conspired to have car hijacked and mother shot. Baby died and he was charged, amongst others, with murder of unborn child. Court held that it could not extend definition of murder to cover killing of unborn child as that would offend principle of legality.

The principle of legality in punishment (*nulla poena sine lege*) – no penalty without a legal provision

- *Ius acceptum* – court can only impose punishment prescribed by statutory/common law
- *Ius praevium* – if punishment is increased, may not be imposed retrospectively (**Sec 35(3)(n)**)
- *Ius certum* – punishment must be defined clearly
- *Ius strictum* – an ambiguous punishment must be interpreted strictly

THE ACT

Actus reus

- Conduct – act and omission
- Thoughts not punishable – must have started converting thoughts into actions
- Act must be human act/omission
- Act must be voluntary – capable of subjecting his bodily movements to his will/intellect

Factors which exclude voluntariness of the act [ANA]

- 1.) **Absolute force** (*vis absoluta*)

Absolute force	Relative force
Excludes ability to subject bodily movements to will or intellect	- <i>vis compulsive</i> Ability is left intact (<i>Goliath</i>)

- 2.) **Natural forces** – (eg hurricane)
- 3.) **Automatism** – mechanical behaviour of an automaton (eg reflex movements, sleepwalking, somnambulism, epileptic fit, black out, etc)

Dhlamini: accused acquitted of murder charge as it was found that he acted mechanically – half asleep and under influence of a nightmare. No act in legal sense of word.

Sane automatism	Insane automatism
Momentarily acted like an automaton (no volun. act)	Defence of mental illness (insanity)
Onus of proof that act performed voluntarily rests on state	Onus of proof on accused to prove his insanity
If successful, leave court free person	Committed to psychiatric hospital – loses freedom

Henry: shoots mother-in-law and wife in rage. Appeal fails – no reasonable possibility that accused in state of automatism. Court’s attitude towards this defence is one of great circumspection. In discharging onus, state assisted by natural inference that, in absence of exceptional circumstances, sane person engages in conduct consciously and voluntarily.

Trickett: woman unexpectedly swerved causing vehicular collision. Claimed that she had a lapse of consciousness that rendered her conduct involuntary. Convicted of negligent driving. Courts are sceptical of this defence. Must provide basis for defence sufficient to create doubt whether act was voluntary (eg medical/expert evidence)

Antecedent liability

- Knows of risk but still proceeds to act
- Liable for crimes requiring culpability in the form of negligence
- eg knows of epileptic attacks but still drives. Liable for negligent driving (*Victor*)

Omissions

- Omission punishable only if there is a legal duty to act positively

Minister van Polisie v Ewels: plaintiff was assaulted in police station by police sergeant not on duty. It took place in front of other policemen who could have prevented it. Minister of Police sued for damages. Liable because police have legal duty to protect citizen. **There is a legal duty to act positively if the legal convictions of the community require him to do so.**

Legal duty: specific instances [SCAR-P2O2]

- 1.) **Statute** (eg income tax)
- 2.) **Common law** (eg treason – must report)
- 3.) **Agreement** (eg railway crossing – *Pitwood*)
- 4.) **Responsibility for control of dangerous or potentially dangerous object** (eg failed to repair cage of baboon that bit child – *Fernandez*)
- 5.) **Protective relationship** (eg parent/guardian – *B*)
- 6.) **Previous positive act** (eg lights fire in veldt then walks away without extinguishing)
- 7.) **Office** (eg police – *Ewels*)
- 8.) **Order of court** (eg omits to pay maintenance)

State has duty to protect citizens from violent crime (*Carmichele; Van Duivenboden*)

The defence of impossibility

- Omission must be voluntary
- Voluntary if possible to perform positive act

Requirements for defence of impossibility: [PON]

- 1.) Legal provision which is infringed must require a **Positive duty** (not mere prohibition)

Canestra: contravention of prohibition against catching undersized fish. Net with larger mesh, while allowing undersized fish to escape, would also allow important kinds of fish to escape. Impossibility rejected as defence, since regulations did not oblige anyone to pursue occupation of fishing.

- 2.) **Objectively impossible to comply** with the legal provision – no person in that position must be able to comply.

Leeuw: driving without a license. Could not do test in particular area due to order restricting his movements. Mere fact of exceptional inconvenience does not mean it is impossible to comply with the law. Besides, law does not impose positive obligation to acquire driver’s license, but merely prohibits driving without one.

