

THE ROLE OF *ERROR IN OBJECTO* IN SOUTH AFRICAN CRIMINAL LAW:

An opportunity for re-evaluation presented by *State v Pistorius*

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ABSTRACT

State v Pistorius provides an opportunity to consider *error in objecto* in the context of the broader approach to *dolus* in South African criminal law. For the last 60 years South Africa has taken a consistently subjective approach to assessing intention, evidenced through the courts' rejection of *versari*, the presumption of intent and transferred malice. This upholds individual autonomy and assigns blame on a principled basis, thus it has achieved recognition from the Constitutional Court. By recognising foresight/ knowledge of unlawfulness as a component of *dolus*, *De Blom* took subjectivity to its logical conclusion in 1977. Consequently, *error in objecto* likely only applies to *dolus directus*, is heavily influenced by the now defunct doctrine of transferred malice and has not become an entrenched principle in our law. It must thus yield to the basic principles of criminal law, including subjectivity and the putative defences flowing from *De Blom*. This was the manner in which it was correctly applied in *State v Pistorius*, although the reasoning was not evident in the judgment. Reviewing *error in objecto* in the broader scheme of *dolus* therefore shows that it is inaccurate to claim that the victim's identity is always irrelevant to a charge of murder.

Every so often cases come before the courts that give academics the opportunity to re-evaluate an ancient principle of law. *State v Pistorius*¹ is one such case. In the build up to the trial most criminal law specialists believed that legally this would be an unremarkable trial. The courts unfortunately deal with murder trials all too often and are well-versed at engaging with the applicable laws – most murder trials ultimately turn on an interpretation of the facts rather than the law.

However, on reading the state's indictment it soon became clear that this impression was mistaken. In response to Mr Pistorius' claim that he was acting under putative private defence² the state sought to rely on a little-known principle of South African criminal law called *error in objecto*: a mistake as to the identity of the victim cannot provide a defence to a

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¹ *State v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014).

² Mistaken belief in self-defence.

murder charge.³ Thus paragraph five of the state's 'summary of substantial facts' read as follows: 'The accused said to witnesses on the scene, that he thought she was an intruder. Even then, the accused shot with the direct intention to kill a person. An *error in persona*, will not affect, the intention to kill a human being'.⁴ In their Heads of Argument at the trials closing the state also included an alternative based on *dolus eventualis*.⁵

'Even in the event that the court were to accept the accused's version, it is submitted with respect that he cannot escape a finding that he acted with *dolus eventualis* by arming himself and, whilst approaching the "danger", foresaw the possibility that he may shoot and kill someone but reconciled himself with this possibility by walking into the bathroom and then without objective or subjective cause, fired four shots into a small toilet cubicle whilst anticipating that someone was in the cubicle and likely to be killed'.⁶

Whether Judge Masipa's verdict was based on an interpretation of law or an evaluation of the facts and if the former, whether her interpretation of the law was faulty, remains to be seen.

This will be the subject of the pending appeal and the Supreme Court of Appeal will decisively settle the matter. Nonetheless, the time is ripe to evaluate *error in objecto* in order to understand its place in the broader scheme of South African criminal law. This article will thus consider *error in objecto* in light of the two most critical shifts in our law on *mens rea* in an attempt to provide a holistic understanding of the principle: the move towards a subjective test for *dolus*; and the recognition of knowledge of unlawfulness as a component of *mens rea*. It will be shown that any potential role that *error in objecto* may have in South African criminal law is contingent on recognising the centrality of *mens rea* and a subjective enquiry into intention.

³ This principle is variously described as *error in objecto* or *error in persona*. For the purposes of this article all references to the term *error in objecto* will be synonymous with *error in persona*. *Error in objecto* can include mistakes beyond merely mistakes of identity but this article is restricted to mistaken identity of the victim.

⁴ *S v Oscar Leonard Cark (sic) Pistorius* 'Summary of Substantial Facts in Terms of Section 144(3a) of Act 51 of 1977'.

⁵ *Dolus eventualis* is often referred to as legal intention. In the context of murder, it occurs where the perpetrator foresees the possibility of the death occurring and proceeds with his/her conduct, reconciling him/herself with the death: JM Burchell *South African Criminal Law and Procedure Volume 1 General Principles of Criminal Law* 4ed (2011) 363.

⁶ *The State Versus Oscar Leonard Carl Pistorius: State's Heads of Argument* at para 76.

THE MOVE TOWARDS A SUBJECTIVE TEST FOR *DOLUS*

Jurisdictions can broadly be divided into two approach categories with regard to assessing fault: psychological systems of fault;⁷ and normative systems of fault.⁸ Psychological approaches to fault predominantly entail subjective assessments while normative approaches to fault generally entail objective assessments.⁹ South Africa predominantly follows a psychological system of fault. It is now trite that intention is subjectively assessed in South African criminal law, that *dolus eventualis* is the most commonly used form of intention and that the central position of *mens rea* in our law has received constitutional recognition.¹⁰

Nonetheless, despite the firmness with which these propositions are now entrenched in South African criminal law, they are in fact products of relatively recent developments in our law that have taken place over approximately the last 60 years. It was only from the 1950's that South African courts began to consistently apply the psychological theory of fault, basing criminal liability primarily on subjectively assessed intention.¹¹

⁷ South Africa and other common-law systems: JM Burchell op cit (n5) 355.

⁸ For Example Germany. See George P Fletcher *The Grammar of Criminal Law – American, Comparative, and International Vol One: Foundations* 321; JM Burchell op cit (n5) 355.

⁹ JM Burchell op cit (n5) 355.

¹⁰ See Van der Westhuizen J in *Masingili* 2014 (1) SACR 437 (CC) at para 37. See also *S v Coetzee* 1997 (3) SA 527 (CC) where O'Regan J stated at para 177 that *dolus eventualis* has 'been recognised as sufficient to meet the requirement of culpability [in our law]'. The same passage was relied upon by Moseneke J in *S v Thebus* 2003 (6) SA 505 (CC) at para 20 who said the following with regard to the legal limits of common purpose liability by active association: '... he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue', thus approving the definition of *dolus eventualis*.

¹¹ See for example *R v Mkize* 1951 (3) SA 28 (A) at 33, *R v Huebsch* 1953 (2) SA 561 (A) at 567, *R v Du Randt* 1954 (1) SA 313 (A) at 316 – 17, *R v Hercules* 1954 (3) SA 826 (A) at 831, *R v Bougarde* 1954 (2) SA 5 (C) at 8, *R v Nsele* 1955 (2) SA 145 (A) at 148. For a concise summary of the historical shift towards South Africa's adoption of the psychological theory of fault and the seminal role played in this by JC de Wet and HL Swanepoel (*Strafweg* 1949) see CR Snyman 'The tension between legal theory and policy considerations in the general principles of criminal law' in *Criminal Justice in a New Society: Essays in honour of Solly Leeman* (2003) 2 – 4 and K Amirthalingam 'Mens Rea and Mistake of Law in Criminal Cases: A Lesson From South Africa' 18(2) *UNSW Law Journal* (1995) 430 – 434.

In fact, the entire element of *mens rea* has not always held the central position in law that it does today. For the purposes of criminal liability, early Roman, Germanic and English law was far more concerned with a consummated deed than with culpability. Thus a person who caused the death of another was criminally liable for the death caused by his conduct irrespective of his intention or negligence:¹²

‘As late as the 15th century a Hollander who killed a human being by mere accident or in self-defence forfeited life and limb according to the law and could rely upon the absence of *dolus* only as a mitigating circumstance upon the strength of which the Sovereign or the court could extend clemency’.¹³

However, as the concept of *mens rea* grew in centrality in the criminal law, means had to be developed to grow the reach of intention beyond its literal meaning. If only a literal or colloquial understanding of intention were to apply in criminal law liability would be confined to results that the actor desired to bring about, those results that were the actor’s aim and object: ‘This suggested that which could be foreseen as a consequence of an act, but which was not desired, was not intended’.¹⁴ This approach to intention would leave the law unduly narrow, excluding blameworthy individuals from criminal liability.

Prior to the 1950’s the ambit of intention was primarily expanded by recourse to a presumption imported from English law,¹⁵ that persons intended the natural and probable consequences of their acts.¹⁶ In other words, if a perpetrator *should* have foreseen a potential consequence resulting from his/her actions they were treated as if they *had* foreseen this

¹² *Rex v Kuzwayo* 1949 (3) SA 761 (A) at 770 where Van Den Heever JA also refers to *Erasmus v Rex* (1945 OPD 50).

