

The Elements of Crime under the Pakistani Legal System: An Overview

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Abstract

Under criminal jurisprudence, a crime is generally different from an offence, however, in Pakistan, both of them are seen as the same thing. There are different categories of crimes under Anglo-American jurisprudence, however, Pakistan does not follow this model and has categorized offences into three types on the touchstone of the presence of *mens rea* as the significance of *mens rea* is such that its presence or lack thereof changes the whole category of crime altogether. There are three essential elements of a crime: *mens rea*, *actus reus*, and concurrence, and the Pakistani Courts with a handful of exceptions mention the first two as the only elements while forgetting concurrence. While there is a presumption of *mens rea* for every offence, the same can be ruled out by the statute itself. The onus to prove the guilt of the accused is on the prosecution through reliable and admissible evidence as a person is deemed innocent until proven guilty. The methodology used in this paper is doctrinal.

Keywords: Criminal Law, Criminal Jurisprudence, Crime, Offence, Elements of Crime, Mens Rea, Actus Reus, Concurrence

Introduction

In every legal system, there is always someone who breaches the law and someone whose right has been violated, which consequently brings about a means to provide a proper remedy to the victim party. It is an offence against that person. This is the crux of civil liability. It is based on the fundamental principle that ‘where there is wrong there is remedy’ (*Marbury v. Madison*, 1803, pp. 163-166). In criminal law, however, the stakes are different. A crime is an offence against not just the victim party but rather the whole society at large. Consequently, in such cases, strict punishments are imposed. These punishments are usually imposed to make sure that the public conscience no longer feels harmed. In such cases, the death penalty was usually imposed. This was due to following the simple age-old custom, ‘an eye for an eye, a tooth for a tooth’ (Harmon Et al, 2023). However, over time this premise would become a subject of stern scrutiny and alternative modes of punishment would be introduced following the endorsement of new theories of punishment such as deterrence, retribution, and rehabilitation (Meyer, 1969). This article discusses what is meant by a crime and

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offence respectively. Whether both mean the same thing? Or whether both embody different precepts? And if both of them are different, then are there any similarities at all between them? What are the elements that constitute a crime or offence? This article lays particular emphasis on whether Pakistan's laws embody either an offence or a crime? Whether misdemeanors and felonies exist within the Pakistani criminal justice system or not? What are the elements that constitute a crime or offence? It discusses what is meant by *mens rea*, *actus reus*, and concurrence. It discusses how a crime or offence cannot exist even if one element is missing. It discusses how to prove whether a person has committed an offence or a crime, the same must be proven beyond reasonable doubt (*Ahmed Ali v. The State*, 2023, para 9) It discusses how the burden to prove the guilt of the accused is on the prosecution (*Jahanara Khatun v. The State*, 1967, pp. 706-707). Hence, this article discusses the basic principles of criminal law that come within the scope and ambit of crime and punishment as incorporated within the criminal justice system. Of course, for one to be punished for a crime, one must make sure that the concerned act is a crime. Every particular crime has its ingredients or elements that make up its constitution, however, the most basic elements include *mens rea* (guilty intention), *actus reus* (actual commission of said guilty intention), and lastly concurrence (where both *mens rea* and *actus reus* exist at the same time) (*Salim Javed Durrani v. The State*, 2005, at para 7). Hence, this article particularly focuses on these very same propositions discussed hereinabove as expounded by the Pakistani Superior Courts.

Research Methodology

This article has adopted the doctrinal approach as it discusses the applicable law that embodies the principles of crime and their elements and its interpretation and application by the Pakistani Superior Courts. This article has also adopted an analytic approach as it engages in an analysis of all the relevant case laws about the proposition and provides a critique of the same in terms of their interpretation and application.

Literature Review

As discussed in the introduction hereinabove, under every legal system, the two central laws are civil and criminal law. Each case falls under these two categories of law. Under civil law or the law of tort, one person shall have a case against another person or the whole world at large for an infringement of his civil right caused by the other party, such as assault, battery, trespass, nuisance, negligence, etc. (Galligan, 2019). Thus, there are rights in *rem* (rights against the whole world) and rights in *personam* (rights against the whole world) involved

(Webb, 2018). In civil cases, for every civil right infringed, there is always a remedy available, which is based on the equitable maxim *ubi jus, ibi remedium* (where there's a right, there is a remedy) (Panicola, 2022).

