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Development and Conceptualisation of Harm Principle and Mens Rea in Statutory Offences

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Abstract

When the British took administration of the country, the condition of the legal system in India was not so good. Therefore, they turned to the adoption of English Criminal law in India. As per the common law, the motive is not considered of much significance. Motive is an attitude of the mind. It is the emotion prompting the act. Love, compassion, fear, jealousy, hatred, perverted lust, desire for money etc. are examples of emotion prompting us to the act and they constitute motive. It is different from mens rea, which is the immediate cause of committing an offence. In the olden days it was a common belief that legislature was not competent to over-ride the established rules of common law. According to this view, even if the necessity of mens rea is not expressly mentioned in a particular statute, the judges should read between lines the necessary mens rea. Now there are statutes which do not attach much significance to the aspect of mens rea.

Keywords: Common law, crime, mens rea, motive, wrong

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Introduction

The concept of crime will change with the change in social values. It is a continuous process by which old rules are replaced by new ones. For example, cybercrimes can be considered as one of the new concepts for the term crime.

In the earlier period crime meant and included only the wrong against the State and it did not include private wrongs. In England, in the 12th and 13th centuries, crime meant only the wrong against the State and religion. Even murder was not included in the list of crimes.

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Similarly, in the primitive period, people did not recognize the distinction between crime and tort. They confused the crime with torts because in almost all wrongs committed against persons the victims could seek remedy against the wrong doer.

With the passage of time, the State assumed more power over the citizens and the responsibility of protecting their life and property. By the middle of the seventeenth century, a severe change occurred in the European countries as a result of the renaissance and the development of science and technology. This sweeping change in society also resulted in a change in the concept of crime.

In the 18th century, divergent criminological thinking took place in European countries and the earlier view that crime was the result of divine displeasure, superstitions and myths were abandoned and fresh thinking was started regarding crime on scientific background. The evolution of the absolute liability for the wrongdoers is one instance of the change.

By the 20th century, criminologists witnessed a severe change in the concept of crime as the new trend like economic offences. This is often due to the change in the social and economic conditions in the State. With the change in the lifestyle of people, they became more selfish and greedy for acquiring wealth. This paved the way for the growth of economic crimes.

In India, the thoughts about criminal law started from the time of Manu. In his code, he clearly defined the crimes like assault, bribery, theft, robbery, false evidence, slander, libel, criminal breach of trust, adultery, gambling and homicide. The King used to dispense justice himself with the help of councillors. However, one of the major defects in Manu's code was that the gravity of the offence varies with the caste and creed of the criminal. The person belonging to the forward caste will get only a lesser punishment than the persons belonging to the lower castes. The Brahmins were protected and they were placed at a top level by exempting from severe punishments. At the time there was no clear distinction between public wrongs and private wrongs. Serious offences like murder and other homicides were considered private wrongs. So, the victim of the crime could claim compensation. A distinction was also made between casual offenders and hardened criminals. Manu exempts certain crimes from criminal liability. They were crimes done without criminal intention or by mistake of fact or by consent, or by accident.

The right of private defence was well established even at the time of Manu. The code of Manu was continued in India till the establishment of Mohammedan rule. After Mohammedan rule was established in India, the people in India were compelled to follow the criminal jurisprudence of

Muslims. The Muslim legal system was entirely based on the holy book known as Quran. The administration of the criminal justice at that period was entrusted to the hands of Kazis.

The punishment varied according to the nature of the crime. The punishment was four-fold namely, Kisa or retaliation; Diyut or blood money; Hadd or fixed punishment; and Tazir or discretionary punishment. But one of the important defects of the Muslim law was that the quantum of punishment varied according to the purse and power of the culprit. Therefore, there was no uniformity in the sentencing system under Muslim Law.

