Impossiblity: Unknown and Unknowable Laws

Margaret Briggs*

I Introduction

> Every law which does not threaten before it punishes is inequitable....Moreover, unless the law is declared and promulgated, so as to remove every credible excuse of ignorance, not even what is done against the law can rightly be punished or called a crime.[1]

At common law impossibility of compliance is recognised as a defence where a person is unable to perform a duty imposed by law.[2] The defence proceeds from the premise that the legislature is not to be assumed to have intended to punish for failure to perform the impossible.[3] In cases of impossibility of compliance the claim is that there was no reasonable opportunity to comply with a *known* law. Unavoidable inability or incapacity to obey the law operates as a negation of responsibility for violating the law. Essentially the same issue arises where it is impossible to know the law. If a person is denied the opportunity to know the law and is therefore unable to conform his or her conduct to the law then, arguably, that person's lack of knowledge ought to exculpate him or her for any breach of the criminal prohibition.[4]

The paradigm is the case of non-publication where the law which a person is accused of violating was not published at the time of the alleged offence. Under the circumstances knowledge of the law can simply not be obtained. The individual is entitled to "fair warning" that the intended conduct is prohibited, and, without such notice, ought not to be blamed for any subsequent violation of the law. If the state has failed to ensure that the law is made known, then the citizen cannot be expected to satisfy any "duty" to know the law.[5] As will be discussed below, unavoidable or "invincible"[6] lack of knowledge resulting from non-publication has been recognised as an exception to the general rule that ignorance of the law does not excuse.[7]

However, beyond the central instance of non-publication there are other situations where a person accused of breaking a published law might reasonably claim to have had no notification or means of learning about that law. For

* Lecturer in Law, University of Otago.

1 Thomas Hobbes, *Leviathan* (Edwin Curley, ed, Hackett Publishing Co. Inc, Indianapolis, 1994), p 528.

2 Eg, *Tifaga v Department of Labour* [1980] 2 NZLR 235; *Finau v Department of Labour* [1984] 2 NZLR 396.

3 *Tifaga*, ibid at 245, per Richardson J.

4 H Gross, *A Theory of Criminal Justice* (OUP, New York, 1979), p 274.

5 A Ashworth, *Principles of Criminal Law* (Clarendon Press, Oxford, 1991), p 209.

6 J Hall, *General Principles of Criminal Law* (2nd ed, Bobbs-Merrill, Indianapolis, 1960), p 406.

7 See Part II.

example, the law may be inaccessible for some reason, or so obscure that the individual had no reason to be on notice of being affected by the law. Publication is adequate to fix people with knowledge where the law reflects conventional standards of morality. Similarly, with the typical and well-known regulatory offences, it is again reasonable to impose the duty to know the law. But in those situations where there is no reason for an individual to suppose his or her conduct is in breach of the law, it becomes necessary to question whether or not bare publication is a sufficient way of fixing individuals with notice. If nothing about the restricted activity would prompt inquiry, then the individual may have a case that he or she is entitled to be excused. The argument in favour of allowing a defence in these cases is premised upon a general principle of fairness. Given the circumstances, the individual cannot fairly be blamed for the lack of knowledge.

The aim of this paper is to examine the current scope of the exception, and to consider related issues about ignorance resulting from inaccessibility and obscurity which, although not falling within the ambit of non-publication, are nevertheless still under the umbrella of unavoidable ignorance.

II Non-Publication

(1) The Common Law

At common law a law took effect from the time it was signed, and an administrative rule could penalise conduct immediately after it was voted on. There was no obligation on the law-makers to publicise or promulgate the enactments.[8] Therefore the individual's "unavoidable ignorance" of an unpublished enactment afforded no excuse. An early case in point is *R* v *Bishop of Chichester*[9] which held that proclamation was not necessary for a law to become effective.

Prior to 1793 statutes were regarded as effective from the first day of the Parliamentary Session in which that statute was enacted.[10] Accordingly, laws could potentially have retroactive effect and catch individuals who had no opportunity of learning the law. In 1793 Parliament rectified this "great and manifest injustice"[11] by enacting The Acts of Parliament (Commencement) Act which made the date of enactment the effective date.[12]

How, then, have the courts dealt with cases where there has been no statutory requirement for publication, and an individual has breached a prohibition without knowing of it or having the opportunity to do so? In *Lim Chin Aik v R*[13]

---

8 See D Lanham, "Delegated Legislation and Publication"(1974) 37 Mod L Rev 510; J Murphy, "The Duty of the Government to Make the Law Known" (1982) 51 Fordham L Rev 258. See also G Williams *Criminal Law -The General Part* (2nd ed, Stevens and Son Ltd, London, 1961), p 288.

9 (1365) YB Pasch 7, 39 Edw 3, referred to by Murphy, ibid at 260.