- 3.) **Not responsible for situation of impossibility**

THE DEFINITIONAL ELEMENTS

- Concise description of the requirements set by law for liability for a specific type of crime
- Differentiates between different crimes re:
 - Kind of act prohibited
 - Circumstances (eg method of execution)
 - Characteristics of person
 - Nature of object
 - Particular place
 - Particular time

Definitional elements	Definition of crime
Not reference to reqts of unlawfulness & culpability	Contains definitional elements as well as reference to reqts of unlawfulness & culpability

CAUSATION

Formally defined crimes	Materially defined crimes
Definitional elements proscribe a certain conduct irrespective of what the result of the conduct is	Definitional elements do not proscribe a conduct, but any conduct which causes a specific condition
Perjury, drug possession	Murder, culpable homicide

The issue of causation

- Materially defined crimes – causal link between conduct and prohibited result

Principles to be applied in determining causation

Basic principle – 2 requirements to find causal link:

- 1.) Factual cause; and
- 2.) Legal cause

Factual causation (*conditio sine qua non*)

- Condition without which prohibited situation would not have materialised (“but for”)
- If the act cannot be thought away without the situation disappearing at the same time

Daniels: Appeal court decided that factual causation is determined on the basis of the *conditio sine qua non* theory

Legal causation [IAN]

- 1.) **Individualisation theories**
 - Most operative/proximate cause
 - Objection: 2 or more conditions are often operative in equal measure

Daniels: court refused to accept that in our law criminal liability is necessarily based on “proximate cause.”

- 2.) **Adequate causation theory [HENT]**
 - If according to **H**uman **E**xperience, in the **N**ormal course of events, the act has the

Tendency to bring about that kind of situation

3.) **Novus actus interveniens**

- New intervening event
- Chain of causation broken
- Unexpected/abnormal/unusual occurrence; deviates from normal course of events
- Differs slightly from test of adequate causation

Courts’ approach to legal causation

- Court must be guided by policy considerations – reasonable, fair and just (*Daniels; Mokgethi*)
- May apply one or more theory, or none
- Wrong for court to regard only one specific theory as correct one to be applied in every situation (*Mokgethi*)

Grotjohn: assisted suicide by providing crippled wife with loaded rifle. Mere fact that last act causing death was victim’s own act did not necessarily mean person handing gun to victim was not guilty of any crime. If victim’s final act is the realisation for the very purpose accused had in mind, victim’s act can never be regarded as a *novus actus*.

Daniels: X shoots Y in back. Y would die in 30min. Latecomer Z shoots Y in head. Majority: both acts cause of Y’s death. Shots fired were fatal and would in any case lead to death. Minority: head shot = *novus actus interveniens*

Mokgethi: bank teller wounded in robbery – paraplegic. Did not follow doctor’s orders and dies from septicaemia after 6 months. Wounding is *conditio sine qua non* but not legal cause. Policy considerations – X’s act too remote from result. Y’s own unreasonable failure = immediate cause of his death. X guilty of attempted murder only.

Tem bani: accused shoots girlfriend twice in chest. Admitted to hospital. Medical personnel negligent. Dies from wounds. Deliberate infliction of an intrinsically dangerous wound from which death likely to occur without medical intervention must generally lead to liability. Irrelevant whether wound was treatable or whether treatment was negligent or sub-standard.

Only exception: if recovered to such an extent that the original injury no longer posed a danger to her life.

Approach justified because of 2 policy considerations:

- 1.) Deliberate fatal wound; conscious that death might ensue – intervening persons do not diminish moral culpability of perpetrator
- 2.) Legal liability cannot be imputed on supposition that efficient/reliable medical attention would be accessible, especially in our country

UNLAWFULNESS

- An act which complies with the definitional elements is provisionally (*prima facie*) unlawful
- One must look at the grounds of justification (defence) as they may then exclude unlawfulness. If defence fails then the conduct will be unlawful.
- Conduct is unlawful if it conflicts with the *boni mores* (good morals) / legal convictions of society

Fourie: judge exceeded speed limit whilst hurrying to get to work. Claimed it was lawful and for interests of state and the administration of justice that he get there on time. Court dismissed this defence. There are a number of grounds of justification recognised in our law – list does not constitute a *numerus clausus*. **Criterion of boni mores / legal convictions of the community should be used as a legal standard for determining unlawfulness of act.** Applying this standard, judge’s actions cannot be countenanced. It would open floodgates to putative defences and endanger safety of road users.

Examples of grounds of justification [PN-CP-ROO]

- 1.) **Private defence**
- 2.) **Necessity**
- 3.) **Consent**
- 4.) **Presumed consent**
- 5.) **Right of chastisement**
- 6.) **Obedience to orders**
- 7.) **Official capacity**

PRIVATE DEFENCE

- Test for private defence: objective (actual facts)
- Putative private defence – not unlawful but may escape liability as lack of culpability
- Exceeding limits of private defence – depends on culpability; dealt with later

Requirements for private defence: [UAT-ANRA]

- 1.) Requirements of attack [UAT]
 - a.) **Unlawful**
 - b.) **Against interests which ought to be protected**
 - c.) **Threatening but not yet completed**
- 2.) Requirements of defence [ANRA]
 - a.) Directed against the **Attacker**
 - b.) **Necessary**
 - c.) **Reasonable relationship to the attack**
 - d.) While **Aware that he is acting in private defence**

Attack must be unlawful

- Need not be accompanied by culpability (can do PD against mentally ill/children/mistake)
- Not PD if against animals, but necessity
- Attack need not be directed at defender; may protect third person

Patel: accused shot man in defence of his brother who was being hit by man with hammer. A person has the same right to use force in the defence of another from a threatened danger, as he would have to defend himself, if he were the person threatened.