¹³ *Ibid*, citing Matthysen *Rechtsboek van den Briel* Tr. 4 cap. 9 vr. 1; *Rechtsgel. Observ. Op Groot. Inleyd* 3.32.7, *Observ.* 87.

¹⁴ JM Burchell *op cit* (n5) 358.

¹⁵ Ormerod *Smith and Hogan Criminal Law* 12ed (2010) 136-7. This rule was abandoned in England in 1967, see s 8 of the Criminal Justice Act 1967.

¹⁶ JM Burchell *op cit* (n5) 367, where the following cases are cited: *R v Jolly* 1923 AD 176 at 186; *R v Jongani* 1937 AD 400 at 406; *R v Longone* 1938 AD 532 at 539, 541, 542; *R v Duma* 1945 AD 410 at 417; *R v Shezi* 1948 (2) SA 119 (A) at 128-30; *R v Koza* 1949 (4) SA 555 (A) at 560. See also S Hoctor ‘The concept of *dolus eventualis* in South African law – an historical perspective’ 2008 (14-2) *Fundamina* 19.

consequence. The courts essentially ascribed the mind-set of the reasonable person to the perpetrator, irrespective of what as a matter of fact the perpetrator actually foresaw. This approach was both unfair and unprincipled.

It was unfair in that it could result in punishment of individuals who did not actually possess intention – the adoption of a purely subjective test for intention is more in keeping with the dictates of justice.¹⁷ This is due to the fact that a subjective enquiry avoids courts imputing criminal intention onto an accused who in fact lacks such intention, or at least foresight. This process of imputation is often referred to as ‘constructive’ intent and arguably leads to artificiality within the law, thereby undermining the project of fair labelling that is central to criminal law.¹⁸

The presumption of intention was also unprincipled in that it blurred the boundaries between the normative enquiry into negligence and the psychological enquiry into intention.¹⁹ This in turn blurred the lines between murder and culpable homicide - after all, the only distinguishing feature in the definitions of these crimes is mens rea, that is intention and negligence.

Clearly the presumption of intention was also inter-woven with the now-defunct doctrines of *versari* and transferred malice. The *versari* doctrine held that ‘a person who commits an unlawful act is criminally liable for all the consequences that follow, irrespective of whether they are foreseen, foreseeable or intended’.²⁰ As this rule offends the basic

¹⁷ *S v Raisa* [1979] 4 All SA 629 (O) at 632-3: ‘The sense of fairness and logic to both the accused and the community will... be better served by a sentence attached to criminal intent rather than accidental results’.

¹⁸ *S v Nkombani* 1963 (4) SA 877 (A) at 883. JM Burchell *Principles of Criminal Law* 4ed (2013) 475 n 73.

¹⁹ S Hooroer op cit (n16) 20; Glanville Williams *Criminal Law: The General Part* (1961) 90.

²⁰ S Hooroer op cit (n16) 21, who cites also Swanepoel *Die Leer van Versari in Re Illicita in die Strafreg* (1944) 57f. See also *S v Mtshiza* [1970] 4 All SA 12 (A) at 16-17 and JRL Milton ‘Recent Cases – A Stab in the Dark: A Case of Aberratio Ictus’ 85 *SALJ* (1968) 116.

principle that a person should not be held liable in the absence of fault,²¹ the Appellate Division firmly rejected *versari* in our law in *S v Van der Mescht*²² and *Bernardus*.²³

A further legal fiction that was historically employed as a pragmatic response to ensure that blameworthy individuals did not evade justice or escape sufficiently serious punishment was that of transferred malice, another import from English law. Transferred malice was employed in cases where the actual victim had not been the intended victim of the assailant: ‘the *mens rea* of the accused vis-à-vis the intended victim is, by a fiction, transferred to the *actus reus* perpetrated on the actual victim so as to fix the accused with liability for a completed crime in respect of the deceased’.²⁴

The doctrine of transferred malice has been described variously as ‘an arbitrary exception to normal principles’,²⁵ a ‘defect’²⁶ and a ‘curious survival of the antique law’.²⁷ Milton aptly noted the following: ‘Considered logically the doctrine of transferred malice is objectionable in that it ignores the general principles of criminal liability by seeking to punish an unfulfilled intent and an unintended result’.²⁸

It is thus unsurprising that as part of the momentum towards the development of distinctively South African criminal law and the adoption of a subjective test for intention South African courts rejected transferred malice. In the words of Young J, ‘... the theory of

²¹ The fault-based nature of South African criminal liability has received Constitutional approval by O’Regan J in *S v Coetzee* supra (n10).

²² 1962 (1) SA 521 (A) at 534.

²³ *S v Bernardus* 1965 (3) SA 287 (A).

²⁴ JRL Milton op cit (n20) 116.

²⁵ Glanville Williams op cit (n19) 134.

²⁶ Wilfred J Ritz ‘Felony murder, Transferred intent, and the *Palsgraf* doctrine in criminal law’ 16 *Wash. & Lee L. Rev.* (1959) 172.

²⁷ William L Prosser ‘Transferred Intent’ 45 *Tex L. Rev.* (1967) 650. Quoted in K Ghanayim, M Kremnitzer ‘Error in persona vel in objecto and aberratio ictus vel impitus: a transferred malice? A Doctrinal and Comparative Study’ in *Selected Works: From the selected works of Khalid Ghanayim* September 2012 available at http://works.bepress.com/khalid_ghanayim/1 18.

²⁸ JRL Milton op cit (n20) 117, citing Glanville Williams op cit (n19) 135.

transferred malice has no place in our criminal law'.²⁹ Furthermore, as criminal attempts are punishable with the same sentence as for the completed offence in South Africa 'there appears to be no juridical or social need for transferred malice'.³⁰

While the courts followed the objective tests for intention the scope for the concept of *dolus eventualis* to develop was contained. It is thus hardly surprising that the development and adoption of *dolus eventualis* came hand in hand with the adoption of the psychological theory of fault, signalled by the rejection of the presumption of intent, *versari* and transferred malice.³¹

The Appellate Division decisively cleared up any remaining confusion between objective and subjective enquiries into intention in 1955 in *R v Nsele*³² by confirming the validity of *dolus eventualis* and the adoption of a purely subjective test for intention that has been consistently applied by South African courts subsequently. As Hoctor reminds us:

'... the fictitious reasonable person applied in the negligence test is not applicable to *dolus eventualis* – whatever such reasonable person might notionally have foreseen is irrelevant, and the only assessment that is relevant is whether the accused actually foresaw the harm in question'.³³

The concept of *dolus eventualis* grows the reach of the law in a principled and fair manner by growing the definition of intention to include consequences that were subjectively foreseen by the actor despite not being the actor's aim and object. In this way, similar to the presumption, a perpetrator can be held liable for the consequences of their actions but, fairly,

²⁹ *R v Mabena* 1967 (3) SA 525 (R).

³⁰ Burchell & Milton *Principles of Criminal Law* (1991) 287.

³¹ S Hoctor op cit (n16) 21.

³² *R v Nsele* supra (n11).

³³ S Hoctor 'Death on the roads and *dolus eventualis* – *S v Humphreys* 2013 (2) SACR 1 (SCA)' 1 *SACJ* (2013) 79, referring to *S v Humphreys* 2013 (2) SACR 1 (SCA) at para [13]. See also P Carstens 'Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and' or pedestrians: *S v Humphreys* 2013 (2) SACR 1 (SCA)' 1 *SACJ* (2013) 70, warning against the risk of conflating intention and negligence through flawed inferential reasoning.

only those that were actually foreseen by the perpetrator rather than those that were merely foreseeable. This distinction is emphasised by Holmes JA in *S v Sigwahla*:³⁴

‘The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.’

Since its inception *dolus eventualis* has become the most commonly relied on form of intention, as it is usually very difficult to prove *dolus directus* or *indirectus* in practice.³⁵

While the content of *dolus eventualis* remains contested in academic writings³⁶ there are aspects of this concept that are well settled: the definition of *dolus eventualis* (that it requires both foresight and reconciliation);³⁷ the fact that it is subjectively assessed;³⁸ and that a determination as to *dolus eventualis* is made through inferential reasoning. ‘The content of *dolus eventualis* remains controversial in the academic writing, but... the academic controversies have rarely occupied the courts for any length of time...’.³⁹ Clearly, despite the controversies regarding the scope of the concept it has still proved to be a concept sufficiently capable of practical application and utility.

³⁴ *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-C.