10 Murphy, supra n 8 at 258, 260.

11 *US v Casson* 434 F 2d 415 at 419 (1970), referred to by Murphy, ibid at 258, n 16.

12 Stat 33 Geo III c 13.

13 [1963] AC 160.

the "law" was a Ministerial Order made pursuant to delegated authority. The appellant had been convicted of remaining in Singapore, being a "prohibited person". However, no provision had been made for publishing the order or bringing it to the appellant's attention and he was unaware of the order of prohibition against him. The Privy Council allowed the appeal, finding that mens rea was an element of the offence and that as there was no evidence that the appellant was aware of the order, he could not be said to have knowingly contravened it.[14] The Crown's argument that ignorance of the law was no defence was similarly rejected, the Privy Council refusing to concede that an order which had not been published or otherwise brought to the attention of the affected party could be a valid exercise of legislative power, such that the law would be binding.[15] Lord Evershed observed that "the maxim cannot apply to such a case as the present where it appears that there is in the state of Singapore no provision ... for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is."[16]

Lim Chin Aik thus stands for the proposition that where there is no provision for publication, and the affected party has not been made aware of the law in question, the rule that ignorance of the law is no excuse is of no application. However, in cases where there is publication the courts have nevertheless made it clear that while valid, the law will not be *effective* until published. In *Johnson v Sargant & Sons*,[17] for example, an order dated one day was published the next. The plaintiffs acted contrary to the order on the day it was dated, that is, the day prior to its publication. Bailhache J concluded that delegated legislation does not come into force until it is published.[18] He also recognised a fundamental distinction between statutes and delegated legislation, doubting that the rule that a statute takes effect on the earliest moment of the day on which it is passed could apply equally to orders (the relevant delegated legislation in the case). The reason for this is that there is a certain "publicity" attaching to statutes even before they come into operation which is absent in the case of orders. Since it is much less likely that citizens will be aware of the making of delegated legislation than of statutes, it is only fair that delegated legislation requires actual publication in order to come "into operation".

In contrast to the approach adopted in *Johnson v Sargant & Sons*, the one New Zealand decision on point, *Scott v Bank of New South Wales*,[19] holds that delegated legislation[20] has the force of law from the date it is made and not from the date of notification in the Gazette. However, it is possible to distinguish *Scott* on the basis that the delegated legislation in that case was emergency war regulations

---

14 Ibid at 175.

15 Ibid at 171.

16 Ibid.

17 [1918] 1 KB 101. For Canadian authority reaching the same conclusion see *R* v *Ross* [1945] 3 DLR 574; *Re Michelin Tires Manufacturing (Canada) Ltd* (1975) 15 NSR (2d) 150; *R v Catholique* (1980) 49 CCC (2d) 65.

18 Ibid at 103.

19 [1940] NZLR 922.

20 In *Scott* the relevant delegated legislation was the Finance Emergency Regulations 1940, which made the plaintiff's commercial transaction illegal.

having, as Smith J noted, the potential to "override the rest of the legislation governing the people of New Zealand."[21] The judge conceded that it may, in other cases, be unreasonable to bring regulations into force without notice. *Scott* was not such a case, however, as the Governor General in Council apparently considered that the regulations had to be brought into force without notice.[22] Therefore *Scott* stands as an exception to the weight of authority which requires that a law be published before it can have effect against the person accused of its violation.

It can be concluded that in the case of delegated legislation, the legislature (the delegator) can be assumed to have intended such delegated acts to be operative only when they are published or notified. This may be related back to the assumption made by Richardson J in *Tifaga v Department of Immigration*[23] that the legislature is not to be assumed to have intended to punish for failure to perform the impossible. As will be discussed next, this "impossibility" exception recognised at common law is now less important than previously because many jurisdictions have introduced legislation requiring the publication and notification of delegated legislation. But the modern publication requirements do not necessarily cover all delegated legislation[24] so the possibility remains for there being an unpublished order or the like which is not subject to the formal publication rules.

(2) The Statutory Requirements

The Acts and Regulations Publication Act 1989 imposes formal publication requirements for delegated legislation. Section 4(1)(b) of the Act requires the printing and publication of copies of all regulations.[25] The publication requirement itself is set out in section 13 which provides that publication of a notice in the Gazette of the new regulation is sufficient.[26] This at least has the advantage of providing a single source by which citizens can keep up with new laws.[27]

Beyond the formal publication requirements, however, New Zealand makes no provision for a defence to a criminal prosecution where the regulation offended against was not published at the time of the commission of the offence. This is in contrast with a number of other jurisdictions which provide statutory defences or exemptions for individuals who breach laws that have not satisfied the formal publication requirements. For example, section 3(2) of the Statutory Instruments Act (UK) 1946 provides a defence where the instrument has not