- Attack need not only be positive act (*commissio*); can also be omission (*omissio*)

Attack must be directed against interests which, in the eyes of the law, ought to be protected

- Property (*Van Wyk, infra*)
- Dignity (*Van Vuuren*: public insult to wife; blows)
- Preventing unlawful arrest (*Mfuseni*)
- Preventing attempted rape (*Mokoena*)

S v Van Wyk: shopkeeper rigged a shotgun to go off if a person broke in. Warning notice placed on shop door. Fatal wound caused to intruder. Discharged of murder on ground of private defence. Private defence can discharge liability if person killed in protection of property.

Attack must be threatening but not yet completed

- There must an attack or immediate threat of one
- Not against past attack or for vengeance

Mogohlwane: Y tried to take paper bag with X’s possessions inside. X resisted but Y threatened X with an axe. X immediately ran to his house, fetched a table knife and returned to regain property. X fatally stabbed Y. Court held that X acted in private defence. Although time elapsed, attack not yet completed. When X ran home to fetch knife, it was part of one and the same immediate and continued act of resistance. Acquitted of murder.

Defensive act must be directed against the attacker

- Cannot direct defensive act against a third person

Defensive act must be necessary

- Must not be possible to ward off attack in another, less harmful way (*Attwood*)
- Snyman: no duty to flee

There must be a reasonable relationship between the attack and the defensive act

- Not be more harmful than necessary (*Trainor*)
- Factors in determining whether reasonable:
 - Relative strength of parties
 - Sex; ages of parties
 - Means at disposal
 - Nature of threat
 - Value of interest threatened
 - Persistence of attack
- Need not be proportionality between:
 - Nature of interests threatened and impaired
 - Weapons/means used by the parties

- Value/extent of injuries between parties

Patel: used revolver to shoot man who was wielding hammer. *Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position.* Used only weapon to hand. Must beware of being an armchair critic.

The attacked person must be aware of the fact that he is acting in private defence

- No such thing as inadvertent/accidental PD
- Cannot succeed in cases of pure coincidence

NECESSITY:

- Test for necessity: objective (actual facts)
- Putative necessity – not unlawful but may escape liability as lack of culpability
- If defence of necessity rejected, may be taken into account in sentencing as mitigating factor

Definition: where a person acts in protection of his own or **another's** life, physical integrity, property or other **legally recognised interest** which is endangered by a threat of harm which has already **begun** or is immediately threatening and which **cannot be averted in any other way**, provided that the person who relies on the necessity is **not legally compelled to endure the danger**, and the interest protected by the act of defence is **not out of proportion** to the interest threatened by such act.

Requirements for necessity: [LABENOC-N]

- 1.) **Legal interest** threatened
- 2.) May protect **Another**
- 3.) Emergency already **Begun** but not yet terminated
- 4.) May rely on necessity **Even if personally responsible** for the emergency
- 5.) **Not legally compelled to endure danger**
- 6.) **Only way to avert** danger
- 7.) **Conscious** of fact that emergency exists
- 8.) **Not cause more harm than necessary**

Necessity	Private defence
<i>Origin of situation of emergency:</i> Any act or chance circumstances	<i>Origin of situation of emergency:</i> Unlawful, human attack
<i>Object at which act of defence directed:</i> Interests of another innocent 3 rd party or a violation of a legal provision	<i>Object at which act of defence directed:</i> Unlawful human attack

Goliath: X was ordered by Z to hold onto Y so that Z might stab and kill Y. X threatened to kill him if he refused to help him. Impossible to run away; only way to save own life was by yielding. X acquitted on ground of compulsion. Necessity can serve as a complete defence to

murder in a case of extreme compulsion. One should never demand more of an accused than is reasonable. Considering everyone's inclination to self-preservation, cannot expect heroism from average person.

Absolute compulsion	Relative compulsion
No voluntary act	Is a voluntary act. Only this form qualifies as necessity.

CONSENT

- *Volenti non fit iniuria* – no wrongdoing committed in respect of somebody who has consented
- Only operates as ground of justification for certain crimes and under certain circumstances

Requirements for valid plea of consent: [VM-BEBB]

- 1.) Given **Voluntarily**

McCoy: air hostess consents to hiding for failure to fasten seatbelt instead of dismissal. Court rejected defence of consent. Consented out of fear and to avoid being dismissed. Also *contra bonos mores*. Guilty of assault.