In contrast to civil law, criminal law is the law that deals with the punishment of someone who committed a crime or an offence. There is thus confusion between both. Are they both the same thing? Or are they two very different things? Do they share any similarities at all? Thus, we shall first distinguish between both crime and offence. The Black's Law Dictionary (hereinafter referred to as the "Dictionary") provides that a crime is a committed or omitted act that violates a public, which was either forbidding or commanding said act (Black, 1910). It also defines it as an infringement of a whole community's public duty or right and the law has provided that for such an infringement, the offender shall compensate the public for it (Black, 1910). The dictionary provides yet even further definition, which is that a crime is a wrong that the government considers as injurious to the public and proceeds to punish it in a 'criminal proceeding' (Black, 1910). The dictionary proceeds to discuss a crime and public offense along the same lines and provides that an offender who has committed a crime, shall then upon conviction be imposed with the following punishments: 1). Death, 2). Imprisonment, 3). Fine, 4). Removal from office, 4). Disqualification to hold and enjoy any office of honor, trust, or profit (Black, 1910).

Hence, we can see that there is no universal definition of crime, but the following elements can be made out: 1). Commission or Omission of an Act. 2). Violation of a law forbidding or commanding such act. 3). Violation of a right owed to the community/public. 4). Punishment is given by a criminal proceeding in the government/public's name. 5). Harsh punishments such as death, imprisonment, removal of public office, or being disqualified from holding and enjoying any office of trust, honor, or profit are imposed.

Hence, we can understand that a crime is a commission or omission of an act that is forbidden or commanded by law, which violates the rights of the public at large, and which has harsh punishments imposed because of such an act. Pakistan's substantial criminal law, the Pakistan Penal Code, 1860 (hereinafter referred to as the "PPC") does not provide any definition of a 'crime'. Instead, it provides for the definition of an 'offence'. Section 40 of the same provides that the term 'offence' indicates anything which is made punishable by this code. Section 4(o) of the Pakistan Code of Criminal Procedure, 1898, (hereinafter referred to as the "Criminal Code") provides that an offence refers to the commission or omission of any act which is made punishable by any law which is in force for the time being in Pakistan and also includes any act concerning which

a person can file a complaint under Section 20 of the Cattle-Trespass Act, 1871. Thus, as mentioned hereinabove, what does the word ‘offence’ mean? Is it the same thing as a crime? Or is it different? According to the Dictionary, an offence is either a crime or misdemeanor and a breach of the criminal law (Black, 1910). The West Encyclopedia of American Law also defines an offence as a breach of law and a crime (West, 2005). It also provides that an offence may also consist of a felony or a misdemeanor as the term is used to indicate an infringement of public rights rather than a private one (West, 2005).

Now, we can see that an offense is a violation of the law of man and that it falls within the scope of crime as well. But we can also see that it may also consist of a felony or a misdemeanor as well. Now, the question arises, what are these two? Are they both the same thing and are they different? Any offense that is lower than a felony and is punishable by fine, penalty, forfeiture, or imprisonment other than in a penitentiary (West, 2005). While a felony is defined as a serious crime, it is characterized as any offense which is punishable by imprisonment which is more than one year, or death under federal law and many state laws (West, 2005). Both come under American criminal law rather than Anglo and Pakistani criminal law.

Hence, we have found out that under the context of offense, a misdemeanor is a small offence while a felony is a big offence and an offence is a breach of law or a crime to be precise. Does that mean that an offence and crime are the same things? The answer is in the negative. An offence need not be criminal. It may also be civil as well an offence can be both a civil and a criminal one. Thus, the appropriate term that should be used is crime. However, as mentioned above, under Pakistani criminal law, the term that is used is “offence”. There is nothing called a felony or misdemeanor, although there are different types of punishments for different types of offences which can be harsh or mild depending upon the type of offence committed. Hence, we can say that there are ‘big’ and ‘small’ offences in Pakistan.

In “*Muhammad Ibrahim Haleemi v. The State*”, the Court defined an offence as “the combination of the intention with the action exposing such intention” (*Muhammad Ibrahim Haleemi v. The State*, 1999, p. 543). Thus, the Court is describing the elements of an offence which we will discuss in detail hereinbelow.

Elements of Crime

We have discussed hereinabove what we mean by ‘crime’ and how in Pakistan, the term ‘offence’ is used instead. For our purposes, in this paper, we shall use both interchangeably. Now, the question arises, what are the main elements that constitute a crime? They are *mens rea*, *actus reus*, and concurrence.