---

21 Supra n 19 at 932-933.

22 Ibid at 934.

23 Supra n 2.

24 Eg, it is common to omit from the statutory definition of "regulation" such instruments as local authority by-laws.

25 This applies only to regulations made after the commencement of section 4 on19 December 1989.

26 Section 12 details what information must be contained in the notice published in the Gazette.

27 Murphy, supra n 8 at 279, n 167-169.

been published unless it is proved that reasonable steps have been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.[28]

In Australia, the Criminal Codes of Queensland and the Northern Territory provide a straight-out exemption where the statutory instrument was not known to the defendant and was not published or otherwise reasonably made available or known to the public or to those likely to be affected by it.[29] However, "Commonwealth statute law does not contain any general provision allowing a defence where a statutory instrument was not published and the accused did not know of its existence."[30]

In Canada, section 11(2) of the Statutory Instruments Act 1970 provides a defence where the ignorance of law is due to the non-publication of a regulation. Canadian provincial legislation effectively enacts the common law approach taken in *Johnson v Sargant & Sons*.[31] Thus the regulation is not "valid", "enforceable" or "effective" against a person who has not had "actual notice" or, in some cases, constructive "notice" of it.[32]

While no equivalent New Zealand legislation is in force, with the result that the courts are left to deal with the issues of non-publication and non-notification, the New Zealand Crimes Bill 1989 has recognised the need for a mistake of law

---

28 While the English provision therefore affords a basis of avoiding criminal liability in cases of non-publication or non-notification, it has been argued that it "has about it more the air of an improvised postwar emergency measure than a calculated attempt to eradicate injustices:" A Smith, "Error and Mistake of Law in Anglo-American Criminal Law" (1985) 14 Anglo-Am L Rev 3 at 13.
See *Sheer Metalcraft Ltd* [1954] All ER 542, where it was held that the onus of proving that reasonable steps have been taken lies with the prosecution. The Court held that a statutory instrument is effective before printing and issue, notwithstanding that the provisions of the Statutory Instruments Act 1946 had not been complied with. This decision appears to be in conflict with the pre-Act decision in *Johnson v Sargant & Sons*, supra n 17.

29 Criminal Code 1983 (NT) s30, and Criminal Code 1899 (Qld) s22(3).

30 Interim Report of the Commonwealth Review Committee (1990), para 6.13. Section 3K of the Interim Report recommends a defence provided that (a) the person did not know that the act or omission constituted an offence, and (b) copies of the instrument had not been published or otherwise reasonably made available to the public or persons likely to be affected by it, and (c) the effect of the provision had not otherwise been reasonably made known to the public or persons likely to be affected by it. Additionally, section 3K would place the onus of proof on the accused. Section 308 of the Discussion Draft of the Model Criminal Code (1992), also considers a defence in cases where copies of the subordinate legislation were not available to the public or persons likely to be affected by it or where the person, by exercising due diligence, could have been aware of the subordinate legislation. For further discussion see K Amirthalingham, "Mistake of Law: A Criminal Offence or a Reasonable Defence?" (1994) 18 Crim LJ 271 at 277.

31 Supra n 17.

32 Alberta, Regulations Act, s 3(5); Manitoba, Regulations Act s 6(2); Ontario, Regulations Act, s 5(3). British Colombia is an exception, having a structurally similar provision to that used at federal law: British Colombia Regulations Act, s 3(2).

exception where there has been no publication or notification.[33] Clause 26(3) provides that:

> A person is not criminally responsible for any offence against any instrument made under the authority of any Act if, at the time of the act or omission,—
>
> (a) The instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it; and
>
> (b) The person did not know of the instrument.

Clause 26(3) places no onus of proof on the defendant. It also covers all instruments made pursuant to delegated legislation.[34] Several questions arise over the possible interpretation of clause 26(3). In particular, the meaning of "published or otherwise made reasonably known" in clause 26(3)(a) may require clarification. Ought it to be sufficient compliance with the publication requirement that the regulation is noted in the Gazette as is sufficient for the purposes of section 13 of the Acts and Regulation Publication Act 1989 ?

Clause 26(3)(a) provides a defence if the instrument has not been published or otherwise reasonably made known to the public or persons likely to be affected by it. Under what circumstances would the instrument be "reasonably made known to the public or persons likely to be affected by it ?" Although the answer is by no means certain, it may include media publicity, circulars put out by the relevant government department or authority, notices in newspapers or, more specifically, circulars to trades, professions or persons likely to be affected by the law change.[35] Nor should clause 26(3)(b) be overlooked. The effect of this provision is that even if the instrument was neither published nor brought to the attention of the public or interested persons, there will be no defence if the individual nevertheless learnt of the instrument by some other means.

A final point common to all legislation (and, with two exceptions, all legislative proposals) is that it applies only to delegated legislation. None extends to statutes.[36] In New Zealand, for example, section 17 of the Acts and Regulations Publication Act 1989 provides that "it shall not be necessary to gazette Acts of Parliament."[37] Given that a great deal of legislation is passed without debate

---

33 For earlier recommendations see the Report of the Public and Administrative Law Committee 1974, para 33(8), and the Report of the Regulations Review Committee 1986, para 44:11.