- 2.) By person w/ certain minimum **Mental abilities**
 - a.) To appreciate nature of act consented to
 - b.) To appreciate consequences of act
- 3.) **Based on knowledge of true & material facts**
 - fact material if relates to definitional elements of the particular crime
 - must not be *error in negotio* (type of act) or *error in persona* (identity of person)

R v C: woman woke up to find man having sex with her. She thought it was her husband. It wasn't. No valid consent. There must be mental state of willingness not only in respect of act but also the particular man she does act with. Accused found guilty of rape.

- 4.) **Express or tacit** (eg taking part in sport)
- 5.) Given **Before commission of the act**
- 6.) **By the complainant himself**

Different effects consent may have:

- 1.) Not defence but forms part of definitional elements (eg rape)
- 2.) Never recognised as a defence (eg murder)
- 3.) Ground of justification (eg theft; malicious injury to property)
- 4.) Sometimes ground of justification, sometimes not (eg assault – criterion: *boni mores* of society/ public policy. Sports, medical treatment, haircut.)

PRESUMED CONSENT

- *Negotiorum gestio*; spontaneous agency
- eg paramedic in ambulance; doctor in emergency

Requirements for presumed consent: [NR-EKIN²]

- 1.) **Not possible to obtain consent in advance**
- 2.) **Reasonable grounds** for assuming that, had Y been aware of the material facts, he would not have objected (test: objective)
- 3.) Reasonable grounds must **Exist at time of act**
- 4.) **Knowledge** of reasonable grounds at time of act
- 5.) **Intend to protect/further Y's interests**
- 6.) Intrusion must **Not go beyond conduct Y would presumably have consented to**
- 7.) **Not required that act be successful**

RIGHT OF CHASTISEMENT

- Parents have the right to punish children with **moderate and reasonable** corporal punishment in order to maintain authority and in the interests of the child's education
- Teachers may not use corporal punishment. Violation of constitutional rights (*Christian Education; sec 10, SA Schools Act*)

OBEDIENCE TO ORDERS

- No member of a security service may obey a manifestly illegal order (*sec 199(6), Constitution*)

Mostert: municipal traffic officer ordered to fetch another municipal traffic officer who refused to accompany him so force used to bring him to their superior. Defence of obedience to orders raised. Usually applied to military but not restricted to soldiers. For proper functioning of police and protection services, defence can be extended to traffic officers. Court laid down requirements: [EUN]

- 1.) Order must **Emanate from a person in lawful authority over the accused**
- 2.) Accused must have been **Under a duty to obey the order** (test: whether order was manifestly and palpably unlawful)
- 3.) Accused must have done **No more harm than necessary** to carry out the order

Court in this case rejected accused's defence of obedience to orders. Acquitted of assault based on lack of intention but convicted of *crimen iniuria* for calling him a 'piccanin.'

OFFICIAL CAPACITY

- By virtue of holding a public office, authorised to perform the act, provided the act is performed in the course of the exercise of his duties.
- eg security personnel doing searches; police trying to arrest someone; customs search

TRIVIALITY

- *De minimis non curat lex* – the law does not concern itself with trifles
- Neither unlawfulness or culpability

CULPABILITY

Mens rea

- Blameworthy state of mind; whether there are grounds upon which, in the eyes of the law, he can be reproached or blamed for his conduct
- Particular person as an individual and his personal characteristics, aptitudes, gifts, shortcomings, mental abilities and knowledge
- Culpability has 2 legs:
 - 1.) Criminal capacity; and
 - 2.) Intention or negligence

Criminal capacity	Intention/negligence
Foundation/indispensable prerequisite to existence of intention/negligence	Question only arises once it is established that accused has criminal capacity
Mental abilities	Presence/absence of certain attitude/state of mind; knowledge

Principle of contemporaneity

- Culpability and the unlawful act must contemporaneous (occur at same time)

Masilela: exception to rule: **single course of conduct.** Assaulted and strangled with intent to kill. Left for dead, ransacked house and set it on fire. Actually survived assault and died in fire. Conviction for murder affirmed.