Derivation of Criminal Law in Common Law Concept

In English Criminal Law, many serious offences like murder, manslaughter and conspiracy to defraud etc are derived from Common law. Still, in the twenty-first century, the courts rely on the age-old judicial pronouncement or the famous common law writers and reporters like- East[3], Hale[4], Coke[5], Hawkins[6] etc. This causes problems in the principle of legality and retrospective application. The importance of certainty and retrospective application in an offence can be found in the best established common law offences like the gross negligence manslaughter offence[7], public nuisance[8], and conspiracy to defraud.

British Period

When the British took administration of the country the condition of the legal system in India was very worse. In the beginning, the British continued the same system but were faced with many difficulties. Therefore, they turned to the adoption of English Criminal law in India. At the initial stage, this arose many conflicting decisions and chaos in the criminal administration.

Therefore, a committee was constituted in 1834, with Lord Macaulay as its president for preparing a Penal Code for India. The Commission submitted its report on 15th June 1834 and

[3] EH East, *A Treaties of the Pleas of the Crown*(1803)
[4] M Hale, *The History of the Pleas of the Crown*(1736)
[5] Co I Inst, *Institutes of the Law of England*(1797)
[6] J Curwood (ed), *A Treaties of the Pleas of the Crown* (8th edn, 1795).
[7] Misra (2004), EWCA Crim 2375, below Ch 15.
[8] *Rimmington*[2005]UKHL 63, below Ch 32.

after a detailed discussion, the draft was approved by the Legislative Council on 6th October 1860 and the Indian Penal Code finally came into force on 1st January 1862.

Theories of Crime

To understand criminal justice, it is necessary to understand crime. Most policymaking in criminal justice is based on criminological theory.

Meta Theoretical Issues

Every Criminological theory contains (1) a set of assumptions (2) a description of the phenomena to be explained and (3) an explanation, or prediction, of that phenomenon. The assumptions are also called meta-theoretical issues. Criminological theories are primarily concerned with the following (1) Aetiology (2) actors in the criminal justice system, such as (a) police, (b) attorneys (c) correctional personnel, and (d) victims.

There are several identifiable types of Criminological theories. The oldest field is Criminal Anthropology, founded by the father of modern criminology, Cesare Lombroso, in 1876. Psychological criminology has been developed in 1914. It tries to explain the finding that there is an eight-point IQ difference between criminals and non-criminals. Even smart people with high IQs are vulnerable to folly.

Ecological criminology was the first sociological criminology. It was developed during the 1920s at the Department of Sociology at the University of Chicago. Hence, it is also called Chicago School Sociology. Ecology is the study of the relationship between an organism and its environment, and this type of theory explains crime by the disorganized eco-areas where people live rather than by the kind of people who live there.

Strain Theory was invented by Emile Durkheim, the father of modern Sociology. In the French language, strain means anomie. So, this theory is also called the anomie theory. It was developed from (1858-1917). The only two things to do are to reduce aspiration or increase opportunities.

Social control theories in Criminology are all about social control. Only those called containment or low-self-control theories have to do with individual psychology. Control theory has pretty much dominated the criminological landscape since 1969. It focuses up on a person's relationship with their agents of socialization, such as parents, teachers, preachers, coaches, scout

leaders, or police officers. It studies how effective bonding with such authority figures translates into bonding with society, hence keeping people out of trouble with the law.

Labelling theory was a chill of the 1960s and 1970s, which saw criminals as underdogs who initially did something out of the ordinary, and then got swept up in a huge, government-sponsored labelling or shunning reaction. It argues that anyone facing such an overwhelming, negative labelling social reaction will eventually become more like the label because that is the only way out for their identity formation. It points out that sometimes it is best to do nothing (for minor offending), and that there are few reintegrative rituals designed to help people fit back into their communities.

Conflict theory holds that society is based on the conflict between competing interest groups; for example, rich against poor, management against labor, whites against minorities, men against women, adults, children, etc. These kinds of theories also have their origins in the 1960s and 1970s and are characterized by the study of power and powerlessness.