(Chandola, 1999). Thus, for a crime to occur, there must be *mens rea*, which means either ill intent (Shaikh, 2015) or guilty mind (Khandewal, 2022), *actus reus*, which is the completion of actions desired for that crime (Shaikh, 2015) or a commission or omission of an act that compose up of a crime's physical components (Khandewal, 2022) and lastly concurrence, which is where the physical exists with the mental condition at the same time (Shaikh, 2015), that is to say, where both guilty intention and the act or omission meet one another. Hence, for a crime to occur, there must be a guilty intention (*Muhammad Uris v. The State*, 1990; *Malik Muhammad Sameen Khan v. Returning Officer*, 2012; *Ameer Khan v. The State*, 2014]), an act or omission of that guilty intention (*Abdul Ghaffar Khan v. Umar Ali Shah*, 2011) and lastly both have to occur simultaneously or concurrently (*Salim Javed Durrani v. The State*, 2005; *Abdul Ahad v. The State*, 2007). In "*Kalipada Bawali v. The Crown*", the Court held that the material test in ascertaining the guilt of the accused is seeing the mind of the person to see the *mens rea* of the person in the instant case (*Kalipada Bawali v. The Crown*, 1954, p. 83). Thus, *mens rea* is a basic ingredient for the determination of guilt in a person (*Tariq v. The State*, 1986, para 8). It is deducible from a person's acts or omissions (*Sardar Khalid Omer v. The State*, 1987, para 10; *Sardar Muhammad Yasin Khan v. Raja Firoze Khan*, 1969, p. 1419). Or to be more precise, the intention of the accused in the instant case can be gathered or inferred from the external act attributed to him (*Sohail v. Badam*, 1996, para 11). Of course, mere rashness or negligence is not enough to constitute *mens rea* unless it can be culpable rashness or criminal negligence (*Jamal v. The State*, 1977, para 6). By culpable rashness, we mean acting with the understanding that wrong and illegal consequences may follow but with the hope that they will not, and being confident that the person who committed such an act has taken sufficient precautions to prevent such consequences from happening. (*Jamal v. The State*, 1977, para 6). Culpable negligence refers to acting without the understanding that the illegal and wrongful effect will follow but under the circumstances, that show that the person who had committed such an act had not exercised the caution that was incumbent upon him and that if he had, he would have the understanding that said act had wrong and illegal consequences. (*Jamal v. The State*, 1977, para 6). *Mens rea* cannot be determined if there is no guilty intention or knowledge of the crime that was committed by the accused. (*Muhammad Bakhsh v. The State*, 1995, para 11). Hence, the question of *mens rea* can very often be deduced from the facts and circumstances of the case at hand (*Sharjeel Inam Memon v. NAB*, 2019, para 25). In "*The State v. M. Idrees Ghauri*", where the accused had appealed both the conviction and sentence that was awarded to him for the offences of committing corruption and corrupt practices under the National Accountability

Ordinance, 1999, (hereinafter referred to as the “NAB”). The Court considered that for an offence to be constituted, there needs to be both *mens rea* and *actus reus* and also observed that under the law in question, Section 9(a)(vi), NAB, the former would be found in misuse of authority that he was well aware of and also of illegal gain or any sort of undue benefit. (*The State v. M. Idrees Ghauri*, para 12). The Court set aside the conviction and sentence awarded to the accused as it could not find any evidence of the *mens rea* of the alleged offence. The Court’s observation was correct to a certain extent as it has forgotten to include the element of concurrence. In “*Zahid Kamal v. Ex-Officio of Justice of Peace/Additional Sessions Judge, Sheikhpura*”, the Court discussed the rationale behind the elements of *mens rea* and *actus reus* under criminal liability. The Court observed that the reasoning and concept behind both are that it shall be wrong to punish those who ‘innocently’ caused harm and that there is only punishment for ‘bad deeds’, not ‘bad thoughts’ (*Zahid Kamal v. Add. Sessions Judge, Sheikhpura*, 2020, para 5).

In “*Muhammad Ismail Qureshi v. Pakistan*”, where the petitioner had challenged Section 295-C, PPC, which provided that for the crime of insulting the name of the Holy Prophet (S.A.W.) in any, the requisite punishment is either imprisonment for or the death penalty. This provision was challenged on the touchstone that the alternative punishment of life imprisonment provided therein is repugnant to the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah of the Holy Prophet (S.A.W) as the offence is such that it comes within the purview of *hadd* and thus the punishment of death provided by the Holy Qur’an itself could not be altered. The Court ruled that to incur criminal liability, any wrongful act has to be done with a corresponding wrongful purpose in mind. (*Muhammad Ismail Qureshi v. Pakistan*, 1991, para 35).