CRIMINAL CAPACITY

- Mental ability to:
 - 1.) Appreciate the wrongfulness of his act or omission (cognitive); and
 - 2.) Act in accordance with such an appreciation of the wrongfulness of his act (conative)

2 psychological legs of test	
Cognitive	Conative
Ability to differentiate between right and wrong	Ability to conduct himself in accordance with insight
Reason/intellect; insight and understanding	Self-control; power of resistance

Defences which exclude criminal capacity:

- 1.) Non-pathological criminal incapacity
- 2.) Mental illness
- 3.) Youth

NON-PATHOLOGICAL CRIMINAL INCAPACITY (NPCI)

- Need not prove any mental illness
- Linked rather to an emotional collapse (eg shock, fear, anger, stress; result of provocation)
- If raised, state has onus to prove accused had criminal capacity. However, defence must lay a foundation for the defence (pref expert evidence)

Eadie: intoxicated, provoked and in a state of road rage, accused smashed Y's car with hockey stick and assaults Y. Court rejects his defence of NPCI; convicted of murder. Court held that **there is no distinction between NPCI owing to emotional stress and provocation and sane automatism**. More specifically, according to the court, there is no difference between the conative leg for the criminal capacity test and the requirement of voluntariness of act. Court did not categorically state that NPCI no longer exists. But defence of NPCI due to provocation should be treated as one of sane automatism, which does not succeed easily and is rarely upheld.

Provocation and emotional stress	Intoxication or other factors
Sane automatism (<i>Eadie</i>)	NPCI still exists

MENTAL ILLNESS

Sec 78(1), Criminal Procedure Act: *A person who commits an act/makes an omission which constitutes an offence and who at the time of such commission/omission suffers from a mental illness/mental defect which makes him incapable*

- (a) of appreciating the wrongfulness of his act/omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act/omission

shall not be criminally responsible for such act/omission

2-legged test in terms of sec 78(1)		
Pathological leg of test	Psychological leg of test	
Mental illness/defect	Cognitive	Conative

Mental illness or mental defect

- Pathological disturbance of the mental faculties. "Pathological" = sick/diseased
- Expert evidence from psychiatrists must prove it
- Mental or organic origin (may stem elsewhere)
- Permanent or temporary nature
- Although intoxication does not constitute mental illness, chronic abuse of liquor may lead to recognised mental illness of *delirium tremens*
- Mental defect is different to mental illness: low intellect, evident at early stage, permanent nature

Psychological leg of test

- Causal link – lack of mental abilities must be attributable to mental illness/defect
- Either cognitive or conative:
 - 1.) Inability to distinguish right & wrong
 - 2.) Inability to act in accordance with insight

Onus of proof

- Sec 78(1A): every person is presumed not to suffer from a mental illness/defect until the contrary is proved on a balance of probabilities
- Burden of proof rests on party raising the issue

Verdict

- If defence successful, court must find X not guilty and apply one of the following orders:
 - 1.) Admit and detain in an institution
 - 2.) Release subject to conditions
 - 3.) Unconditional release
 - 4.) Detainment in a psychiatric hospital/prison

Diminished responsibility or incapacity

- Mitigating circumstance
- Sec 78(7): criminally responsible but capacity diminished, taken into account when sentencing

Mental abnormality at time of trial

- Court cannot try a mentally abnormal person
- Lacks capacity to understand proceedings and defend himself
- Investigation, psychiatrists; may be detained in psychiatric hospital till fit to stand trial
- Procedural matter

YOUTH

- Part 2 of **The Child Justice Act 75 of 2008** provides for the new minimum age for criminal capacity (rebuttable presumption no longer starts at 7 years old, but now at 10 years of age)

Sec 7(1): a child who commits an offence while **under the age of 10 years** does **not have criminal capacity** and **cannot be prosecuted for that offence**.

A child who is **10 years or older but under the age of 14 years** and who commits an offence is **presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity**.

Sec 11(1): the State must **prove beyond a reasonable doubt** the capacity of a child who is 10 years or older but under the age of 14 **to appreciate the difference between right and wrong** at the **time of the commission** of an alleged offence and **to act in accordance with that appreciation**.

INTENTION

Dolus

2 elements of intention:

- 1.) **Cognitive – knowledge** or awareness of
 - a.) The nature of the act
 - b.) The existence of the definitional elements
 - c.) The unlawfulness of the act
- 2.) **Conative – directs will** towards a certain result

Definition of intention: a person acts or causes a result intentionally if he **wills** the act or result in the **knowledge** of what he is doing (ie the **act**), that the acts

and circumstances surrounding it accord with the **definitional elements**, and that it is **unlawful**.

3 forms of intention: [DIE]

- 1.) **Direct intention** (*dolus directus*) – causing of the forbidden result is the **main aim/goal**
- 2.) **Indirect intention** (*dolus indirectus*) – causing of the forbidden result is **not** his main aim/goal, but conduct will **necessarily** cause result in question
- 3.) **Dolus Eventualis** – causing forbidden result **not** main aim but subjectively **foresees** the **possibility** that his conduct may cause it, and he **reconciles** himself with this possibility/**reckless**
 - Minimum requisite: actual contemplation
 - “Ought to”/”must have” not sufficient

Test for intention: purely subjective

- Court must determine what state of mind of particular person was at time of act
- Question never whether he should have foreseen, but whether he foresaw as an actual fact

