Analytical Study on the Structure of Criminal Offences under the Penal Code of Myanmar

Khin Phone Myint Kyu[1], Khin Khin Su[2]

Abstract

The paper titled "Analytical Study on the Structure of Criminal Offences under the Penal Code of Myanmar" analyzes the different ingredients to construe a crime or an offence. The words '*mens rea* such as purposely, knowingly, recklessly, and negligently and *actus rea'* are regarded as the element or structure of a crime. The researchers also critically analyze whether a person has been said to commit a crime when and which elements of crime met together. The purpose of the paper is to provide a detailed study and analysis of the interpretation and court decisions concerning these criminal structures. This research will also explain why the criminal offence structure is necessary to determine if a person is responsible for an offence or not.

Keywords: offences, *mens reas*, *acuts rea*, responsibility.

Introduction

Although most legal systems recognize the importance of the guilty mind or *mens rea*, the statutes have not always spelled out exactly what is meant by this concept. The Penal Code has attempted to clarify the concept by reducing the variety of mental states to four. Guilt is attributed to a person who acts 'purposely,' 'knowingly,' 'recklessly' or, more rarely, 'negligently.' Singly or in combination, they appear largely adequate to deal with most of the common ***mens rea*** problems. Under the Penal Code and in most states, most crimes require a demonstration of 'purposely,' 'knowingly,' or 'recklessly.' Negligent conduct will support a conviction only when the definition of the crime in question includes it.

Materials and Methods

In this research, provisions for the structure of criminal offences under the Penal Code of Myanmar are explored. In addition, a thorough study was carried out on prominent and important cases in Myanmar and India.

Discussion

I. Structure of Criminal Responsibility

Generally, there are four main aspects or elements of common law-based Criminal Law that must be proven to convict a defendant of an alleged crime. The four elements of the structure of offences are as below;

(1) ***Actus Reus,*** Latin for "guilty act," is the objective, external element of a crime. In most cases, there needs to be an "act" for there to be a crime. An act is any voluntary or involuntary bodily movement. Commission, omission, and possession are all forms of "acts." However, for *actus reus* to be proved, the defendant must voluntarily engage in the act.

(2) ***Mens Rea,*** Latin for "guilty mind." *Mens Rea* is the mental element of a crime. It is almost always necessary to prove a person's intent to commit a crime in order to establish liability. 'Strict liability cases' like those involving negligence are the exception to the rule. Generally, the accused is only held liable for crimes committed with *mens rea*. That is to say, the accused either intentionally committed the crime or knowingly acted in a way that resulted in a crime.

[1] Dr., Professor and Head, Department of Law, University of Yangon.
[2] Dr., Lecturer, Department of Law, University of Yangon.

(3) **Concurrence** requires the occurrence of both *actus reus* and *mens rea*. In Criminal Law, concurrence means that both the intent of a crime and a voluntary criminal act must both be present and proven. *Temporal Concurrence* is when both *actus reus* and *mens rea* coincide. *Motivational Concurrence* is when *mens rea* occurs first, subsequently motivating the *actus reus*.

(4) **Causation** is proof of a causal relationship between the act and the resulting crime. However, causation alone does not create liability. In fact, causation is not possible for *Inchoate Offences,* which are intended yet incomplete criminal acts.[3]

The core element of the structure of a criminal offence in Myanmar is generally regarded as the bipartite system that is used in common law countries.

"Except in the chapters and sections mentioned in clauses 2 and 3 of section 40, the word "offence" denotes a thing rendered punishable by this Code.

In Chapter IV, Chapter VA, and in the following sections, namely, sections 64, 65, 66, 67, 71, 109,110,112,114,115,116,117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 329, 330, 331, 347, 348, 388, 389 and 445, the word 'offence' denotes a thing punishable under the Penal Code or under any special or local law as hereinafter defined.