³⁵ JM Burchell op cit (n5) 367. Hoctor refers to *dolus eventualis* as ‘manifestly the most important form of intention in practice in South African criminal law’ in S Hoctor op cit (n16) 14. For definitions of the various forms of *dolus* in South African criminal law refer to discussion on page 28 below.

³⁶ S Hoctor op cit (n33) 75-85; S Hoctor ‘The degree of foresight in *dolus eventualis*’ 2 *SACJ* (2013) 131-155; S Hoctor op cit (n33) 14-23; P Carstens op cit (n33) 67-74; A Paizes ‘*Dolus eventualis* revisited: *S v Humphreys* 2013 (2) SACR 1 (SCA)’ *Criminal Justice Review* 2013 (1) 6-8; A Paizes ‘*Dolus eventualis* again’ *Criminal Justice Review* 2014 (1) 11-13.

³⁷ Referred to by Hoctor as ‘cognitive’ and ‘conative’ components respectively: S Hoctor op cit (n32) 78. Even Paizes, who consistently argues for the abandonment of the reconciliation component of *dolus eventualis*, has referred to it as ‘trite’ that ‘in a case of murder, the test for *dolus eventualis* was twofold: (a) did the accused subjectively foresee the possibility of the death of the victim ensuing from his conduct; and (b) did he reconcile himself with that possibility’: A Paizes op cit (n36) (2013) 6.

³⁸ See *S v Humphreys* supra (n33) at para [58] where the court emphasises that the entire test for *dolus eventualis* is subjective.

³⁹ S Hoctor op cit (n33) 78.

The central position of *dolus eventualis* in South African criminal law has been recognised and endorsed by the Constitutional Court.⁴⁰ Arguably, the constitutional validity of the South African approach to *dolus* generally is further enhanced by our adherence to the principle of correspondence.⁴¹ According to this principle, the fault element in a crime must correspond with the consequence/s prohibited by that crime.⁴² ‘To say that a certain crime should require intention... is not enough. One must enquire: intention as to what?’⁴³ Thus, in South Africa the *mens rea* required for a conviction of murder is intention *to kill*, as the consequence the crime prohibits is death. In light of this, the court in *Pistorius* was correct when noting that ‘the intention to shoot... does not necessarily include the intention to kill’⁴⁴ – foresight of bodily injury short of death will not suffice for a charge of murder.

This is unlike English law, which transgresses the principle of correspondence, as either intention to kill or intention to cause grievous bodily harm is sufficient to sustain a charge of murder.⁴⁵ English law is built on the basis of ‘sufficient similarity’⁴⁶ between the perpetrator’s intention and the actual result. The focus is placed on the result caused accompanied by intention, rather than the specific or subjective nature of that intention. This

⁴⁰ See *S v Coetzee* supra (n10) where O’Regan J stated at para 177 that *dolus eventualis* has ‘been recognised as sufficient to meet the requirement of culpability [in our law]’. The same passage was relied upon by Moseneke J in *S v Thebus* supra (n10) at para 20 who said the following with regard to the legal limits of common purpose liability by active association: ‘... he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue’, thus approving the definition of *dolus eventualis*. *Masingili* supra (n10) at para 36. JM Burchell op cit (n5) 368; S Hoctor op cit (n36) 132.

⁴¹ JM Burchell op cit (n5) 345.

⁴² A Ashworth *Principles of Criminal Law* 5ed (2006) 245; embodied by the decision in *S v Van der Mescht* supra (n22).

⁴³ A Ashworth op cit (n42) 197.

⁴⁴ *State v Pistorius* supra (n1) at 3317.

⁴⁵ A Ashworth op cit (n42) 244, JM Burchell op cit (n5) 345.

⁴⁶ A Ashworth op cit (n42) 198.

pragmatic approach relies, amongst other doctrines, on the doctrine of transferred malice that has been rejected from South African law.⁴⁷

A subjective approach to intention coupled with the principle of correspondence embodies the notion of individual autonomy, according to which ‘... individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices’.⁴⁸ Individual autonomy lies at the heart of *mens rea* – only when people are adequately aware of what they are doing, and the potential consequences of those actions, can they fairly be described as having chosen the behaviour and consequences, thus justifying the imposition of the coercive power of the state through criminal liability.⁴⁹

South Africa has spent the last 60 years moving away from the British pragmatic approach towards an enquiry of *mens rea* that truly embodies individual autonomy. This not only adheres to the related principles of correspondence and fair labelling but best gives expression to ‘[t]he constitutional guarantees relating to individual autonomy and dignity [which] have underlined the need only to punish those who can be held to be blameworthy for their actions by reason of *mens rea*’.⁵⁰

⁴⁷ Commentators are divided on their views of this pragmatic system. A Ashworth op cit (n42) 199-201 acknowledges the need for some pragmatism in the law but questions whether English law strikes the right balance, Glanville Williams ‘Convictions and Fair Labelling’ [1983] *CLJ* 85 believes the three doctrines are effective, symbolically correct and necessary for justice. This begs the question – justice from whose perspective? South African law has followed a principled approach to this area of law development, rejecting constructive doctrines like transferred malice, and the much feared floodgates have not opened as a result. The South African approach could be described as principled development of the law with pragmatic application in the form of inferential reasoning.

⁴⁸ A Ashworth op cit (n42) 158-9.

⁴⁹ A Ashworth op cit (n42) 158.

⁵⁰ S Hooroer op cit (n16) 23. Our adherence to individual autonomy has been recently affirmed by the Constitutional Court in *Masingili* supra (n10) at paras 37-9. See also fn 44 of that judgment referring to the number of times the Court has affirmed autonomy:

‘In *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 100 it was noted that “[o]ur society asserts individual moral agency and it does not flinch from recognising the responsibilities that flow from it”. O’Regan J and

THE IMPACT OF A SUBJECTIVE ENQUIRY INTO *DOLUS ON ERROR IN OBJECTO*

Ashworth, a loyal proponent of individual autonomy in the criminal law, describes the doctrine of mistaken object in English law as follows: ‘When D sets out to commit an offence in relation to a particular victim but makes a mistake of identity and directs his conduct at the wrong victim, the offence may be said to have been committed despite the mistaken object’.⁵¹ This is the principle known in South Africa as *error in objecto* or mistaken identity. The principle goes as follows: if you intend to kill X but kill Y instead, believing that Y is X, your mistake as to the identity of your victim cannot provide a defence of lack of intention.

Despite the wide publicity this principle has achieved through the Pistorius trial, its position in South African criminal law is less certain than first appears from a superficial review of sources. In preparing the research for this article I have not been able to find a case that has turned on *error in objecto*. Thus its position in South African criminal law generally, and specifically, how it relates to the rest of the rules of intention, remains to be fleshed out by commentators and the courts.

Cameron AJ also quoted Honoré’s observation in *Responsibility and Fault* (Hart Publishing, Oxford 1999) at 125:

“[W]e do well, indeed we are impelled . . . to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused – something that we cannot know and which, if true, would be a surprise – but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time, it makes possible a sense of personal character and identity that is valuable for its own sake.”

See also *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 251; *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at paras 52-3; and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57. Autonomy has been understood as linked to the right to dignity, as well as the value of freedom expressed in, among others, sections 1, 7 and 39 of the Constitution’.

⁵¹ A Ashworth op cit (n42) 199

For example, does *error in objecto* apply to *dolus eventualis* or is it limited to *dolus directus*?⁵² It seems to be a much more natural fit in the context of direct intent, where it is my aim and object to kill X (I intended to kill the body I was aiming at). In fact, all of the descriptions of *error in objecto* appear to be written in language suggesting or describing direct intent. For example, Ormerod provides the following example: ‘D intends to murder X and, in the dusk, shoots at a man whom he believes to be X. He hits and kills the man at whom he aims, who is in fact V’.⁵³ According to Milton, ‘[I]n the case of *error in objecto* A’s *mens rea* is directed at a specific predetermined individual, although he is in error as to the exact identity of that individual. In other words, he intends to kill the individual regardless of whether the name of the individual is B or C’.⁵⁴

Limiting *error in objecto* to *dolus directus* would narrow the scope of the criminal law in this context. Considering the scope of the criminal law ultimately determines the extent to which the state uses its coercive power to interfere with the civil liberties of citizens, it may be preferable to restrict such a principle to direct intent. But before any principle is capable of application its exact nature must be ascertained. In this regard, it is useful to examine cases in which it has been discussed.