Proof of intention can be direct or indirect

- Direct evidence: confession
- Indirect – court infers intent from evidence relating to X’s conduct at time of commission of act and the circumstances surrounding the events
- When inferring, must guard against applying objective instead of subjective test – individual characteristics; court places itself in X’s position

Knowledge as an element of intention must cover all the requirements of crime

- Knowledge must refer to **all** the elements of the offence **except** the requirement of culpability
 - 1.) Act
 - 2.) Circumstances incl in definitional elements
 - Need not be convinced that circumstance exists; foresees possibility & reconciles (*dolus eventualis*)
 - 3.) Unlawfulness of the act
 - Aware that conduct prohibited by law; not covered by ground of justification
 - May also be *dolus eventualis*

Distinction between motive and intention

- In determining whether X acted with intention, the motive behind the act is immaterial
- Good motive does not exclude intention; but may at most influence degree of punishment

MISTAKE

- If knowledge absent, it is said there is a mistake
- Mistake excludes/nullifies existence of intention
- Need not be reasonable; question of fact; test is subjective – personal characteristics considered

- Mistake must be material – concerns an element/requirement of the crime
 - Requirement of an act
 - Requirement in definitional elements
 - Requirement of unlawfulness

Error in objecto – mistake about the object of act

- Whether it excludes intention and is a defence depends on definitional elements of partic crime
- eg shoots human thinking he was a buck – excludes intention to murder as mistake concerns definitional element of crime (to kill a human)
- If intended to kill human but killed *wrong* human (*error in persona*), mistake is not material and will not exclude intention. Hence, guilty of murder

Mistake relating to the chain of causation

- Can only occur in materially defined crimes
- X believes that result will be brought about in a certain manner; the result does ensue, but in a manner which differs from that foreseen by X
- Before **Goosen (1989)**, assumed that this form of mistake did **not** exclude intention

Goosen: Y killed in robbery. Z fired the shot involuntarily because he had been frightened by an approaching vehicle. X was getaway driver. X knew Z had firearm and foresaw possibility that someone might get shot during course of robbery but had not foreseen that it might happen in that manner (involuntarily). Court found that there was a substantial difference between the actual and foreseen manner in which death was caused and this negated intention to murder. Culpable homicide.

(Court gave illustration of thief robbing café owner and firearm goes off accidentally when thief slipped to floor.)

Mistake relating to causal chain of events **may** exclude intention, provided the actual causal chain of events **differed materially** from that envisaged by X. in materially defined crimes, X’s intention must be directed at bringing about the result in **substantially the same manner** as that in which it was actually caused.

Lungile: shop assistant killed in shoot-out between robbers and policeman. Possible that bullet was from policeman’s gun. Court rejected argument that policeman’s shot was *novus actus interveniens*. Death caused in cross-fire not an abnormal, independent occurrence. Convicted of murder without even considering possible argument of mistake as to causal course of events.

Aberratio ictus does NOT constitute a mistake

- *Aberratio ictus* means the going astray of the blow and is **not** a form of mistake

Transferred culpability approach

- Intention to kill Y transferred to killing of Z
- Doctrine of transferred malice
- X intended to kill a person – fact that actual victim different ought not to afford any defence

Concrete-figure approach

- Concrete intention to kill actual victim required
- X’s intention to kill Y cannot serve as a substitute for the intention to kill Z
- Can only be liable if X had foreseen possibility that might hit other person and reconciled himself to this possibility (*dolus eventualis*)
- In *aberratio ictus* situations, merely apply ordinary principles relating to culpability
- This approach preferred:
 - 1.) Subjective test to determine intention
 - 2.) Doctrine of *versari in re illicita* rejected

Mtshiza: X and Y drank together then quarrelled. X aimed at Y with pocket knife. Z moved forward to intervene, was struck and died. X convicted of culpable homicide. Holmes’s minority judgment accords with concrete-figure approach and lays down the following

rules with regard to aberratio ictus situations:

- 1.) X normally always **guilty of attempted murder of Y**, the person he wished to kill
- 2.) **3 possibilities in respect of Z**, the actual victim
 - a.) If X had foreseen that Z could be struck and reconciled himself to this possibility, he had *dolus eventualis* and is **guilty of murdering Z**
 - b.) If X had **not** foreseen/reconciled himself to the possibility, lacks *dolus eventualis* – **not guilty of murder**. But if X **ought to** have foreseen it, there is negligence and he is guilty of **culpable homicide**
 - c.) Only if it is established that **both intention & negligence absent** will X be discharged on both murder and culpable homicide

NB: if Y not killed, only injured, X either guilty of assault or not guilty at all. No such thing as negligent assault.