34 There may be a question as to the meaning to be attributed to "instrument." If it were to be given the same meaning as "regulation" in s2 of the Acts and Regulations Publication Act 1989, then "instruments" such as sub-delegated legislation and local authority by-laws would not be covered. The Report of the Crimes Consultative Committee 1991 recommended that "instruments" be replaced by "regulations" in clause 26(3). Furthermore, "regulations" was to have the same meaning as that assigned to it in s2 of the Regulations (Disallowance) Act 1989.

35 See, N Cameron's observations on clause 26(3): "Defences and the Crimes Bill" from *Essays on the Criminal Law in New Zealand - Towards Reform?* VUW Law Review Monograph 3 at 65.

36 Cases decided at common law (eg, *Johnson* , supra n 17), make the same distinction.

37 See Wild C J in *VUWSA v Government Printer* [1973] 2 NZLR 21 at 23. There still remains a duty, however, to make all Acts available for public purchase.

and without media comment, the distinction drawn between statutes and delegated legislation may be questioned. Thus, "a crude rule that a statute is deemed to be known by all upon promulgation also dodges all questions of blameworthiness."[38] Arguably, the fact that statutes usually receive more publicity would be a factor to consider when looking at the practical likelihood of the defence succeeding rather than to the availability of the defence in law.[39] Morgan echoes these concerns:[40]

> However, the argument that 'the existence of an Act is sufficiently made known to the public by the passage of the Bill through the Parliament' will strike many as quixotic given the volume of complex modern legislation in which the 'criminal law applies in surprising ways to otherwise ordinary behaviour.' In practice, problems of accessibility are unlikely to arise with statutes, but there is no good reason in principle for their exceptional status.

Since statutes are always published, their inclusion within a non-publication exception may prove to be of little practical use. Yet it is not impossible to envisage situations where a statute might come up against the same non-publication complaint as delegated legislation. One foreseeable situation would be where an industrial strike causes a delay in the publication of penal legislation.[41] More generally, the sheer volume of modern statutes—a parallel in some cases to the flood of delegated legislation—admits the possibility of an oversight or delay in publication. So, while statutes are always published, it may sometimes be a case of later rather than sooner. Thus, better that the non-publication provision is benignly inclusive (of statutes) than narrowly restricted (to delegated legislation).

There has been tentative recognition of the benefits of including statutes within a non-publication defence in North America. The Model Penal Code of the American Law Institute provides a general non-publication defence in cases of statutes and other enactments.[42] The Law Reform Commission of Canada has also recommended the introduction of such a defence, clause 3(7) providing that "[n]o one is liable for a crime committed by reason of mistake or ignorance of law ... (b) reasonably resulting from...(i) non-publication of the law in question". The Commission envisages that its recommendation will widen the already existing exception to cover the non-publication of *any* law.[43]

---

38 D Stuart, *Canadian Criminal Law* (2nd ed, Carswell, Toronto, 1987), p 284.

39 E Colvin, *Principles of Criminal Law* (2nd ed, Carswell, Toronto, 1991), p 263.

40 "Mistake" (1991) 15 Crim LJ 128 at 132. Both the Interim Report of the Commonwealth Review Committee (1990) and the Discussion Draft of the Model Criminal Code (1992), declined to extend a defence to Acts of Parliament on the basis that the existence of an Act is sufficiently made known to the public by the passage of the Bill through Parliament.

41 See Law Com No 143 (1985), para 13.71.

42 Section 2.04(3)(a).

43 Report No 31 (1987), 34-35. Stuart, supra n 38, p 284 has welcomed the recommendation but cautions that the adoption of a wide definition of "law" will be needed.

In conclusion, while there are still a number of issues to be resolved in respect of the defence of non publication, there now seems little doubt that a defence of some sort ought to be provided. However, the next point for discussion raises rather more complex problems.

III Inaccessibility

(1) General

The model of ignorance resulting from non-publication of a law shades into another general area where the claim is that a published law was inaccessible or unavailable to the person accused of its violation. By contrast with the non-publication cases where ignorance is truly unavoidable or invincible, the inaccessibility cases span the distinction between avoidable and unavoidable ignorance. At one end of this span the courts have usually rejected claims based on lack of knowledge of a law validly enacted and published shortly before the violation.[44] Since the law was available and knowable in advance of the criminal act, ignorance of the law was avoidable. A similar result has followed where the person charged with violating a published law is a stranger to the jurisdiction and claims in defence that the act in question was not an offence under the law of that person's home jurisdiction.[45] Here again the courts have been unwilling to recognise exceptions to the ignorance of law rule.