The cases in which *error in objecto* has been mentioned are those relating to the now defunct rule of *aberratio ictus*. For example, in *Rex v Kuzwayo*,⁵⁵ a case of *aberratio ictus* in which the killer missed his intended target and shot and killed the woman next to the target instead, Matthaëus is quoted describing the effect of the wrong victim being killed: ‘the accused intended to kill; he did kill, although not the person he intended. The common law demands a consummated deed – here we have a consummation though with respect to a

⁵² J Burchell *Principles of Criminal Law* Revised 4ed (2015) 396 fn50.

⁵³ Ormerod op cit (n15) 126.

⁵⁴ JRL Milton op cit (n20) 118.

⁵⁵ *Rex v Kuzwayo* supra (n12).

different person. It is proper therefore that the death penalty should be imposed'.⁵⁶ It is worth noting that this quote would apply equally to what we now term the distinct instances of *error in objecto* and *abberatio ictus*. In fact, the old authorities often treat these categories as one in the same.

Not only do the Roman Dutch commentators often treat the two as indistinct but they explicitly link both to *versari* liability, which is no longer part of our law. It is thus clear that this principle, that the identity of the victim is irrelevant, is one that developed and was discussed before *mens rea* became a central concept in the law. For example, consider the following quotes from Voet and Matthaëus respectively:

‘But in the first place indeed it makes little difference with this Cornelian law as to assassins whether a person kills the man whom he had designed to kill, or on the other hand kills another in mistake. This is so whether he makes a mistake as to the person, as when he thinks it is Titius, and he had formed the purpose to kill Titius, though it was really Maevius: or a wounding blow aimed at Titius, but parried by him has been the destruction of Maevius who was standing close by; or lastly a man is killed who had thrust himself midway between attacker and defender with the object of preventing the killing. **This is because the main act carries most weight**, and such a mistake does away neither with the intention to kill, nor with the avenging of the killing by the Cornelian law.’⁵⁷ (my emphasis)

‘Our next task is to decide what should be said if an attempt has produced a murder but the person whom the murderer intended to kill was not killed. For example, Sempronius kills Maevius by error when he wishes to kill Titius. Should he be more leniently punished as if absolved of or not apart from the result of the crime? It is more right that he should not, for it is contrary to morality and general custom that the capital punishment be not imposed. Certainly Sempronius had the intention to kill and he killed, although not the man he desired. **Custom requires a consummated crime. This is a complete crime, albeit against another person.** Accordingly it is just that the crime should be punished capitally.’⁵⁸ (author’s emphasis)

Even some of the more recent cases explicitly or inadvertently treat *aberratio ictus* and *error in objecto* as a single category. For example, in *Koza*⁵⁹ Centlivres JA described the law of *aberratio ictus* as follows: ‘It is also clear that where a person commits an act intending to murder one person and kills another he is guilty of murdering that other person’. This description in fact encompasses both *aberratio ictus* and *error in objecto*.

⁵⁶ Matthaëus *De Criminibus ad. D.* 48.5 cap. 2 n. 12 cited in *Rex v Kuzwayo* supra (n12) at 771.

⁵⁷ Voet 48.8.2, Gane’s translation, vol. 7, p. 424, cited in *R v Mabena* supra (n29) at 456.

⁵⁸ Matthaëus 48.3.12, cited in *R v Mabena* supra (n29) at 457.

⁵⁹ *R v Koza* supra (n16).

Beadle CJ went even further in *Mabena*:⁶⁰ ‘Furthermore, I find the rather academic distinction they draw between an *error in objecto* and an *aberratio ictus* somewhat unrealistic, as in each case the accused has the requisite *mens rea* and in each case due to human error the death of an unintended victim has resulted’.⁶¹

Whether or not one accepts the ‘academic distinction’ between *aberratio ictus* and *error in objecto* as valid, it is still necessary to scrutinise the relationship between *error in objecto* and the discarded doctrine of transferred malice. If it is found that *error in objecto* is based on transferred malice, a court grappling with the application of the doctrine would be faced with two options: either discard the principle or allow transferred malice back into South African criminal law in this limited context.

Interestingly, in England, the mistaken object doctrine is explicitly based on the doctrine of transferred malice: ‘When D sets out to commit an offence in relation to a particular person... English law regards D’s intent as transferred and the offence as committed against the actual victim...’.⁶² Therefore, the discussions of mistaken object by Simester and Sullivan and Ormerod appear in their books under the subheading ‘Transferred mens rea’ and ‘Transferred malice’ respectively.⁶³

In order to distance the concept of *error in objecto* from transferred malice South African commentators have explained *error in objecto* thus – there is an uninterrupted

⁶⁰ *R v Mabena* supra (n29) at 463.

⁶¹ cf *S v Raisa* supra (n17), where Flemming J (at 629) refers to *error in objecto* and *aberratio ictus* as fundamentally different, suggesting that the former is permissible in terms of *mens rea* but the latter is not. He does not, however, address the historical origins of the two rules, particularly their both being based on *versari* and transferred malice. He assumes *error in objecto* is not based on *versari* without explaining how *error in objecto* avoids the pitfalls of *versari* and transferred malice in cases where the accused has not subjectively foreseen the possibility of killing the actual victim (eg Pistorius). See further the section titled ‘The role of the victim’s identity in a charge of murder’ at page 27 below.

⁶² A Ashworth op cit (n42) 199

⁶³ Simester, Spencer, Sullivan and Virgo *Simester and Sullivan’s Criminal Law Theory and Doctrine* 4ed (2010) 164; Ormerod op cit (n15) 126.

connection between the body at which your intention was directed and the person who fell victim to your conduct.⁶⁴ Milton, for example, provides the following explanation:

‘[I]n the case of *error in objecto* A’s *mens rea* is directed at a specific predetermined individual, although he is in error as to the exact identity of that individual. In other words, he intends to kill the individual regardless of whether the name of the individual is B or C. There is thus in the case of *error in objecto*, so to speak, an undeflected *mens rea* which falls upon the person it was intended to affect.’⁶⁵

But this explanation would not hold in cases where the death of the eventual victim had been subjectively excluded as a possibility by the perpetrator. For example, in the Pistorius case, the court accepted that he genuinely but mistakenly believed Steenkamp was in the bedroom:⁶⁶

‘The evidence before this court does not support the state’s contention that this could be a case of *dolus eventualis*.

On the contrary the evidence shows that from the onset the accused believed that, at the time he fired shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet.’

This adheres to a subjective approach to intention where, if the facts and evidence suggests that an accused did not foresee the death of the victim they cannot be held to intend that victim’s death, even in cases of *indeterminatus*.⁶⁷ If the accused had excluded the possibility that the victim could be killed to apply *error in objecto* here would be to transfer his subjective foresight from the death of the supposed victim to the death of the actual victim. This accords with the defence contention in the Pistorius matter that recognising *error in objecto* would in fact amount to transferred intent, which has been rejected in South African law.⁶⁸

⁶⁴ *State v Pistorius* supra (n1) at 3323.

⁶⁵ JRL Milton op cit (n20) 118.

⁶⁶ *State v Pistorius* supra (n1) at 3327.

⁶⁷ See discussion below at 17 ‘The role of the victim’s identity in a charge of murder’.

⁶⁸ *State v Pistorius* supra (n1) at 3322; *The State and Oscar Leonard Carl Pistorius Defence Heads of Argument (closing)* para 701-31.

The earlier review of South African authorities that mention *error in objecto* in the same vein as *aberratio ictus* further supports the classification of *error in objecto* as a form of transferred malice. Equally, finding an accused has intention in cases where they had subjectively excluded the possibility of the death of the actual victim would signal a return to results based liability – holding someone liable for the result of their conduct even where the evidence suggests there was no subjective foresight.

Nonetheless, even if in theory *error in objecto* is distinct from *aberratio ictus*, does not rely on transferred malice and irrespective of whether it applies beyond direct intent, one question remains. Considering that *error in objecto* only exists in textbooks and a handful of *obiter dicta* – what is the legal status of *error in objecto*?

In considering this it is instructive to go back to the previously mentioned cases on *aberratio ictus*, which either implicitly or explicitly included *error in objecto* in their discussions. They were eventually overruled when *aberratio ictus* was finally dispensed with from our law.⁶⁹ The Appellate Division noted in *Mtshiza*⁷⁰ (an appeal on sentence) that cases such as *Kuzwayo*'s⁷¹ were decided before the rejection of *versari*⁷² and before the principles of *dolus eventualis* had been finally formulated,⁷³ thus these cases could no longer stand. Holmes JA took the opportunity to restate the centrality of *mens rea* in our law since rejecting *versari*:

‘Accordingly, if A assaults B and in consequence B dies, A is not criminally responsible for his death unless—

(a) he foresaw the possibility of resultant death, yet persisted in his deed, reckless whether death ensued or not; or

(b) he ought to have foreseen the reasonable possibility of resultant death.