Left realism was developed in the mid-1980s. Sometimes people of the working -class prey upon one another. That means they victimize other poor people of their own race and kind. It wants the police to have more power in protecting poor people, but on the other hand, doesn't want the police to be invasive or intrusive.

Peacemaking Criminology came during the 1990s. It suggests the following: (1) the solution to crime is to create more caring (2) create mutually dependent communities and (3) try to strive for inner rebirth or spiritual rejuvenation (inner peace).

Feminist Criminology matured in the 1990s. This theory says that patriarchy, or male domination, is the main cause of crime. Feminists also tend to call for inviting more attention to female points of view. Postmodern criminology also matured in the 1990s. Postmodernism itself was born in the late 1960s. It explains how stereotypical words, thoughts, and conceptions limit our understanding. This theory also explains how crime develops from feelings of being disconnected and dehumanized. It says that our current legal system should be replaced with informal social controls such as group and neighbourhood tribunals.

What Conduct Ought to be Criminal

Parker in his work, *The Limits of the Criminal Sanction,* identified two important conditions to be satisfied before ascertaining conduct as a crime: (1) the conduct must be wrongful; (2) it must be necessary to employ the criminal law to condemn or prevent such conduct. The general view is that conduct should not be prevented unless it is wrongful. Therefore, here it is important to identify the wrongful act.

Clarkson and Keating in their work on *Criminal law (1998),* has provided three features for identifying wrongful act. According to them, the first one is that the conduct must be immoral. Secondly, conduct is wrongful if it causes harm or serious offence to others. Thirdly a conduct is wrongful if it causes harm to the actor (himself). The conduct that comes under the second class is called harm principle or liberalism and the conduct under the third class is called paternalism.

According to Patric Devlin, criminal sections should be determined by the deep disgust of the right-minded person. He suggested that the criteria to identify conduct as criminal should be based on the depth of the antipathy.

Harm Principle

The other view is that the harm principle should be taken into consideration for criminalizing conduct. As per this view, people should be allowed to make free choices unless and until such choice will constitute a serious offence to others. This is also called the liberal policy of the State in favour of the citizen's conduct.

J. Kaplan, in his article published in the Duke Law Journal [1971] has made a distinction between harms. Accordingly, harm can be classified into (involving direct harm to others) and secondary (involving indirect harm to others). But this distinction got only less attention, because it has been considered that it is a difficult task in drawing the dividing line between primary harm and secondary harm.

Legal paternalism is based on the view that each individual should be protected from the harm made by himself. Eg: penalizing the two-wheeler drivers who are driving vehicles without wearing the protective helmets. Here the law is entitled to interfere with the autonomy for it's own good.

Inchoate Offences

There are instances where a substantive offence may not have come to completion some other actions or agreements. These are known as inchoate offences. Williams in his book *Textbook on Criminal Law* defines inchoate crime as one that is "committed by doing an act with the purpose of effecting some other offence". Actually, the inchoate offence is one that is closely related to the main offence. There are three main inchoate offences- (1) attempt (2) conspiracy and (3) incitement. The important characteristic of an inchoate offence is that it will share the common feature of the main offence.

The Indian Penal Code, 1860

In India, the law relating to the definition and punishment of crime is mainly dealt with in the Indian Penal Code, 1860. The provision under the Code can broadly be divided into two types, viz., (i) General principles[9] and (ii) Specific offences[10].

Conceptualisation of Crime

Criminal law is that branch of law, which deals with crimes and their punishments. Crimes form a specific category of wrongful acts. The state intervenes to punish the wrongdoers who commit wrongful acts of this category. The object of criminal law is the punishment of the offender and the preservation of law and order.

Crimes are generally considered as a particularly harmful effect on the public and do more than interfere with merely private rights.[11] Sir Carleton Allen writes:

[9] General principles are related to the jurisdiction, basic principles of criminal law, criminal liability and the provision relating to general exceptions from criminal liability.