But there are other cases at the further end of the avoidable/unavoidable spectrum of ignorance where a defendant can establish that the law in question was completely beyond his or her means of knowledge. Such cases impel the conclusion that the defendant's ignorance of the law was unavoidable and therefore excusable. Intuitively, any objective impossibility of knowing the law ought to avoid liability whether it results from non-publication of the law or lack of any means of discovering what the published law is. However, as the following cases illustrate, the courts are generally reluctant to excuse under these circumstances too.

(2) The Nineteenth Century Cases

The first of the early cases on inaccessibility or unavailability is *R v Bailey*.[46] The defendant, the captain of a ship, was charged with firing at another ship while at sea. This was prohibited by a statute (39 Geo III c 37) passed six weeks earlier. The defendant was already at sea when the royal assent was given and therefore could not have known of the prohibition. He was convicted but subsequently pardoned:[47]

---

44 See, L Hall & S Seligman, "Mistake of Law and Mens Rea" (1941) 8 U Chi L Rev 641 at 656, n 62 for relevant USA authorities.

45 Eg, *R* v *Esop* (1836) 7 C & P 456, 173 ER 203. See also Hall & Seligman, ibid at 44 for further case references.

46 (1800) 168 ER 651, Russ & Ry 1.

47 Ibid at 652-653.

> Lord Eldon told the jury that he was of the opinion that [the prisoner] was, in strict law, guilty within the statutes, taken together, if the fact laid were proved, though he could not then know that the Act of the 39 Geo III c 37 had passed, and that his ignorance of that fact could in no otherwise affect the case, than that it might be the means of recommending him to a merciful consideration elsewhere should he be found guilty... [The Court was] of the opinion that it would be proper to apply for a pardon, on the ground, that the fact having been committed so short a time after the Act 39 Geo III c 37 was passed, that the prisoner could not have known of it.

One possible *ratio decidendi* for *Bailey* is that ignorance of the law does not excuse—even a person who had no means of knowing the law.[48] Other more restrictive interpretations have also been suggested. On one view the decision may stand for the proposition that conduct known to be wrongful—Bailey might well have been guilty of an assault even if the relevant statute had not been enacted—will not be excused merely because an accused did not know and could not have known which particular offence was being committed.[49] But apart from being purely speculative,[50] this interpretation simply begs the question as to the relevance of ignorance of the *particular* law under which the defendant was charged. It does not meet the objection that the defendant in *Bailey* ought not to have been held formally liable for violation of a law that, in the circumstances, was unknowable.[51]

Another possible interpretation is that since recommending a pardon was, at that time, the only means of correcting a legally erroneous conviction,[52] *Bailey* arguably does recognise invincible ignorance of the existence of the law as an excuse. Thus as Matthews points out, "it must at least be arguable that in *Bailey* the defendant's invincible ignorance of the passing of the statute was an excuse, and that *Bailey* is really no authority for the proposition for which it is usually cited."[53] However, this argument may be overstated because although the judges, sitting as an informal appellate court, recommended a pardon, the decision in "strict law" was that the defendant's ignorance "could in no otherwise affect the case". While the harshness of this rigid adherence to the ignorance of law rule was avoided by an act of forgiveness, judicial concern with "merciful considerations" might more properly have been focused on recognition of an

---

48 Law Com No 143 at 73, para 9.2 and No 177, vol 2, at 196, para 8.24, cite *Bailey* (1800) 168 ER 651, *Esop* (1836) 173 ER 203, and *R* v *Barronet & Allain* (1852) Dears CC 51; 169 ER 633, for the proposition that "[t]here is abundant authority that as a general rule the accused's ignorance of the offence he is alleged to have committed, or his mistake as to its application, will not relieve him of liability."

49 Colvin, supra n 39, p 264.

50 There is no evidence of this matter having been taken into account by the judges when recommending the pardon.

51 Colvin, supra n 39, p 264.

52 P Matthews, "Ignorance of the Law is No Excuse?" (1983) 3 Legal Stud 174 at 180; P Brett, "Mistake of Law as a Criminal Defence" (1966) 5 Melb Univ L Rev 179 at 187.

53 Ibid at 181.

54 6 F Cas 620 (1810), referred to by R Cass, "Ignorance of the Law: A Maxim Re-examined" 17 Wm & Mary L Rev 671 at 688; Hall & Seligman, supra n 44 at 657–658; Murphy, supra n 8 at 259–260.

exception to the general rule.