In sections 141,176, 177, 201, 202, 212, 216, and 441 the word 'offence' has the same meaning when the thing punishable under a special or local law is punishable under such a law with imprisonment for a term of six months or above either with or without a fine."[4]

Therefore, an offence is an act punishable not only by the Penal Code but also by any special or local laws.

In order to have criminal responsibility:-

(a) he or she commits a criminal offence, as defined under section 40 of the Penal Code, with intention, recklessness, or negligence;
(b) no lawful justification shall exist for the commission of the criminal offence, and
(c) there are no grounds for excluding criminal responsibility for the commission of the criminal offence.

Therefore, in order to allocate criminal responsibility to the perpetrator of an offence, it must be committed by him with criminal intent and it may not be an excusable and justifiable offence under the Penal Code. Moreover, the action of a perpetrator needs to meet the necessary elements for the respective offence.

II. The Objective Elements of an Offence

In order to constitute an offence, firstly, there must be the conduct of a wrongdoer. Secondly, there must be a circumstance that makes the act wrongful. Lastly, consequences (e.g. death of another) must result from these wrongful acts.

1. Offender

Guilty parties are divided into principals and accessories. The actual perpetrator of the felonious deed is called the "principal". Other persons who themselves are not the main offenders but who assist or aid them, are known as "accessories", and to distinguish among these with reference to time and place they are divided into three classes:

i Accessories before the fact;

[3] http://suddarthandkoor.com/types-of-criminal-law/
[4] Section 40 of the Penal Code, 1860.

ii Accessories at the fact;

iii Accessories after the fact.

The reason why different degrees of principals and accessories were permitted under the common law and also in some modern jurisdictions was basically to make the attempt to soften penalties for persons not actually or directly involved in the crime itself.

Thereafter, when there are two or more parties to a crime in felony cases, these are classified into two kinds of principals. The first one is first degree and the other is second degree, and two kinds of accessories which are before the fact and after the fact.

Principals in the first degree are persons who commit a crime directly. In other words, those who actually commit the crime or offence with their own hands or through innocent agents are principals in the first degree.

Principals in the second degree are those who are present at the commission of the crime and extend aid and assistance in its commission. Accessories at the fact and principals in the second degree are the two classifications which essentially denote the same type of offender.

An accessory before the fact is a person who is guilty of a felony for acts which aid, counsel, command, or encourage the culpable act, without being present either actually or constructively at the time of perpetration. In other words, accessories before the fact are those who, though not present at the scene of occurrence or where the crime is committed, counsel, procure or command another to commit the crime.

An accessory after the fact is one who, with knowledge of the other's guilt, renders assistance to an offender in an effort to hinder his detection, arrest, trial, or punishment. In other words, all those who know that a person has committed an offence knowingly receive, relieve, comfort, harbour, or assist him from escaping from the clutches of law is identified as an accessory after the fact.

In common law, there is some authority for using the word "accomplice" to include all accessories and all principals.

In most states, accessories after the fact face far less punishment than the principals or accomplices.

The following are some of the basic differences between accessories and accomplices-

- An accessory usually helps the principal before or after the crime while an accomplice helps the principal before and during the crime.
- An accessory may receive lesser charges and punishments while an accomplice may receive the same charges and punishments as the principal offender.[5]

The **Kyaw Hla Aung and one v. The Union of Burma**[6] case is related to the corroboration of an accomplice. The question of whether a witness is or is not an accomplice is a question of fact, in each case. Though a person according to his own evidence cannot be strictly called a guilty associate, his conduct immediately preceding a murder and afterward can show him to be an accessory after the fact. The statements that the witnesses accompanied appellant Kyaw Hla Aung to the side of the creek or some distance from the village, that they went across the creek to the side further away from the murdered persons and they did not run away at the

[5] Sakshi Vishwakarma, Classification of parties to crime under common law and the Indian penal code, journal of legal studies and research criminal law review, volume 3 issue 4 – August 2017.