This observation is correct. The Court also observed that there are some crimes or offences for which a person may be penalized for if he did not do his best as a reasonable man of ordinary prudence would do to avoid the said consequence or how a man may be held liable for his acts without giving regard to whether he committed any culpable negligence or had any malicious purpose in mind. The Court thus categorized three kinds of offences, namely:

- i. Intentional Wrongs, in which the *mens rea* is intentional there is some malicious design in the mind.
- ii. Wrongs of Negligence, where the *mens rea* is not intentional but instead it assumes the less serious nature of carelessness. In such cases, a plea of mistake is a strong defence provided that said mistake was not made negligently.

- iii. Wrongs of Strict Liability, in which there is added condition of *mens rea*. In such cases, a plea of mistake cannot be used as a means of defence (*Muhammad Ismail Qureshi v. Pakistan*, 1991, para 35).

This classification is correct. In “*Arshad Mahmood v. The State*”, the Court defined *actus reus* as “simply a statement of the point at which the criminal law will intervene to penalise a particular type of human conduct assuming a certain state of mind.” (*Arshad Mahmood v. The State*, 1991, para 8). This observation is laudable. In “*Sher Muhammad v. The State*”, the Court observed that alongside *mens rea*, an incriminating material or fact any piece of evidence that ties the accused to the crime must also be included in order to incur criminal liability. (*Sher Muhammad v. The State*, 1998, p. 1361).

In “*Salim Javed Durrani v. The State*”, the Court after contemplating on the stages of a crime accurately provided all the elements that constitute a crime. The Court observed that the most essential element is *mens rea*, followed by *actus reus* and lastly, where both these elements meet, concurrence (*Salim Javed Durrani v. The State*, 2005, at para 7).

This observation is laudable as it has accurately provided all the elements that constitute a crime, unlike the other judgements which only provided the first two elements and would consistently forget the last one. In “*Abdul Ahad v. The State*”, the Court observed that.

“*In Jurisprudence, “mens rea” means the intent or mental condition which must concur with the act done and the consequences achieved. The combination of these acts would tag the wrong doer with the mens rea.*” (*Abdul Ahad v. The State*, 2007, para 15).

This observation is laudable. Although the Court has not mentioned the element of concurrence directly, it is still discussed therein indirectly. In several other cases, the Courts would consistently forget the element of concurrence in their respective expositions of the elements of crime (*Nasir Abbas v. The State*, 2011, para 9; *Syed Hamid Saeed Kazmi v. The State*, 2017, para 49; *Raja Khurram Ali Khan v. Tayyaba Bibi*, 2019, para 22; *Zahid Kamal v. Ex-Officio Justice of Peace/Additional Sessions Judge, Sheikhpura*, 2020, para 5; *Muhammad Masood Chishti v. Chairman, NAB, Islamabad*, 2021, para 12).

Where the Elements are not Needed to Constitute a Crime

We have discussed hereinabove that there are elements without which a crime cannot be constituted. However, this rule is not absolute, it allows for exceptions. Where a particular statute has done away with the element of *mens rea* or is silent about it, the mere doing of the act itself shall supply the *mens rea* (*Daluram Bahani v. The State*, 1958, p. 193; *Pakistan v. Hardcastle Waud*

(Pakistan) Ltd., Karachi, 1967, p. 12; *State Bank of Pakistan v. Khawaja Akhtar Elahi*, 1992, para 12; *Muhammad Younis v. Muhammad Khan*, 1999, p. 2138; *State Bank of Pakistan v. Syed Akbar Hussain Rizvi*, 2002, para 14; *Messrs Iram Ghee Mills, Lahore v. Customs*, 2004, p. 570) or by the text and substance of which the offence handles rules it out. (*Nazar Hussain v. The State*, 2007, p. 1605; *Bilal v. The State*, 2007, p. 3101; *Muhammad Noor v. The State*, 2010, p. 931-932). However, it should be noted that merely removing the term “knowingly” or “intentionally” is not enough to deny this presumption as all such words do is ‘to expressly say that which is usually implied (*Nazar Hussain v. The State*, 2007, p. 1605). Hence, where the terms that are used in the law are not unambiguous, an examination of the general scheme and object of the statute becomes necessary to determine whether the general rule of liability has been departed from. (*Nazar Hussain v. The State*, 2007, p. 1605). In other words, unless there is something in the law’s text and substance that indicates the need to establish the element of *mens rea*, generally it is sufficient to prove that non-compliance with the law has occurred. (*The State v. Fateh Khan*, 1968, p. 89; *Syeda Waheeda Shah v. Election Commission of Pakistan*, 2013, para 33; **R vs. Prince, 1875, para 21**).