The decision in *Bailey* can be contrasted with the result in *The Cotton Planter* (1810).[54] This case involved a prosecution for the forfeiture of the ship *The Cotton Planter* for violation of a shipment embargo. The Act imposing the embargo was passed on 9 January 1808 but was unknown in St Mary's, Georgia, when the defendant sailed on 18 January from the port.[55] The Act did not indicate the date on which it was to become effective. The case is distinguishable from *Bailey*, where the statute was clearly in effect, on the ground that the relevant law became operative only when it was received at the place where the alleged offence had occurred.[56] It has been suggested that even if the court had been forced to accept that the law was effective from the date it was passed, the strong language used by the court and the policy underlying the court's decision would indicate that a defence based on ignorance of the law would nonetheless have been given.[57] In contrast, the contemporaneous circuit court decision in *The Ann* (1812)[58] held that the same law came into effect immediately on enactment and therefore applied to the ship's operators even though they were ignorant of it.[59]

However, in *Burns v Nowell*,[60] a civil action for damages, the English Court of Appeal recognised an important qualification to the ignorance of law rule. The plaintiff vessel left port before the passing of the Kidnapping Act 1872 which required ships to have licences to carry "native labourers" of the South Sea Islands. The first that the plaintiff learned of this law was from the defendant vessel in August 1873 while still at sea, and with "native labourers" on board. The court found that the Act did not apply to the plaintiff vessel. Although holding that ignorance of the law was no excuse, the court added the following rider to the general rule:[61]

> [B]efore a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for [an individual] who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued and when and how it was discontinued, with a view to determine whether a reasonable time has elapsed without its being discontinued.

---

55 Hall & Seligman, ibid.

56 *The Cotton Planter*, supra n 54 at 261 per Livingston J, "such laws should begin to operate in the different districts only from the times they are respectively received."

57 Hall & Seligman, supra n 44 at 658, n 74.

58 1 F Cas 926 (1812).

59 *The Ann* makes no reference to *The Cotton Planter*. Hall & Seligman, supra n 44 at 658 suggest that while the decision as to the effective date of the statute is sound, it would have been better policy to allow mistake of law as a defence, "enforcement of the statute against those too far off to have heard of it is as truly ex post facto in substance as to enforce it retroactively."

60 (1880) 5 QBD 444.

61 Ibid at 454.

(3) Other Cases and Problems

This qualification in *Burns v Nowell* provides a solution couched in terms of reasonableness for "continuous proceedings" and resultant problems of unavoidable ignorance of post-commencement law.

Given modern communication systems it is less likely, although not impossible, that the *Burns*-type situation would arise today. A possible example may be found where a hunter enters the bush for a certain time during which no communication is possible with the outside world. Upon leaving "civilisation" the hunter is aware of the laws that govern what species he may hunt and kill and what species he is prohibited from hunting and killing. However, while still "incommunicado", the law is changed so as to include within its prohibitions a bird or animal which the hunter believes he is free to hunt and kill. If, in fact, he does shoot such an animal ought he to be prosecuted on his return to the outside world? The situation is surely analogous to Burns so that "a reasonable time must be allowed...for...the discontinuance [of an act]."[62]

Burns v Nowell and related cases can also be largely cured by the "fixed-wait" provisions[63] which require the lapse of a defined period of time before a law takes effect.[64] However, neither the exception in favour of continuous proceedings nor the legislative palliative of a fixed-wait provision ensures that the law is accessible and findable. Take, for example, cases such as *Lim Chin Aik*[65] where the prohibition order had been made solely to prohibit the appellant but had not been published or otherwise brought to his attention. In this context the relevance of the Privy Council's judgment is to be found in the conclusion that the ignorance of law rule cannot apply where there is no means of enabling a person by appropriate inquiry to discover what the law is.[66]

A problematic New Zealand decision is *Police v Harkness*[67] where the defendant was convicted of being found unlawfully on a racecourse contrary to section 101(5) Racing Act 1971. The New Zealand Trotting Conference, pursuant to the empowering provisions of section 101, had made rules expressly excluding certain classes of persons from racecourses during race meetings. These rules were published in the Gazette on 8 June 1978. Rule 3(c) provided that persons convicted of certain offences, including assault, were to be excluded from race meetings.[68] The defendant had been convicted of assault in April 1982 and was found and removed from a racecourse in September of the same year. He claimed he did not know he was a person excluded by the rules from being present at

---

62 Situations such as that mentioned in the text may have the potential to arise under legislation such as the Wildlife Act 1953. See ss 5, 8 and the Second Schedule.

63 See Murphy, supra n 8 at 273–275.

64 Law Commission Preliminary Paper No 1 (1987) *Legislation and Its Interpretation* at para 22, states that it has been practice in New Zealand since 1980 that, in general, regulations are to have effect two weeks after they are made. The Acts and Regulations Publication Act 1989 has not enacted any "fixed-wait" provisions.

65 Supra n 13.

66 Ibid.

67 (1983) 2 DCR 198.