[10] The specific offences contained in IPC may be classified into six major categories. They are offences against the State (Chapters VI, VII), Offences affecting the Common Wellbeing (Chapters VIII, IX, IX-A, X, XI, XII, XIII, XIV, XV, XIX, and XX), Offences Affecting the Human Body (Chapter XVI), Offences Affecting Property (Chapters XVII, XVIII), Offences Affecting Reputation (Chapters XXI, XXII) and Offences Relating to Marriage (Chapters XX and XX-A).

[11] David Ormerod, *Smith and Hogan's Criminal Law*, (2011),13 ed. Oxford University press, p.5

"Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security and wellbeing of society, and because it is not safe to leave it redressable only by compensation of the party injured."[12]

The Indian Penal Code contains the law relating to crimes and their punishments. The expression 'crime' has not been defined in the Indian Penal Code. A crime is an act or omission in respect of which punishment may be inflicted on the person responsible for the act or omission.

Similarly, it is difficult to attach an exact definition to the term crime. There are motoring offences ranging from simple parking errors to death by dangerous driving. Offences against the person range from slaps to murder.

In Halsbury's Laws of England, the crime is defined as "an unlawful act or default, which is an offence against the public. Blackstone in his classical work, *Commentaries on the Laws of England*, attempted to define crime as a public wrong. According to him "crime is an act committed or omitted in violation of a public duty forbidding or commanding it". Blackstone identified the demerits of his first definition, so he modified it and said, "a crime is a violation of the public rights and duties due to the whole community.

Later when Stephen got an opportunity to edit the work of Blackstone, *Blackstone's commentaries,* he made a modification to the definition. Thus, from the definitions given by Blackstone and Stephen, one can conclude that the crime is a breach of laws which injures the community in general. But this concept has been criticized by Kenny as erroneous because in his view all acts that are injurious to the community are not necessarily crimes. A Crime is an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act.

India & Greece

In Greek language the term crime owes its genesis to the term 'Kimos' which is similar to the term 'Karma' in Sanskrit, which means social order. Garafalo defines the term crime as "an immoral and harmful adaptation of the individual to society". This definition also had its

[12] CK Allen, *The Nature of Crime'*(1931) *Journal Of Society Comparative Legislation*, Feb, reprinted in *Legal Duties* 221 at 233-234.

demerits because all offences will not come against moral rules. For instance, the crimes like traffic offences, taxing etc. Some Others defined crime as a conventional wrong. Austin defined crime as "a wrong which is pursued by the sovereign or his subordinates the definition of Austin does not hold well. So, Kenny modified the definition of Austin and said, "crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown along if remissible at all". Section 40 of the Indian Penal Code says that the word offence denotes a thing made punishable by this Code or under any special or local law.

Elements of Crime

To constitute a crime, two elements are necessary and they are the physical element or actus reus and the mental element or mens rea. The fundamental principle of penal liability is based on the Latin maxim "Actus non facit reum nisi mens sit rea" It means that an act does not become a crime unless done with a guilty mind. So, the guilty mind and the act must concur to constitute a crime. Both the Actus Reus and Mens Rea are essential to constitute a crime.

Actus Reus

The term 'Actus' means a deed, a physical result or conduct. It is defined as "such result of human conduct as the law seeks to prevent". For e.g. in the case of a murder, the conduct of the murderer is brought out by the victim's death. Here, the conduct is 'Actus reus'.

The conduct of the offender is experienced in 3 ways and it includes a certain wilful movement or omission, certain surrounding circumstances including past acts and certain consequences. An act is a conscious movement. It results from the operation of the will. The will may be by thinking and working out by the mind. It may also be expressed by way of working out a problem on paper. The former is called Internal Act and the latter is called External Act.

Elements of Act

The act consists of three basic elements namely origin, circumstances and consequences. If a person commits an act, he has to think of it and do some physical bodily activity. For example, if A wants to kill B, A must think of it and then raise his hand, apply his fingers on the trigger and pull it.