[6] 1949 B.L.R. (H.C.) 582.

time of the murder or after the murder but helped to dispose of the dead body make the witnesses as accessories after the fact. As such, their evidence requires independent corroboration and it would be very unsafe to accept the evidence alone and convict on it. Corroboration means independent evidence not merely tainted evidence but fresh untainted evidence.

But the Penal Code of Myanmar, 1860, does not expressly recognize such classifications of parties to crime which is present in the common law. However, it also seems that the classification of parties and the complicity of parties were there in the mind of the authors of the Penal Code. Accessories at the fact and principals in the second degree are thus two classifications which essentially denote the same type of offender. Both the two classifications have been classed as abettors.

However, a distinction is made with regard to the punishment that is liable to be imposed on them depending upon the nature of participation.

For instance, Section 114 of the Penal Code, 1860, says that-"Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such an act or offence."

The Penal Code makes separate provisions to cover the liability of persons who associate with or extend help, give assistance or aid to the principal offender to flee from justice, despite knowing well that the person has committed a crime. Also, under the Penal Code, accessories after the fact are known as 'harbourers'. Section 52-A provides the definition of the term 'harbour' which includes food, drink, clothes, money, shelter, arms, ammunition, or means of conveyance or the assisting of a person, by any means, to evade apprehension.

Examples of some of those separate provisions which talk about parties to crime in the Penal Code are sections 136, 157, 212, 216, and 216A. These sections deal with harbouring deserters and their liability in different methods of commission. Other examples of such provisions are section 201 which talks about "causing the disappearance of evidence of an offence or giving false information to screen offenders", and section 412 which deals with "dishonestly receiving property stolen in the commission of a "dacoity".

In the Penal Code, there is no such classification of parties to the crime that is present in the common law. The Penal Code does not expressly provide different classifications for parties to the crime. However, this cannot be implied that there is no recognition of offenders who are guilty of committing or helping to commit a crime under the Penal Code. It does recognize parties to crime in different sections through different expressions. Therefore, the classification of parties to crime under the common law system is different from that of the Penal Code. If such a method of classification of parties to crime is used under the Penal Code then it will be easy for judges to set the criminal liability on different types of parties to the crime. It will also be advantageous and helpful to interpret the legal degrees.[7]

2. Act

An 'act' generally means something voluntarily done by a person. 'Act' is a determination of the will, producing an effect in the sensible word. This word includes writing and speaking or, in short, any external manifestation. In the Penal Code the term 'act' is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omission.[8]

[7] Sakshi Vishwakarma, Classification of parties to crime under common law and the Indian penal code, journal of legal studies and research criminal law review, volume 3 issue 4 – August 2017.

[8] Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002, p. 9.

Section 33 of the Penal Code states: "the word 'act' denotes also a series of acts as well as a single act. It necessarily is something short of a transaction which is composed of a series of acts but cannot be restricted to every separate willed movement of a human being; for when in an act of shooting or stabbing, the act is taken as a whole and not the numerous separate movements involved.[9]

Section 33 must be read along with section 34 of the Penal Code. Section 34 says that 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.

'A criminal act means that unity of criminal behaviour which results in something, for which an individual would be punished, if it were all done by himself alone, i.e. a criminal offence.' It is, therefore, clear that the 'act' spoken in section 34 denotes not only a single act but includes a series of acts. It follows, therefore, that the words "when a criminal act is done by several persons," in section 34 may be construed to mean "when criminal acts are done by several persons", or "when several persons engage in criminal enterprises".[10]

Section 39 of the Penal Code mentions that "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or had reason to believe, to be likely to cause it."

It may be noted that a person is liable for an act only if it is performed voluntarily. The consequence of being found to have acted involuntarily is that the person is not held criminally liable at all even though harm may have been caused.