Burden of Proof

We have discussed the elements that constitute a crime hereinabove. We shall now discuss on whom the burden to prove the elements of crime lies. Proving that such elements are involved in the case at hand is on the prosecution (*Jahanara Khatun v. The State*, 1967, pp. 706-707). It is essential that one can prove that the accused had *mens rea* when the crime was committed to charging him for “criminal misconduct”. (*Mst. Riaz Bibi v. S.H.O, Police Station, Zahirpur*, 2002, para 11; *FBR v. Nafees-ur-Rehman Barry*, 2020, para 5). The existence of *mens rea* cannot be automatically presumed merely because an illegal order has been passed by a public functionary as very strong evidence is needed to prove unfairness and the want of good faith by the accused (*Sardar Khalid Omer v. The State*, 1987, para 18). Thus, the criminal prosecutor must prove that the accused is guilty beyond any reasonable doubt (*Muhammad Younus v. Muhammad Khan*, 1999, p. 2138). This is based on the principle that every single person who is accused of something shall be considered innocent unless it is proven otherwise that he is guilty through legal and concrete evidence. (*Muhammad Ibrahim Haleemi v. The State*, 1999, p. 543; *Sanullah v. The State*, 2015, para 7; *Zafar Majeed v. Umer Asghar*, 2019, para 9). Such a charge is to be proved either through direct or circumstantial evidence (*Muhammad Ibrahim Haleemi v. The State*, 1999, p. 543). When it comes to direct evidence, its soundness depends upon whether its value is corroborative (*Muhammad Ibrahim Haleemi v. The*

State, 1999, p. 543). It is considered to be the best evidence and it needs no corroborative evidence if it is entirely credible (*Saeed Ullah v. The State*, 2021, paras 18-19). Whereas in the cases of circumstantial evidence, the simple consideration is whether the alleged crime which is committed by a person is unreconcilable with any reasonable assumption of the said person's innocence (*Muhammad Ibrahim Haleemi v. The State*, 1999, p. 543). Hence, in the latter case, each circumstance must be linked without any break of the link (*Muhammad Ibrahim Haleemi v. The State*, 1999, p. 543). Every chain of evidence must be able to link the accused from one end to the crime at the other end (*Sikander v. The State*, 2021, para 15). Should there be a missing link, then the whole chain is broken, and thus the whole evidence is tossed out the window (*Sikander v. The State*, 2021, para 15). Hence, it is a basic principle of criminal jurisprudence that a person shall not be linked to a crime unless and until the criminal prosecutors can prove his guilt beyond any reasonable doubt through legally sound and concrete evidence (*Abdul Ahad v. The State*, 2007, para 15) as penalizing a person in the absence of *mens rea* would be unjust (*Rizwan Ullah v. The State*, 2023, para 12).

Conclusion

We can conclude that generally a crime and offence are not usually the same thing as offences can be of both civil and criminal nature as well. However, in Pakistan, an offence is usually the term used to denote a crime under criminal law. There is no categorization of crimes into misdemeanors and felonies in Pakistan as is done in Anglo-American criminal jurisprudence, however, in Pakistan, there is a categorization of offences nonetheless. The elements of crime are three: *mens rea* (guilty intention), *actus rea* (act or omission of that guilty intention), and concurrence, where both the previous two meet. However, in Pakistan, the courts mostly refer to the previous two as the elements of crime and leave out concurrence with only a handful of exceptions. The categorization of offences in Pakistan is three in nature: intentional crimes, crimes of criminal negligence, and crimes of strict liability. The first two have the element of *mens rea* incorporated within, with criminal negligence incorporating it less compared to intentional offences and the latter do not need the element of *mens rea*. The impact of the element of *mens rea* is such that due to its presence or a lack of its presence, the whole category of crime and its requisite punishment changes as a result. There are also exceptions in which *mens rea* is not necessarily incorporated within, with the general presumption being that *mens rea* is an essential ingredient unless the law that prescribes the offence either expressly or implicitly rules it out or that the subject matter/substance with which the offence deals with rules it out.

The criminal prosecutor bears the burden to prove that a person who is accused of something is guilty beyond any reasonable doubt every single person who is accused of something shall be considered innocent unless it is proven otherwise that he is guilty through legal and concrete evidence.

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