⁶⁹ See the discussion on *aberratio ictus* in *S v Mtshiza* supra (n20).

⁷⁰ *S v Mtshiza* supra (n20) at 16, citing De Wet and Swanepoel *Die Suid Afrikaanse Strafbreg* 2ed 131-134.

⁷¹ *R v Kuzwayo* supra (n12).

⁷² *S v Bernardus* supra (n23).

⁷³ As applied in *S v Malinga* 1963 (1) SA 692 (AD) 694F-H.

In (a) the *mens rea* is the type of intent known as *dolus eventualis*, and the crime is murder; in (b) the *mens rea* is *culpa*, and the crime is culpable homicide; see *S. v. Sigwahla*, 1967 (4) S.A. 566 (A.D.) at p. 570B-E'.⁷⁴

The above statement was made not only in reference to *aberratio ictus* but rather with regard to criminal liability generally. It thus applies equally to *error in objecto* and in fact all other principles of criminal law. Therefore, if an accused shoots at and kills X thinking X is Y, he cannot be convicted unless he subjectively foresaw the possibility of killing X.

Furthermore, in *Raisa*, Flemming J provided the following additional ground to explain the rejection of the *aberratio ictus* rule from South African criminal law:

‘There is no reason to think that the *aberratio ictus* rule received any wider recognition than the *versari in re illicita* doctrine. If the *ratio* of the decision in *S v Van der Mescht* (*supra*) encompassed that the *versari in re illicita* doctrine had to yield to the basic principles of criminal law because it had not gained such wide recognition as to become an entrenched principle of the law, the *ratio* would apply equally to the *aberratio ictus* rule’.⁷⁵

The term ‘*aberratio ictus*’ in the above quote could just as well be swapped for the term *error in objecto*. The same line of reasoning applies to *error in objecto* except, unlike *aberratio ictus* and *versari*, no reported case I could find has been decided on the basis of *error in objecto*. It is either the subject of textbooks or lumped into the same discussion in *aberratio ictus* cases. It would thus be fair to say, to echo the above quote, that it ‘has not gained such wide recognition as to become an entrenched principle of law’ and must therefore ‘yield to the basic principles of criminal law’.

In other words, an *error in objecto* will only result in a finding of intention to kill where as a matter of fact, proved by the prosecution beyond a reasonable doubt, the accused at least subjectively foresaw the possibility of killing the deceased and proceeded, reckless to that possibility. This accords with CR Snyman’s characterisation of *error in objecto* as follows:

⁷⁴ *S v Mtshiza* *supra* (n20) at 17. Referred to in *State v Pistorius* *supra* (n1) at 3324.

⁷⁵ *S v Raisa* [1979] 4 All SA 629 (O) at 636.

‘*Error in objecto* is not the description of a legal rule: it merely describes a certain type of factual situation. It is therefore wrong to assume that as soon as a certain set of facts amounts to an *error in objecto*, only one conclusion (that X is guilty or not guilty) may legally be drawn.’⁷⁶

This is implicit in the court’s approach in *State v Pistorius* in the following passage from the judgment:

‘We are clearly dealing with *error in objecto* or *error in persona*, in that the blow was meant for the person behind the toilet door, who the accused believed was an intruder. The blow struck and killed the person behind the door. The fact that the person behind the door turned out to be the deceased and not an intruder, is irrelevant.

The starting point however, once more is whether the accused had the intention to kill the person behind the toilet door whom he mistook for an intruder.’⁷⁷

In finding an *error in objecto* but nonetheless going on to consider the accused’s intention, Judge Masipa implicitly recognises that any rule must adhere to the centrality accorded to the role of *mens rea* in South African criminal law, which is a subjective assessment. In other words, to borrow the words of Holmes JA again, a finding of *error in objecto* cannot lead to a finding of intention unless, at the very least, ‘(a) [the accused] foresaw the possibility of the resultant death, yet persisted in his deed, reckless whether death ensued or not’.⁷⁸

Furthermore, South African criminal law is robust enough to deal with cases of mistaken identity in a way that accords with the fundamental concept of fair labelling whilst still ensuring that serious consequences attach to serious unlawful conduct. Where X intends to kill Y but in fact kills Z instead, X may be guilty of the attempted murder of Y and the culpable homicide of Z. Both of these crimes are governed by discretionary sentencing⁷⁹ thus the court would be free to fashion a sentence that accurately reflected the seriousness of the offences and the harm caused.⁸⁰

⁷⁶ CR Snyman *Criminal Law* 6ed (2014) 188-189.

⁷⁷ *State v Pistorius* supra (n1) at 3325.

⁷⁸ *S v Mtshiza* supra (n20) at 17.

⁷⁹ In the case of attempts the courts may sentence the same as they would have for the completed crime.

⁸⁰ Though culpable homicide is a less serious offence than murder that is not tantamount to saying it is not a serious offence and sentencing can reflect this.

It thus does not yet appear that *error in objecto* has attained binding legal status as a ‘rule’ nor that there is a lacuna in criminal liability in South Africa that it needs to address. However, even if it were accorded such recognition, it remains to be reconciled with the 1977 decision in *De Blom*⁸¹ that introduced the concept of knowledge of unlawfulness and the resultant putative defences into South African law.

KNOWLEDGE OF UNLAWFULNESS, PUTATIVE DEFENCES AND *ERROR IN OBJECTO*

In keeping with the adoption of a subjective test for *dolus* in 1977 the Appellate Division in *De Blom*⁸² formally recognised that knowledge of unlawfulness is required for *mens rea*: ‘*mens rea* must exist in relation to the law no less than in relation to the facts’.⁸³ Ever since this seminal judgment it is no longer true that ‘every person is presumed to know the law and that ignorance of the law is no excuse’.⁸⁴ *De Blom*’s case made it clear that a genuine mistake will negate intention and a reasonable mistake will negate negligence, thus further reinforcing the boundaries between intention and negligence.⁸⁵

The recognition of knowledge of unlawfulness introduced putative defences into South African law. A putative defence arises where an accused mistakenly believes s/he is acting under one of the defences to unlawfulness. For example, putative private defence is mistaken belief in self-defence – because the accused genuinely but mistakenly believes they are acting in self-defence they lack knowledge (or foresight) of unlawfulness required for intention. If their mistake is also reasonable, this would negate negligence and lead to a full acquittal. Putative private defence can occur in one of two circumstances: 1) either where an

⁸¹ *De Blom* 1977 (3) SA 513 (A).

⁸² *Ibid.*

⁸³ R C Whiting ‘Changing the Face of Mens Rea’ 95 *SALJ* 1 (1978) 2.

⁸⁴ *S v Tshwape* 1964 (4) SA 327 (C) at 330.

⁸⁵ R C Whiting *op cit* (n83) 5.

accused genuinely and mistakenly believes they are under attack⁸⁶ and/or 2) where the accused genuinely but mistaken believes their response to an attack is proportional.⁸⁷ Either of these circumstances would support a putative defence and thus negate intention.

Nonetheless, many commentators at the time felt that the court in *De Blom* went too far with subjectivity, believing that only reasonable mistakes of the law should negate liability.⁸⁸ The criticisms expressed can broadly be described as floodgates arguments – that the court’s finding would open the floodgates of unwarranted acquittals.⁸⁹ For example, it was noted that most crimes require intention and have no competent verdict based on negligence.⁹⁰ Thus in the majority of cases a genuine mistake regarding lawfulness, even when that mistake was unreasonably held, will result in a complete acquittal. Furthermore, it was argued that while the decision in *De Blom* may be theoretically acceptable it would be impossible to apply in practice – courts would not be able to adjudicate such matters with sufficient certainty and prosecutors would not be able to refute spurious claims.⁹¹

It is clear with the benefit of hindsight that the fear of the floodgates opening did not materialise.⁹² As Dlamini pointed out in his ten year review of *De Blom*, ‘despite the demise of the *ignorantia iuris* rule, the criminal justice system has not collapsed as was feared by its

⁸⁶ *Coetzee v Fourie* 2005 (1) SACR 382 (SCA); *Netshitungulu v S* [2003] JOL 11856 (W); *S v JOSHUA* 2003 (1) SACR 1 (SCA); *Gumbu v S* [2007] JOL 19014 (T). See also cases reported in the media: Siyabonga Mdungo at <http://www.ofm.co.za/article/National/144510/Man-who-shot-wife-thinking-she-was-a-burglar-gets-suspended-sentence>, accessed on 13 July 2015; Collin Masilela at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8870186/Father-shot-dead-teenage-daughter-he-thought-was-a-burglar.html>, accessed on 13 July 2015; Rudi ‘Vleis’ Visagie at <http://mg.co.za/article/2004-08-10-charges-dropped-against-vleis-visagie>, accessed on 13 July 2015.