3. Omission

An omission or failure to act may constitute a criminal act if there is a duty to act. This word is used in the sense of intentional non-doing. Thus, an 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must be in no doubt to be such as to have an active effect leading to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred. The Code makes punishable omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, a certain evil effect in the same manner as it punishes acts, provided they were illegal. When the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment.[11] The words 'acting or purporting to act' will include in section 32 of the Penal Code which express: "in every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omission. In section 36, the legal consequence of an 'act' and an 'omission' is the same, if an act is committed partly by an act and partly by an omission the consequences will be the same as if the offence were committed by an act or by an omission alone. It means that when an offence is an effect partly of an act or partly of an omission, it is one offence only.[12]

Section 33 of the Penal Code states: "the word 'omission' denotes as well a series of omissions as a single omission." The word 'omission' tends to be an illegal action. It is stated in section 43 of the Penal Code: "the word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes grounds for a civil action and a person is said to be 'legally bound to do' whatever it is illegal in him to omit."

---

[9] *Ibid*, p. 100.
[10] *Ibid*, p. 112.
[11] *Ibid*, p. 99.
[12] Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002,p. 143.

The word illegal has been given a very wide meaning. It consists of three categories; (1) everything which is an offence; (2) everything which is prohibited by law; and (3) everything which furnishes grounds for civil action. The words of this section cover, not merely a tort but also a breach of contract which furnishes grounds for a civil action, in respect of which damages could be obtained under section 73 of the Contract Act of Myanmar, 1872, or which could be enforced specifically.

Generally, a man may be liable for inducing another to commit an actionable wrong, by whatever means he employs or he may be held liable for inducing another to do something, though not wrongful, to the detriment of a third party if the means he employs for so inducing him are themselves illegal.[13]

The words 'illegal' and 'unlawful' have the same meaning under the Code but it does not follow that if one of those words is specially defined and the other is not, the two words must necessarily have the same meaning to the one word by definition. The word unlawful in its general connotation means what is not justified by law. It is akin to the word illegal which is defined in this section but has not the same restricted sense but is used in a more elastic manner. It is also not restricted to what is immoral. Omission to perform a duty required by law, such as to provide food, clothing, shelter, or medical aid to another to whom that duty is owed, would fall within the scope of the word illegal but not refusal to perform acts of charity or mercy; these are not coupled with a legal duty.[14]

It should be noted that in a situation where there is a duty to act and he or she omits to do so, he or she shall be liable because of the omission to do an act that should be done under the law or morally.

4. The object of the act

People commit crimes for many reasons. Some people may even have more than one motive for committing a crime. Some motives are personal. Some motives are social. Rational choice, the environment, passion, mental illness, and drug addiction are the causes of motive.

Motive is something that prompts a man to form an intention and knowledge is an awareness of the consequences of the act. Motive is the ultimate end that a person hopes to achieve whereas intention is the immediate effect of an act.

Motive refers to the reason a crime was committed. It is often in the background of the suspect when committing the alleged crime. As a background, motive comes before intent. Unlike intent, motive can be determined but its existence does not exactly prove guilt. It can be refuted by evidence or an alibi on the suspected person's part (often referred to as "a person of interest" in criminal jargon). Motive is an initial factor but not a conclusive determinant to link a person to a crime.[15]

As an example, a man is charged because he fatally shot a man who was having an affair with his wife. His motive for the shooting was revenge but the motive is irrelevant in determining his guilt. All that matters is whether he intentionally killed the victim or whether he was motivated by revenge, jealousy, desire for wealth, and so on. It is not always easy to prove the motive for an offence. Often the motive is locked up in the heart of the offender.

The appellant, who was accused of murder, was compared to a 'dog' before the people and the girl. This is just a word 'using excessively obscene language' with regard to the appellant.

[13] U Nyi Pu v. East End Films, 1938 R.L.R. 12.
[14] Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002, p. 151.
[15] http://www.differencebetween.net/language/words-language/difference-between-motive-and-intention/

These words cannot cause the appellant to be so suddenly provoked that he cannot control himself.[16]

It is generally an impossible task for the prosecution to prove what precisely has impelled the murderers to kill a particular person.