68 Section 101(5) provided that any person in breach of the rules could be removed from the racecourse and would be liable on summary conviction to a fine not exceeding $100.

the race meeting. Bradford DCJ distinguished *Lim Chin Aik* on the basis that the order in that case was directed solely at the appellant and that since it had not been published there was no way he could have learned of its existence. However in the present case:[69]

> [Section] 101 did provide for publication of the rules made by the Trotting Conference in the Gazette, and also required the Minister of Internal Affairs to give his approval to the rules so made. In my view, publication of the rules in the Gazette is notice to the world, and in particular to the defendant... That being so, the maxim, "ignorance of the law is no excuse", applies and the defendant is caught by the provisions of s 25 of the Crimes Act 1961. The defendant in this case therefore is presumed to know the law contained in s 101 of the Racing Act 1971, and by virtue of publication of the rules of the New Zealand Trotting Conference in the Gazette he is fixed with knowledge of those rules and the necessary mens rea is imputed to him.

Bradford DCJ therefore saw no injustice in convicting the defendant because the rules had been duly made and published. Even so, *Harkness* is a distinct example of how even published laws may not come to the attention of the particular wrongdoer. This raises the question of whether there ought to be a defence available in certain circumstances, even where the law has been published.

The decision in *Harkness* may in turn be contrasted with two United States cases, *Mullane v Central Hanover Bank & Trust Co*,[70] and *Lambert v California*.[71] In the first, *Mullane*, a civil proceeding, the only notice given was by way of publication in a local newspaper. The United States Supreme Court found that notice of an adjudication must reasonably be calculated to inform interested parties of the proceeding and give them an opportunity to be heard[72] and, in the absence of such a method designed to inform interested parties, the court found that the method must not be "substantially less likely to bring home notice than other of the feasible and customary substitutes."[73] In *Mullane* itself it was held that the notice was inadequate since it was "not reasonably calculated to reach those who could easily be informed by other means at hand."[74]

In *Lambert*[75] a municipal ordinance made it an offence for a convicted person to remain in Los Angeles for more than five days without registering with the Chief of Police. Lambert, a convicted person, had lived in the municipality for seven years without registering and without any knowledge of the requirement to do so. A divided United States Supreme Court reversed the conviction with Justice Douglas for the majority finding that, while ignorance of the law is no excuse:[76]

---

69 Supra n 67 at 202.
70 339 US 306 (1950).
71 355 US 225 (1957).
72 Murphy, supra n 8 at 263–264.
73 Supra n 70 at 315.
74 Ibid at 319.
75 Ibid at 319.
76 Ibid at 229.

> We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

In *Lambert*, like *Harkness*, the ordinance was directed at a class of persons and not just an individual as in *Lim Chin Aik*. Whereas Lambert was required to do something (register), Harkness was required not to do something (to attend race meetings). In both cases the law, although originally published (albeit some years earlier) and therefore providing the "wrongdoers" with at least the opportunity to learn the law, nevertheless seemed quite beyond the knowledge of the ordinary person. While the majority in *Lambert* affirmed the general rule that ignorance of the law does not excuse, the ordinance was held unconstitutional for violating the due process clause of the United States Constitution. The reason for this was that the defendant had no *notice* of the ordinance. As Justice Douglas said, "ingrained in our concept of due process is the requirement of notice."[77] So the defendant was not liable in the absence of actual knowledge, or proof of the probability of such knowledge, of the registration requirement. The harshness of punishing for breach of such a law is starkly illustrated by the comment of Justice Douglas that, "[w]ere it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[78] Thus, by the means of due process, unavoidable ignorance did in fact excuse in *Lambert*.[79]

In *Harkness* the defendant was presumed to know the law and Bradford DCJ found him to be fixed with knowledge of the rule by virtue of publication.[80] Therefore the court can be seen to have found constructive notice upon publication. Arguably the same result would follow under clause 26(3) of the Crimes Bill 1989 since, in terms of clause 26(3)(a), it is enough if the "instrument" has been published. The second limb of that provision relating to making an instrument known appears intended to come into play only on non-publication. Consequently, assuming that "publish" is satisfied by notification in the *Gazette*, Harkness would have no defence.

---

77 Ibid at 228.

78 Ibid at 229. See also *Screws* v *United States* 325 US 91 (1945) at 96 where the Supreme Court, in assessing a vagueness challenge, stated that to impose criminal liability for violation of a statute that did not adequately define the conduct it prohibited "would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."

79 In the later case of *United States* v *International Minerals & Chem Corp* 402 US 558 (1971), Justice Douglas held that ignorance of the law was no defence to a charge that the defendant had "knowingly violated" a regulation relating to shipments interstate.

80 Supra n 67.

Realistically an authority such as the Trotting Conference cannot be expected to bear the burden of informing every person affected by its rules that they are prohibited from attending race meetings.[81] No legal system could operate on the basis of individual notification, but it is equally unusual for individuals to ascertain the lawfulness or otherwise of each and every activity they engage in. As Gross puts it, the legal system works on the "presumption that a person either is informed about the law because the matter is sufficiently well-known, or that he is prompted to inform himself when the activity at hand is notoriously of the sort that falls within the general concerns of the law."[82] The rule that ignorance of the law is no excuse is coherent and explicable in such cases. Theft, assault, culpable homicide and such like are clear instances of sufficiently well known matters governed by the law. In these offences the law reflects standards of conventional morality and it is fair to presume knowledge by all or, to put it another way, it is fair to impose upon the individual a "duty" to know the law in these circumstances.