⁸⁷ *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014); *S v Dougherty* 2003 (2) SACR 36 (W); *S v Naidoo* [1998] JOL 1958 (Tk).

⁸⁸ See R C Whiting op cit (n83), C R Snyman *Criminal Law* (1984) 178.

⁸⁹ J C Stassen (1977) *TSAR* 261 – 3, R C Whiting op cit (n83), C R Snyman op cit (n88) 179.

⁹⁰ R C Whiting op cit (n83) 6.

⁹¹ R C Whiting op cit (n83) 7.

⁹² See for example, K Amirthalingam op cit (n11) 440. The author also quotes the 1991 the *Annual Survey of South African Law* fn 70 noting that ‘*De Blom*’s case has not, in South Africa, led to a rash of cases where this defence has either been claimed or upheld’ (at 440).

supporters'.⁹³ First, many cases in which the putative defence is raised involve a killing, where culpable homicide is a competent verdict on a murder charge. Thus the law is robust enough to catch these cases in the net of liability while arguably more fully adhering to the principle of fair-labelling. Where a person is negligent, falling short of the standard of the reasonable person, and someone dies as a result, the appropriate label to attach is that of culpable homicide. The discretionary sentencing attached to this conviction leaves adequate room for the individual blameworthiness of the offender to be reflected.

A second reason that the floodgates have not opened is the process of inferential reasoning followed by the courts. Where an accused claims to have lacked knowledge of unlawfulness and such a claim is patently unreasonable it is more likely that the state will be found to have satisfied their burden of proof, that the only reasonable inference to draw from the facts is that the accused in fact possessed knowledge of unlawfulness: 'the process of establishing actual subjective foresight invariably involves the drawing of conclusions founded on objective probabilities based on general human experience'.⁹⁴

Before a court will accept that doubt has been cast on knowledge of unlawfulness a significant evidential burden will need to be discharged by the accused in order to provide the court with an evidential basis on which to find that their claim of lack of knowledge of unlawfulness could reasonably possibly be true. Experience has proven that the genuineness of claims of mistakes of law is capable of assessment by reference to the surrounding circumstances:⁹⁵

'[C]ommon sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would

⁹³ C R M Dlamini 'In defence of the defence of ignorance of law' (1989) 2 *SACJ* 14.

⁹⁴ S Hoctor *op cit* (n36) 132, 154.

⁹⁵ Contrary to the fears expressed by R C Whiting *op cit* (n83) 7. See P Carstens *op cit* (n33) 73: 'Such a finding, however, will be dependent on the proven facts of each case and a good measure of inferential reasoning'.

have been obvious to any person of normal intelligence. The next logical step would be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.⁹⁶

The court's reasoning in *De Blom* itself illustrates this.⁹⁷ One of the charges faced by De Blom was contravening the Exchange Control Regulations at the time by taking foreign currency out of the country above the value permitted by law and without seeking the necessary permission to do so. De Blom claimed she did not know the law required her to seek permission. On reviewing the evidence as a whole this argument failed on the facts. The court noted that De Blom was experienced in money matters and foreign travel and had taken the trouble to hide the dollar notes. The Appellate Division was satisfied that the only reasonable inference to draw on the facts was that she indeed had the knowledge of unlawfulness.⁹⁸

South Africa may be alone in following a consistently subjective approach to knowledge of unlawfulness but it is not alone in recognising a subjective approach to putative private defence specifically. The British Court of Appeal adopted a subjective approach to mistaken belief in self-defence in *Gladstone Williams*,⁹⁹ which was endorsed by the Privy Council in *Beckford*.¹⁰⁰ The matter has since been decisively settled by s 76(4) of the Criminal Justice and Immigration Act 2008 adopting a subjective approach to the matter.

However, unlike in South Africa where thanks to *De Blom* the subjective approach has been consistently applied to any aspect of knowledge of unlawfulness, English law has no

⁹⁶ *Bradshaw v S* 1977 (1) PH H60 (A) at para 13.

⁹⁷ K Amirthalingam op cit (n11) 441.

⁹⁸ See Colin Turpin 'Defence of Mistake of Law' *The Cambridge Law Journal* Vol 37 No 1 (Apr 1978) 8 – 11. See also the court's reasoning in *De Oliveira* 1993 (2) SACR 59 (A) where it was held there was insufficient evidence off which to base an inference of putative private defence.

⁹⁹ [1987] 3 All ER 411. See N Lacey, C Well, O Quick *Reconstructing Criminal Law Text and Materials* 3ed (2003) 796.

¹⁰⁰ [1988] AC 130.

uniform approach to this issue. Thus, for example, in *Graham*¹⁰¹ the Court of Appeal found that a mistaken belief in duress must be based on reasonable grounds to exculpate. This was subsequently endorsed by the House of Lords in *Hasan*,¹⁰² which, much like certain South African commentators in the wake of *De Blom*, explicitly reasoned that the subjective approach would be open to abuse and fabrication.

This concern is forcefully criticised by Ormerod, quoting Dixon J, who eloquently expresses the imperative of a subjective approach to intention:

The difficulty of distinguishing between “he foresaw” and “he ought to have foreseen”, “he knew” and “he ought to have known”, is not a good reason for not drawing the line at this point. It is an inescapable difficulty when we have a law which requires us to look into individual’s minds; and such a requirement is essential to a civilised system of criminal law. “[A] lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from enquiry the most fundamental element in a rational and humane criminal code”.¹⁰³

The piece-meal approach followed in England obfuscates the law and is lacking in principle: ‘What is signally lacking in English law is any discussion of what general principles should be invoked when determining whether, if at all, mistake or ignorance of law should provide a defence’.¹⁰⁴ Furthermore, the fears expressed by the House of Lords were the same fears expressed by local commentators in South Africa in the aftermath of *De Blom*, where the perceived floodgates and abuse simply did not materialise. Inferential reasoning is a powerful tool at a court’s disposal in reaching subjective determinations.

¹⁰¹ [1985] 1 All ER 801.

¹⁰² [2005] 2 AC 467.

¹⁰³ Ormerod op cit (n15) 140 quoting *Thomas v R* (1937) 59 CLR 279 at 309, per Dixon J.

¹⁰⁴ Simester, Spencer, Sullivan and Virgo op cit (n63) 682-3. Ormerod has argued that the principle from *Beckford* should be applied to all defences – Ormerod op cit (n15) 139.

Not only is the defence introduced by *De Blom* practically manageable but it is principally desirable as it increased fairness and consistency in South African criminal law.

As Milton noted in 1987 in reflection on the combined effect of *De Blom* and *Chretien*:¹⁰⁵

‘these decisions have one common philosophical basis: that punishment is only properly inflicted when it is deserved; that desert follows from individual blameworthiness; that blameworthiness is a function of decisions made with a mature free will and a conscious awareness of wrong doing’.¹⁰⁶

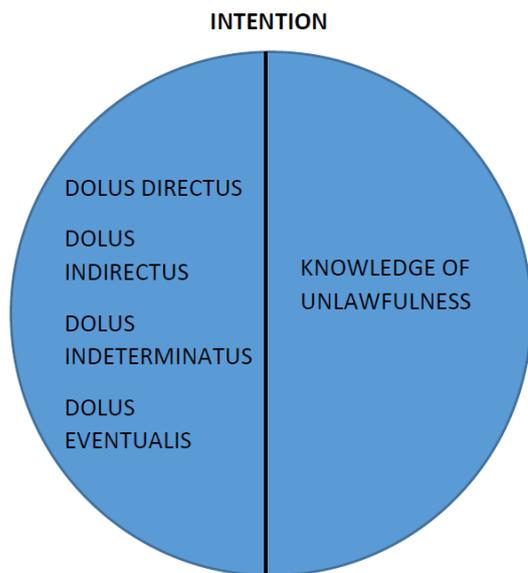
So it is clear that the rule in *De Blom* followed the centrality accorded to *mens rea* with the adoption of a subjective test for intention to its full logical conclusion. It is also clear that the early fears of floodgates and the practical applicability of the rule have proved unfounded. What remains to be clarified is the relationship between *error in objecto* and the putative defences born out of *De Blom*.