5. Causation requirement and related rules governing the attribution of criminal liability

'Causation' in Criminal Law is concerned with whether the defendant's conduct contributed sufficiently to the prohibited consequence to justify criminal liability, which is assessed from two aspects, namely 'factual' and 'legal' causation.

Factual causation requires proof that the defendant's conduct was a necessary condition of the consequence, established by proving that the consequence would not have occurred but for the defendant's conduct.

For example, a man sets fire to his house with the intention of killing his wife. His wife dies in this event. He is charged with murder but the medical evidence shows that she died of a heart attack while the house was burning. She did not die from burning.

The question arises as to whether he can be liable for his planned murder given that his actions had not factually caused the death. A second issue is whether the death of a heart attack resulting from the burning house is a sufficient 'attempt' to convict in accordance with the evidence that he had intended this for his wife. It is sufficient that the attempted murder had been initiated even though his plan was not completed. Thus, he can be convicted of attempted murder.

Legal causation requires that the harm must result from a culpable act. However, this does not apply where the offence is one of strict liability. For instance, a man is driving on the roadway when the victim suddenly appears in front of his car. He cannot brake in time and the victim is killed. At that time, he was not speeding and had not been driving recklessly or without care. He can provide evidence that it would have been impossible to avoid hitting the victim because the distance was too close. However, he had been drinking alcohol at the time of the incident. There is a prohibition under the Road Traffic Act that no man shall drive while intoxicated. Therefore, he can be convicted of causing death by driving while intoxicated under the Road Traffic Act instead of section 304A of the Penal Code.

Moreover, causation also arises depending on some situations as below:

1. The defendant's action need not be the sole cause of the resulting harm but it must be more than minimal;
2. There must be no *novus actus interveniens* which is a new intervening act that breaks the chain of causation. Different tests apply to decide if the chain has been broken depending on the intervening party.
3. The thin skull rule (eggshell skull rule).

Under the thin skull rule, the defendant must take his victim as he finds him. This means if he has a particularly vulnerable victim he is fully liable for the consequences to him even if an ordinary person would not have suffered such severe consequences. For example, if A commits a minor assault on C who has a heart condition and C suffers a heart attack and dies, A is liable for the death of C even though such an attack would result in no physical harm to someone without a heart condition. This rule applies irrespective of whether the defendant was aware of the condition.

[16] Maung Tin Aung v. the Union of Burma, 1958 B.L.R. (H.C.) 607.

6. Objective elements of offences of negligence

Criminal negligence occurs when someone acts in a way that is an extreme departure from the way that a "reasonable" person would have acted in the same or similar situation. Criminal negligence generally involves an indifference or disregard for human life or for the safety of other individuals, where there is no intention to cause death and knowledge that the act done in all probability would cause death. It only applies to cases in which, without any intention or knowledge, death is caused by a rash or negligent act.

Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to a fine: provided that, if such act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years.[17]

Section 304 A defines 'Causing death by negligence' and also prescribes the punishment for it. The wrongful act may be rash or negligent. This section frames a specific offence where death is caused by doing a rash or negligent act. Such a wrongful act does not amount to a culpable homicide under section 299 or murder under section 300.

Generally, section 304 A is taken into consideration in cases of traffic accidents, accidents in factories, and so on.

In the **Maung Kan Tint v. The Union of Burma**[18] case, the evidence showed that the accused had to be shouted at to apply his brakes. This proves that the accused was negligent and had to be told to do his duty which an ordinary driver would normally have done without being told. In addition to this neglect of applying the brakes in good time, which could have prevented even the first collision with the motorcycle, the accused also failed to blow his horn to warn Chan Mya, the deceased. The accused may not have been rash in his driving as he was going at only about 10 miles an hour but, for the reasons stated, he was certainly guilty of culpable negligence within the meaning of section 304 A of the Penal Code. The use of the 'ordinary driver' as a standard of assessment illustrates the objective nature of negligence.