There is another type of case where the nature of the activity should also alert us to the fact of legal regulation. These are the typically regulatory offences such as drunk driving, traffic regulation, food and health offences. As with the first type of case, it is again reasonable to presume knowledge of the law or to impose upon the individual a "duty" to know the law. Ashworth explains this idea as the "thin-ice" policy in the sense that those citizens who know their conduct is on the borderline of illegality take the risk that their conduct will breach the law.[83]

However, Gross's point is that not all conduct falls within the two categories described above. In other words, not all conduct is the subject of legal restriction—we have the liberty to do all kinds of things that the law does not regulate. Gross terms this the "model of prior privilege".[84] In this area there must be a *reason* for the individual to seek to inform himself or herself about the law. To return to *Harkness*, for the moment, if a rule-making body such as the Trotting Conference makes a rule which curtails a "prior privilege"—the liberty to attend race meetings—then people like Harkness, who violate the rule without knowing it, ought to be excused. While publication would otherwise be adequate to fix people with knowledge in the two obvious categories mentioned above, it is insufficient here. Gross explains it in this way:[85]

> Notification of those who may be affected is required in order for these somewhat eccentric legislative specimens to have the force of law in curtailing the prior privilege of those affected, since nothing about the activity restricted in such a case would prompt inquiry.

---

81 Just as, in *Lambert*, the Los Angeles Police Department could not be expected to warn every newcomer to the city that they must register with the police department if they had been convicted.

82 Gross, supra n 4, p 274.

83 Ashworth, supra n 5, p 63, 209. Lord Morris in *Knuller* v *DPP* [1973] AC 435 used the "thin-ice" expression saying, "those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic] will fall in."

84 Gross, supra n 4, p 274.

85 Ibid at 275.

If the particular law is, as Gross puts it, "eccentric", or, is as if "written in print too fine to read or in a language foreign to the community",[86] people like Harkness have been denied a fair opportunity to conform their conduct to the law.

IV Conclusion

A progression may be traced in the examples of "impossibility" examined in this paper. In paradigm cases of non-publication and strict impossibility of knowledge, judicial strategies avoid punishment of the truly innocent in such cases as *Johnson v Sargant & Sons* and *Lim Chin Aik*. There are also statutory requirements for publication in some jurisdictions but these promulgation requirements are really only technical rules dealing with the date at which laws become operative and effective; they do not resolve the wider problems of unavoidable ignorance of formally published laws. Recent legislative proposals to create limited exceptions to the ignorance of law rule, such as the Crimes Bill 1989 and the Australian Model Criminal Code, are similarly limited to non-publication. Yet they do embody the rudiments of a wider approach in their references to laws not "reasonably made available to the public or to those persons likely to be affected." At present the requirement of making the law available appears intended only to come into operation on non-publication. But as can be seen from cases like *Harkness* there is scope for the argument that a general impossibility exception is needed.[87]

Whether the law under scrutiny in any given case had or had not been published or made available would be an important factor in determining whether an accused's ignorance was unavoidable. Other important factors would be the nature of the law and the activity it regulated and so forth. There may well be arguments that the provision of a general defence would be too vague and open to abuse by claims that were not deserving. However, the counter-argument to this is that judgments about impossibility of compliance, necessity, mistake of fact and the like are made in other areas of the law without any apparent difficulties.[88]

Admittedly, some limitations should be placed upon a general defence of impossibility or unavoidable ignorance. One important qualification would be to impose a requirement of reasonableness so as to avoid self-induced or pseudo-ignorance. This by itself may not be enough, however, to avoid a flood of unmeritorious claims. To appease objections based upon this ground the answer may be to reverse the onus of proof as proposed in the Interim Report of the Australian Commonwealth Review Committee (1990) so that the defendant seeking to plead a defence of unavoidable ignorance would bear the persuasive or probative burden of proving that such ignorance was reasonably unavoidable in the circumstances.

---

[86] *Lambert*, supra n 71 at 229, per Justice Douglas.

[87] Stuart, supra n 38, p 280, says that "courts faced by impossibility *in any circumstances* must be prepared to recognise a common law exception to section 19." (emphasis added)

[88] See, eg, *Tifaga*, supra n 2; *Finau* , supra n 2; *Booth* v *MOT* [1988] 2 NZLR 217; *Breen* v *Police* (1989) 5 CRNZ 238; *Wireless Kapi* v *MOT* unreported, Court of Appeal, Wellington, AP No 51/91, 15 May 1991.