In the above example, the aspect that the rifle must be already loaded and that B should be in the line of the trigger point so as to enable the act are the circumstances. Consequences are the outcome (result) of the origin or circumstances. In the above example, the fall of the trigger and the explosion of the bullet constitute the consequences of the act. It is not the origin that completes the act as illegal, but it is only the circumstances and consequences which make the act illegal or an offence.

Characteristics of Act

An act is an event subject to the control of willpower. For example, 'A' falling from a tower or building is an event whereas 'A' jumping from a tower or building is an act. Similarly, an act may include omission also. For instance, a parent can be held liable for the murder of his child by starvation.

A man is liable only for such acts, the consequences of which are foreseen by him. So also, if there are subsisting and intervening causes, the act is not punishable. For e.g, if a man shoots a girl, but she dies from fever, then the accused is not guilty of murder, because the death is not due to the act of shooting.

Under certain circumstances, even without physical participation, a man's act is punishable. For e.g, a man in Delhi can be held liable for arranging the commission of a crime in Madras. Thus, acts like Abetment and Conspiracy are punishable even though there is no physical participation in the commission of the crime.

Mens Rea

A prohibited act will become a crime when it is accompanied by a certain state of mind. There must be a mind at fault before any crime can be committed. An act or omission alone is not sufficient to constitute a crime. The act or omission should have been followed by evil intent. The combination of an act with the intent makes a crime. An act by itself is not wrong. An act done with a guilty mind makes a crime if the act is prohibited by law. Mens rea is an evil intention or knowledge of the wrongfulness of the act. Mens rea may be of the following kinds:

1. **Intention**

Intention indicates the state of mind of a man who, not only foreses, but also desires the possible consequence of his conduct. It can be illustrated through an example. Suppose X throws a stone at Y with a desire to cause injury to Y. As a result of that injury is caused to Y. The desire of X to cause injury to Y is the intention or mens rea and the act of throwing the stone and the consequential injury is the actus reus.

2. **Recklessness**

When a person does an act with foresight of injury but without the desire to cause harm to any person the state of mind can be called "recklessness". It can be illustrated through an example. Suppose X drives a vehicle at high speed through a busy street without any desire to commit injury to any person. He foresees the possibility of an accident but consciously takes the risk that may result from such a driving. The accident may or may not happen. The state of mind of X at the time of driving is recklessness. It is a mind at fault with mensrea for constituting a crime.

3. **Negligence**

Negligence means want of care. When a person who is bound to take care fails to take care of an ordinary prudent man his mind is at fault and the faulty state of mind is known as "negligence". Recklessness includes negligent conduct.

4. **Knowledge**

Knowledge refers to the personal information of a person doing an act. It is a state of mind of a person. Under law doing of an act with knowledge may constitute a crime. It can be illustrated through an example. Suppose X receives stolen property from Y with knowledge that it is stolen property. The act of X is an offence punishable under law.

5. **Motive**

Motive is an attitude of the mind. It is the emotion prompting the act. Love, compassion, fear, jealousy, hatred, perverted lust, desire for money etc. are examples of emotion prompting us the act and they constitute motive.

Motive refers to the ultimate intent. X is a starving man. He decides to commit theft of bread to satisfy his hunger and he commits theft of bread from B's shop. The immediate intention of his act is theft of bread and the motive is to satisfy his hunger. Thus, motive is the ulterior object of an act which prompted him to do an act. Purity of motive or good motive will not convert an act which otherwise criminal into one which is not punishable.

Mens Rea in Statutory Offences

There are certain enactments which define offences without mentioning the necessity of mens rea. In those statutes offences are defined in absolute terms. The Opium Act, 1878, The Foreign Exchange Act, 1947, The Prevention Food Adulteration Act, 1954, The Narcotic Drugs and Psychotropic Substance Act, 1985, etc, are examples of such enactments.