Since *De Blom*¹⁰⁷ the enquiry into intention in South African criminal law has two components: first, a form/ definition of intention and, secondly, knowledge of unlawfulness. Both of these components must be present before a finding of intention can be made. It is useful for the purposes of this discussion to provide a simplistic graphic illustration the relationship:

¹⁰⁵ 1981 (1) SA 1097 (A).

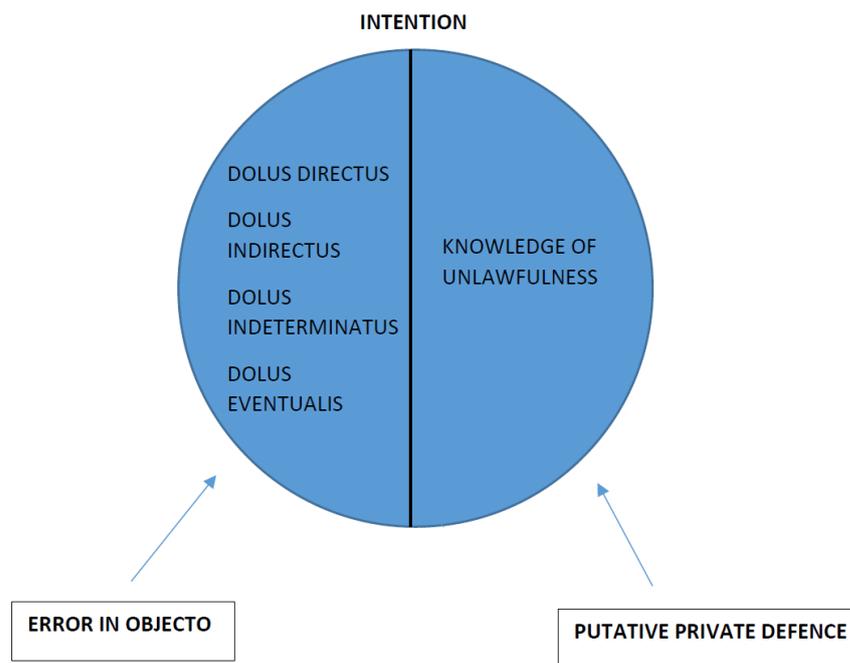
¹⁰⁶ JRL Milton ‘Criminal Law in South Africa 1976 – 1986’ (1987) *Acta Juridica* 43, quoted in C R M Dlamini *op cit* (n93) 16.

¹⁰⁷ *De Blom* *supra* (n81).



Since *error in objecto* pre-dates the developments in *De Blom* (and possibly only applies to *dolus directus*) it can be assumed that *error in objecto* targets the left side of the diagram above. In other words, *error in objecto* says that where you do not meet a definition of intention due to mistaking the identity of your victim the law will treat you as if you meet the definition of intention – a mistake as to the identity of your victim will not provide a defence to intention.

Conversely, a putative defence impacts the right hand side of the diagram in that it negates knowledge of unlawfulness. In other words, putative private defence says that I genuinely believed I was acting in lawful self-defence thus I lacked knowledge of the unlawfulness of my conduct.



Viewed such it is clear that these two rules of law are at cross-purposes with each other. They impact different components of the enquiry into intention. As both components need to be met for a finding of intention, if an accused has a putative defence they will be acquitted of murder, even if an *error in objecto* is present. Judge Masipa implicitly acknowledges this in *Pistorius* when she in one breath, finds an *error in objecto*, and in the very next nonetheless goes on to consider the putative defence.¹⁰⁸

It is true that many putative defences will entail a mistaken identity.¹⁰⁹ However, the putative defence is much broader than a claim of mistaken identity (*error in objecto*). When relying on a putative defence the accused is not arguing: ‘I mistakenly thought the victim was someone else, acquit me’. The accused is arguing: ‘Because I thought the victim was someone else I mistakenly believed my life was in danger and that I had a lawful right to defend myself – I lacked knowledge of unlawfulness, acquit me’. Due to the fact that the two

¹⁰⁸ *State v Pistorius* supra (n1) at 3325-6.

¹⁰⁹ See cases referred to in fn86 above. Despite the mistaken identity involved, *error in objecto* has quite correctly not been raised by the prosecution in any of these cases as it speaks at cross-purposes with the putative defence.

rules speak at cross-purposes, irrespective of any *error in objecto*, if the facts of a case support a finding of putative defence an acquittal will result.

THE ROLE OF THE VICTIM'S IDENTITY IN A CHARGE OF MURDER

As both putative private defence and *error in objecto* raise the issue of the identity of the victim it is pertinent to consider the role of the identity of the victim in a murder charge more broadly. Despite the definition of murder referring to 'the unlawful, intentional killing of *another human being*' (emphasis added) the identity of the deceased is still relevant to some extent to a charge of murder.¹¹⁰

A brief review of judgments illustrates this submission. For example, in *Humphreys*¹¹¹ the Supreme Court of Appeal set out the test of *dolus eventualis* as follows: '(a) did the appellant subjectively foresee the possibility of the death of *his passengers* ensuing from his conduct; and (b) did he reconcile himself with that possibility'. The test is clearly applied in relation to the deceased passengers not in relation to 'whoever' or 'human beings'. This also coincides with the expression of the test in *Pistorius*: 'Did the accused have the required *mens rea* to kill *the deceased* when he pulled the trigger?'¹¹²

This approach is echoed in academic writing. For example, Paizes defines the test for *dolus eventualis* in a murder case as follows: '(a) did the accused subjectively foresee the possibility of the death of *the victim* ensuing from his conduct; and (b) did he reconcile

¹¹⁰ Cf prosecution argument in *Pistorius*.

¹¹¹ *S v Humphreys* supra (n33) at para 12, emphasis added.

¹¹² *State v Pistorius* supra (n1) at 3317. See also 3327 in the judgment: 'I now deal with *dolus eventualis* or legal intent. The question is: Did the accused subjectively foresee that it could be the deceased behind the toilet door and notwithstanding the foresight did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet.'

himself with that possibility'.¹¹³ The grammatical use of the definite article in this definition clearly infers the identity of the actual victim not any hypothetical victim.

Secondly, if identity were never relevant *dolus indeterminatus* would be rendered superfluous. Surely the very distinction between *indeterminatus* and the other varieties of *dolus* is that in their regular form they relate to a specific victim whereas in their *indeterminatus* variety they relate to any possible victim? It is useful to briefly consider the definitions of *dolus* to illustrate this point.

Intention can occur in three different forms.¹¹⁴ *Dolus directus*, or direct intention, is intention in its grammatical sense – the death of the victim was the aim and object of the perpetrator.¹¹⁵ *Dolus indirectus*, or indirect intention, is present where the death of the victim was not the aim and object of the perpetrator but was foreseen by the perpetrator as a substantially certain outcome of pursuing his/her aim and object.¹¹⁶ *Dolus eventualis*, occurs where the perpetrator foresees the possibility of death occurring and proceeds with his/her conduct, accepting the possibility of the victim's death into the bargain.¹¹⁷ *Dolus indeterminatus*,¹¹⁸ or general intention, is a variety of intention that can attach to any of the previous three forms of intention described above.

The defining feature of *indeterminatus* when applied to the other three forms of intention is that there is no particular victim in mind. In other words, a perpetrator may have *dolus directus* in its *indeterminatus* variety. For example, X throws a bomb into a crowded

¹¹³ A Paizes op cit (n36) (2013) 6, emphasis added.

¹¹⁴ The tests are expressed in the context of a murder charge in this paper though they apply to all crimes for which intention is required.

¹¹⁵ JM Burchell op cit (n5) 362.

¹¹⁶ See for example *R v Kewelram* 1922 AD 213 where the perpetrator's aim and object was to destroy stock but, by setting fire to the stock, he foresaw the destruction of the store as substantially certain. He was thus convicted of arson. JM Burchell op cit (n5) 363.

¹¹⁷ JM Burchell op cit (n5) 363.