<i>Error in objecto</i>	<i>Aberratio ictus</i>
Form of mistake	Not a form of mistake
X believes object against which he directs his action is different from what it actually is	Person struck not confused by X with the person at whom he is aiming (blow misses due to lack of skill)
Material mistake? def elem	<i>Dolus eventualis</i> ?foreseen;rec

Mistake relating to unlawfulness

2 subdivisions of knowledge relating to unlawfulness:

- 1.) Conduct is not covered by ground of justification
- 2.) Conduct is punishable by the law as a crime

Mistake relating to ground of justification

De Oliveira: employee and friends tried to get into servants quarters at back of X’s house. X’s wife woke up and told X “there are unknown black men outside”. X opened window and fired 6 shots. Hit employee (injured) and one of his friends (died). **Putative private defence** raised. Only inference drawn from evidence (and failure to testify) is that X foresaw possibility of death when he fired 6 shots into driveway knowing people were there. Necessary intention to kill present in form of *dolus eventualis*. Convicted of murder and attempted murder.

Private defence	Putative private defence
Actual attack/threat	Perceived attack/threat not actually there
Unlawfulness at issue	Culpability at issue

Mistake of law

- Prior to **De Blom (1977)**: ignorance of the law is no excuse (*ignorantia iuris neminem excusat*)

De Blom: X travelled abroad taking jewellery worth more than R600 without prior permission. Unbeknownst to her, this was a crime. Her defence was she did not know that it was a crime. Appeal court held that she had been truly ignorant of the prohibition, upheld her defence of ignorance of the law, and set aside her conviction.

Present law: ignorance of law excludes intention and is a complete defence in crimes requiring intention

NEGLIGENCE

Culpa

Test for negligence: usually objective (exceptions *infra*)

- Conduct measured against an objective standard: **what a reasonable person would have foreseen or done in the same circumstances**

Definition: a person’s conduct is negligent if

- 1.) A **reasonable person** in the same circumstances would have **foreseen the possibility** that
 - a.) The particular circumstance might exist, or
 - b.) His conduct might bring about the particular result
- 2.) A reasonable person would have **taken steps to guard against such a possibility**, and
- 3.) The conduct of the person whose negligence had to be determined **differed** from the conduct expected of the reasonable person

Concept of the “reasonable person”

- Fictitious person
- *Bonus paterfamilias* or *diligens paterfamilias*

- Ordinary/normal/average person
- May sometimes take reasonable risk
- Embodies an objective criterion – personal, subjective characteristics not taken into account
- Need not be perfect/robot – reactions are subject to limitations of human nature
- Mere fact that somebody had an error of judgment does not necessarily mean negligence

Reasonable foreseeability

- Foreseeability relates to a possibility and not a probability or likelihood (*Herschell*)
- Assessed *in concreto*, and not *in vacuo* – in light of the circumstances X was in at time of act; reasonable person in same situation as X
- Negligence must relate to the act, definitional elements and unlawfulness

Taking of steps by the reasonable person to avoid the result ensuing

- This leg of test may come into play when –
 - Foreseen possibility is far-fetched/remote
 - Cost and effort necessary to undertake steps do not outweigh the more important and urgent purpose of X’s act.
- Balance social utility of X’s conduct against magnitude of risk of damage created by conduct

Subjective factors – exceptions to objectivity of test:

- 1.) Children – reasonable child of same age
- 2.) Experts – reasonable expert in similar activity
- 3.) Superior subjective knowledge of a relevant fact must be taken into account

Negligence and intention

Ngubane: X was charged with murder. He pleaded guilty to culpable homicide. Prosecutor accepted this plea. Trial judge asked questions, the answers to which made him doubt that X really intended to plead guilty to culpable homicide, so ordered a plea of not guilty to be recorded. Trial proceeded and resulted in murder conviction. While the court found that intention and negligence are conceptually different, incorrect to assume that proof of intention excludes possibility of a finding of negligence. Possible for one to act intentionally and also negligently (fall short of reasonable man standard). Hence, court found it could convict X of culpable homicide despite finding of existence of intention.

Conscious negligence	Unconscious negligence
X does foresee prohibited result, but decides unreasonably that it will not ensue*	X does not foresee prohibited result

*(If foresaw and reconciled himself to it – *dolus eventualis*)

Exceeding the bounds of private defence

Ntuli: X killed older woman (who attacked him first) after an argument with 2 blows to her head. Trial court found that he had exceeded the bounds of private defence and convicted him of culpable homicide. On appeal, the finding was confirmed and the Appeal Court laid down the following important principles:

- 1.) If victim dies – murder/culpable homicide depending on culpability; no culpability not guilty
- 2.) Ordinary principles of intention/negligence apply

NB: If X did not kill Y, but only injured him while exceeding bounds of self-defence, X either guilty of assault or not. No such thing as negligent assault.