In olden days it was a common belief that legislature was not competent to over-ride the established rules of common law. According to this view, even if the necessity of mens rea is not expressly mentioned in a particular statute, the judges should read between lines the necessary mens rea. In other words the necessity of mens rea should not be taken as for granted. Thus even if the offences are defined without mentioning the necessity of mens rea, the courts used to acquit the accused in the absence of guilty mind. But the present view is that when the legislature defines an offence in absolute terms the courts cannot read in between lines the necessary mens rea.

In *State of Maharashtra v. M.H. George*[13], this case the accused was a passenger in a Swiss Plane from Zurich to Manila. When the plane landed at the Bombay Airport, 34 Kg of gold was recovered from him. He pleaded that he brought gold in to India for mere transit to Manila. Supreme Court convicted him on the ground that violation of law itself is sufficient for criminal liability even without mens rea.

In *Inder Singh v. State of Punjab*[14], the appellant received a parcel containing fruits. While he was carrying the parcel from the railway station the Police arrested him. The parcel was found to contain Opium along with fruits. The mere possession of Opium is punishable under the

[13] AIR 1965 SC 722.
[14] 1972 (2) SCC 372.

Opium Act, 1878. The accused was punished for possession of Opium though he had no knowledge of the existence of Opium in the parcel.

Thus the classical view that 'no mens rea, no crime' has been avoided by several statutes enacted by the legislatures in India and by such laws severe punishments have been prescribed for mere *actus reus.* Thus the statutory offences constitute an exception to doctrine of mens rea.

Vicarious Liability in Crimes

Vicarious liability is a principle by which one person is held liable for another's wrong. In the case of crime only the person who actually commits the crime is normally responsible. There are certain exceptions to the general rule that in case of crime only the person who committed the crime is liable. However there are some exceptions to this general concept. For instance Section 154 of IPC provides that if unlawful assembly or riot takes place on the land of person, the owner or occupier of such land is liable to be punished with fine not exceeding one thousand rupees if he or his agent or manager fails to give the earliest notice of an unlawful assembly or riot to the principal officer at the nearest police-station.

In *R. v. Prayag Singh*[15], a riot took place on the land of one Prayag Singh during the course of which one Pir Khan was killed. Prayag Singh was punished with a fine of Rs. 1000/-.

According to Section 155 of the I.P.C. whenever a riot is committed for the benefit of the owner or occupier of any land who claims any interest in such land, if such person has reason to believe that such riot was likely to be committed, the owner or occupier is liable for fine if he has not taken all lawful means to prevent such a riot. Similarly, Section 34 deals with joint liability or vicarious liability on the basis of "common intention". By virtue of Section 34 of the Indian Penal Code, "when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone".

In *Hari Ram v. State of UP*[16], it was held that in order to establish the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all accused persons to commit the offence.

[15] 1890 (12) All 550.
[16] 2004 (8) SCC 146.

In *State of U.P v. Kishan Chand and Others* [17], it was held that the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

Sections 120A and 120B of IPC deal with the joint liability of a member of a conspiracy to commit an offence. Section 149 deals with joint liability or vicarious liability of members of an unlawful assembly when an offence is committed by a member in the prosecution of the common object of the unlawful assembly.

Similarly, Section 396 deals with joint liability or vicarious liability of dacoits when a dacoit commits murder for committing dacoity. Section 460 deals with the joint liability of persons concerned in lurking-house trespass or house-breaking by night when death or grievous hurt is caused by one of them.

In *Koppula Venkat Rao v. State of A.P.*[18] , it was held that an attempt consists in it, the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

Conclusion

In India, the thoughts about criminal law started from the time of Manu. The right of private defence was well established even at the time of Manu. Similarly in the olden days it was a common belief that even if the offences are defined without mentioning the necessity of mens rea, the courts used to acquit the accused in the absence of a guilty mind. But the present view is that when the legislature defines an offence in absolute terms the courts cannot read between lines the necessary mens rea.

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[17] 2004 (7) SCC 629.
[18] 2004 (2) KLT SN 19.