¹¹⁸ JM Burchell op cit (n5) 364.

shopping centre – his aim and object is to kill people (*dolus directus*) but he doesn't have a particular person in mind (*indeterminatus*). Or an accused may have *dolus eventualis* in its *indeterminatus* variety. This is the variety of intention that the State alleged in the Pistorius matter: even if it is accepted that Pistorius genuinely believed there was an intruder in the bathroom, he foresaw the possibility that 'whoever' was behind the door (*indeterminatus*) would be killed and proceeded to shoot, reckless to that possibility (*dolus eventualis*). *Indeterminatus* exists where the perpetrator does not have a particular victim in mind, but they intend to kill someone.¹¹⁹

Finally, in considering the relevance of the victim's identity in a charge of murder it is necessary to distinguish between an abstract prohibition (the definition of the crime) and the concrete charge:

'...it is possible to distinguish between two levels, that of the prohibition in general – the norm – and that of imputing the prohibition to an actor – the charging. While on the general level we can, and should view the prohibition in the abstract terms of the elements of the offence, that is not the case in regards to charging and punishing a person for the commission of an offence. Criminal liability is imputed to a person for a concrete offence committed in the real world, and not for an abstraction. A defendant is put on trial for a concrete act'.¹²⁰

'*Mens rea* must relate to the concrete object of the offence. When an actor is not aware that his conduct may injure the concrete object of the offence that is actually harmed, that harm cannot [be] described as having been caused with *mens rea*.'¹²¹ Thus even in cases of *indeterminatus*, where the identity of a particular victim is not a requirement for a conviction on a murder charge, that *indeterminatus* must still apply to the actual victim. In other words a distinction must be drawn between the concept of requiring identity versus not having subjectively excluded a particular identity.

¹¹⁹ *R v Jolly* 1923 AD 176 is an example of *dolus eventualis* in its *indeterminatus* variety.

¹²⁰ K Ghanayim, M Kremnitzer op cit (n27) 8. This explains why an indictment is crafted in terms of the identity of a particular victim.

¹²¹ K Ghanayim, M Kremnitzer op cit (n27) 6.

In the rare situation where the accused has subjectively excluded the possibility that their actual victim may suffer the consequence of the crime they cannot be convicted of that crime as they lack intention regarding that victim.¹²² Convicting them of the crime would be transferring their intention from the intended victim/s onto the actual victim. The law would be fictitiously treating the offender as if he had foreseen the consequence in question when as a matter of fact, in the circumstances, the offender had not subjectively foreseen the consequence. This would be reintroducing the doctrine of transferred malice into South African law.

So, to use an extreme example by way of illustration, if X intends to kill civilians by blowing up a shopping centre it does not matter that X does not know the identity of the victims who end up dying in the blast. X had *dolus directus indeterminatus* – it was his aim and object to kill *whoever* was in the shopping centre – he has intention to satisfy a conviction of murder. If, however, X knows that his mother frequents the shopping centre but believes her to be in bed sleeping when he sets the bomb off he subjectively excludes the possibility of killing his mother.

If, unbeknown to him his mother had woken up earlier and gone to the shopping centre and was killed in the blast, he cannot be convicted of her murder. It was not his *aim and object* to kill her and he did not subjectively foresee the possibility of her death and proceed reckless. In fact, in this example he subjectively eliminates the possibility of her death thus cannot be said to reconcile himself with this possibility. He does not have *dolus eventualis* regarding her death thus to convict him would be constructively treating him as if he had intention, when in fact he did not. He should have foreseen the possibility of her death thus he is negligent and can be convicted of culpable homicide. Furthermore, he had *dolus*

¹²² See K Ghanayim, M Kremnitzer op cit (n27) 12: ‘Where the actor does not take into account the possibility that his conduct may harm the actual object, we cannot impute *mens rea* to harm the actual object’.

directus indeterminatus regarding the deaths of the other shoppers therefore he can be convicted of their murders.¹²³

Thus it is clear that despite the definition of murder being framed in reference to killing ‘a human being’ the identity of the victim still retains relevance in determining criminal liability. This is all the more pertinent in jurisdictions like South Africa that follow a subjective approach to determining intention, which enhances fair labelling, embodies individual autonomy and has received constitutional endorsement.

CONCLUSION

This article sought to reconcile the historical principle of *error in objecto* in the broader context of the modern legal terrain in which it exists. Arguably the court in *Pistorius* also implicitly achieves this, though insufficient reasoning was provided. This is especially clear when reviewing the court’s concluding paragraphs on the murder charge. Having spent the earlier portion of the judgment reviewing the various arguments and evidence placed before the court, Masipa J concludes the following:

‘From the above it cannot be said that the accused did not entertain a genuine belief that there was an intruder in the toilet, who posed a threat to him. Therefore he could not be found guilty of murder *dolus directus*...’¹²⁴

This proceeds from the premise that if there had been evidence to support a finding of *dolus directus indeterminatus* regarding a supposed intruder an acquittal would still result. This is because, regardless of the *error in objecto*, the putative defence remains because it is broader than *error in objecto* and therefore unaffected by it. Knowledge of unlawfulness is required for a murder conviction, which is lacking in the case of a putative defence.

¹²³ This reasoning explains why the accused in *Pistorius* could not have been convicted on the basis of *dolus indeterminatus*, as the court had accepted his evidence that he mistakenly believed Steenkamp was in the bedroom at the time of the shooting – he had subjectively excluded her death as a possibility.

¹²⁴ *State v Pistorius* supra (n1) at 3347.

The court then proceeds as follows:

‘...This court has already found that the accused cannot be guilty of murder *dolus eventualis* either, on the basis that from his belief and his conduct, it could not be said that he foresaw that either the deceased or anyone else, for that matter, might be killed when he fired the shots at the toilet door. It also cannot be said that he accepted that possibility into the bargain.’¹²⁵

On the *Dolus eventualis* argument the accused escapes liability on all fronts. First, he has a putative defence in that he both genuinely but mistaken believed that he was under attack and he believed he was shooting to injure not kill – that is, he mistakenly believed his response to the supposed attack was proportional. Furthermore, as he believed his response was proportionate, it cannot be said that he foresaw the death of anyone as he believed he was shooting to cause injury short of death. Finally, and in-keeping with the principle of correspondence, as he did not foresee the consequence of death he cannot be said to have intention to kill.

Perhaps on the facts it may have been a less controversial finding in the circumstances to hold that there was foresight of death but this was the courts factual finding and the accused would have been acquitted either way.¹²⁶ Even on a finding of *dolus eventualis indeterminatus*, he would still have a putative defence on the basis of a genuine mistaken belief that he was under attack and acting under lawful self-defence. He would thus lack knowledge of unlawfulness, which would not be impacted by the *error in objecto*.

Secondly, his *dolus eventualis indeterminatus* would still have to apply to the death of his actual victim. As he had excluded Steenkamp’s death as a possibility due to his mistaken belief she was in the bedroom, he could not be said to have reconciled himself with her death. It is worth noting, it will only be in exceptionally rare cases such as this one where there will

¹²⁵ Ibid.

¹²⁶ This analysis proceeds from the factual findings of the court. The purpose of this article is not to step into the shoes of the judge and assessors and issue judgment on their factual determinations but rather to scrutinise the factual findings in the context of the applicable law.

be sufficient surrounding evidence to support a claim that an accused had subjectively excluded the possibility of their particular victim's death. The court will not simply take the accused's version at face value – a significant evidential burden will need to be met to convince the court to draw this inference. But where the surrounding evidence suggests that the accused had genuinely excluded the possibility of the victim's death, there cannot be a finding of intention when applying a subjective test. Such a finding would be a legal fiction on the facts.

Criminal law is a complex ecosystem – no principle can be fully understood without considering how it impacts, or is impacted by, the principles surrounding it. Furthermore, criminal law is not static and develops and progresses through time – ancient principles must be re-evaluated in light of modern developments. Two of the most critical modern developments in our law regarding *mens rea* are: the adoption of a subjective approach to *dolus*, culminating in the development of *dolus eventualis*; and the related recognition of knowledge of unlawfulness as a component of *mens rea* in 1977,¹²⁷ leading to the development of putative defences. Any engagement with *error in objecto* must occur in light of these critical shifts in our law in order to display a holistic understanding of the rule that does not do violence to the central status accorded to *mens rea* in South African criminal law.

Arguably, considering the above analysis, this was achieved by the court in *S v Pistorius*, though unfortunately explicit reasoning was not provided in the judgment. *Error in objecto* was applied in a manner that gave primacy to the pivotal status of *mens rea* and adhered to a subjective approach to intention, which best encapsulates and enhances individual autonomy and fair labelling in our law. The court's finding in the Pistorius matter might be unpopular but reviewing the developments in the law on *mens rea* over the past 60

¹²⁷ *De Blom supra* (n83).

years shows the decision is in keeping with a consistent application of the current law. The rule of law must always persevere, even in the face of an unpopular verdict.