THE EFFECT OF INTOXICATION ON LIABILITY

- 1.) **Involuntary** – complete defence
- 2.) **Voluntary**
 - a.) **Actio libera in causa;** drinking for courage – no defence whatsoever/aggravating
 - b.) **Intoxication resulting in mental illness** (*delirium tremens*) – ordinary rules re mental illness apply: may be acquitted due to lack of criminal capacity
 - c.) **Remaining instances of voluntary intoxication** (*infra*)

Unyielding approach	Lenient approach
Voluntary intoxication never a complete defence; at most, mitigating circumstance (may even be aggravating – negligence)	Application of ordinary principles of liability mean intoxication may exclude voluntariness of act/ criminal capacity/ intention
Prevailing school of thought prior to 1981*	Chretien (1981) favours this approach

*Specific intent theory applied

- Crimes divided into 2 groups:
 - 1.) Those requiring a specific intent; and
 - 2.) Those requiring an ordinary intent

If X charged with specific intent crime, intoxication excluded specific intent and convicted of less serious crime only requiring ordinary intent.

Chretien: X got drunk at a party. He drove off, made a U-turn and hit a number of people standing in the street. 1 killed; 5 injured. Charged with murder and attempted murder. Trial court found that, due to intoxication, he had expected the people to see his car and move out the way, and that he had no intent to drive into them. He was convicted of culpable homicide and acquitted on all 5 counts of attempted murder since he lacked intention to kill. Court also found that he could not be convicted of assault because he lacked intention. State appealed. Appeal court upheld the decision of the trial court.

Summary of legal points in decision:

- 1.) If muscular movements involuntary, there can be no question of an act and cannot be found guilty
- 2.) If lack criminal capacity – not criminally liable
- 3.) Specific intent theory rejected
- 4.) Court must not lightly infer that, owing to intoxication, X acted involuntarily or lacked criminal capacity or the required intention

3 effects of intoxication according to Chretien:

- 1.) It may mean that the **requirement of a voluntary act was not complied with**
- 2.) It may **exclude criminal capacity**
- 3.) It may **exclude intention**

Result: intoxication could result in a **complete defence!**

Criticism: society does not accept situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunken person is pardoned merely because he was drunk. Hence, the following legislation was passed:

The Criminal Law Amendment Act 1 of 1988

Sec 1: (1) *Any person who consumes/uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.*

(2) *If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption/use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.*

Elements of crime: [CALK-ALN] – **MEMORISE!**

- As to consumption of liquor:
 - 1.) **Consumption or use** by X
 - 2.) Of **Any substance**
 - 3.) Which impairs his faculties to such an extent that he **Lacks criminal capacity**
 - 4.) While he **Knows that the substance has that effect**
- As to commission of act:
 - 1.) The commission by X of an **Act prohibited under penalty**
 - 2.) While she **Lacks criminal capacity** and
 - 3.) Who, because of the absence of criminal capacity, is **Not criminally liable**

Sec 1 covers situations where X lacks criminal capacity or where there is no voluntary act. It does *not* cover situations where X lacked intention – *Chretien* still applies.

No voluntary act	Not guilty of crime charged (<i>Chretien</i>) but guilty of sec 1, Act 1 of 1998
Lacks criminal capacity	Same as above
Lacks intention	Not guilty of crime charged, nor sec 1, but can be found guilty of alternate charge (eg culpable homicide) (<i>Chretien</i>)
Charged with negligence	Intoxication does not exclude negligence
Complies with all requirements for liability	Guilty of crime charged but can affect punishment

THE EFFECT OF PROVOCATION ON LIABILITY

- Theoretically, may exclude voluntary act leading to acquittal, but unlikely (see *Eadie supra*)
- It may operate as a mitigating circumstance
- It may reduce murder to culpable homicide
- It may serve to confirm the existence of intention

DISREGARD OF THE REQUIREMENT OF CULPABILITY

The general rule is that culpability is a requirement for all crimes. However, there are exceptions to this basic rule:

- 1.) **Strict liability** in statutory crimes (*bee in bottle*)
 - a.) Expressly excluded by legislature
 - b.) No mention of culpability; courts determine; assumed leg did not exclude unless there are clear and convincing indications to contrary:
 - i.) Language and context
 - ii.) Object and scope
 - iii.) Nature and extent of punishment
 - iv.) Ease with which provision evaded if culpability required
 - v.) Reasonableness in deciding excluded
- 2.) **Vicarious liability** – liability for acts of another; only in statutory crimes (eg employer-employee)
- 3.) **Versari doctrine:** if engages in unlawful/immoral conduct, criminally liable for all consequences flowing from such conduct, irrespective of whether there was in fact any culpability in respect of such consequences
 - Doctrine rejected (*Bernardus*)

THE CRIMINAL LIABILITY OF CORPORATE BODIES

Sec 332(1), Criminal Procedure Act: an act by a director (servant) of a company deemed to be act of company if act performed by the director exercising his powers or while furthering the interests of the company.