In the fields of medical negligence and house construction, section 304 A is taken into consideration. In the medical field, if a doctor conducts an operation or gives treatment in a negligent manner and causes the death of a patient, he will be held liable under this Section. It is the duty of the house owner or contractor in constructing or demolishing a building or any construction, to take all precautions so that no harm or injury shall occur to the neighbours or the workers.

In the cases under this section, the doctrine of *mens rea* does not apply. The wrongdoer causes the offence due to rashness or negligence or inefficiency, thus *mens rea* is out of place in this category of offence. However, if *mens rea* in the accused is proved by the prosecution, then this section does not apply, section 299 or 300 apply.[19]

The doctrine of contributory negligence does not apply to criminal liability where the death of a person is caused partly by the negligence of the accused and partly by his own negligence. Where the accused is charged with the offence of causing loss of life by a negligent

[17] Section 304 A of the Penal Code, 1860.
[18] 1965 B.L.R. 44.
[19] http://www.shareyouressays.com/knowledge/legal-provisions-regarding-causing-death-by-negligence-in-india-section-304-a-of-ipc/115831

omission, he cannot rely on the plea of contributory negligence, which is distinctly recognized in the law of torts but finds no place in an indictment for criminal negligence.[20]

III. The Subjective Elements of an Offence

Generally, subjective *mens rea* is required in criminal law. Intent, knowledge, or recklessness, for example, might all lead to murder. The important thing is that there is subjective foresight. Section 299 of the Code (i) states explicitly "means to cause death" but (ii) says that murder can be committed by someone who causes "bodily harm that he knows is likely to cause (the victim's) death, and is reckless as to whether death ensues or not". Bear in mind that motive (what you kill or inflict bodily harm for) is irrelevant to *mens rea* and, typically, not an issue that the criminal courts are interested in (except for evidentiary purposes).[21]

1. Definition and elements of the subjective side of the offence

To commit a criminal offence of ordinary liability as opposed to strict liability the prosecution must show both the *actus reus* (guilty act) and *mens rea* (guilty mind). A person cannot be guilty of an offence for his actions alone; there must also be the requisite intention, knowledge, recklessness, or criminal negligence at the relevant time. In the case of negligence, however, the *mens rea* is implied. Intention, knowledge, rashness, and negligence are not expressly defined in the Penal Code. But this word can be seen in some sections.

For example, offences affecting the life and property of humans: some such kinds of offences:- culpable homicide[22], murder[23] , and culpable homicide by causing the death of a person other than the person whose death was intended[24], are committed by any persons 'with the intention of causing such bodily injury or death'. In addition, offences related to the causing of miscarriage[25], injuries to unborn children[26], exposure of infants, and the concealment of births[27] are committed by any persons 'voluntarily causing….', intentionally doing…..', 'with the intention of…;'. Furthermore, the offence of theft[28] is committed by any persons 'intending to take dishonestly any moveable property'. The term 'dishonestly' is defined in section 24 of the Penal Code as 'the intention of causing wrongful gain or wrong loss'. However, there is no any definition of what the word '**intention**' defines. '**Voluntarily**'[29] is defined as a person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or had reason to believe it to be likely to cause it.

In the case of **Shwe Ein v. King Emperor**,[30] to constitute the offence of murder, there must always be a finding that the act which caused the death was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to cause death. A finding of inflicting an injury that was merely likely to cause death would not of

[20] http://www.shareyouressays.com/knowledge/legal-provisions-regarding-causing-death-by-negligence-in-india-section-304-a-of-ipc/115831
[21] http://www.thecriminaljusticecourse.site/the-theory-of/the-many-shades-of-intention-what-does-it-take-to-will-a-crime
[22] Section 299 of the Penal Code, 1860.
[23] Section 300, *Ibid.*
[24] Section 301, *Ibid.*
[25] Section 312 of the Penal Code, 1860.
[26] Section 315, *Ibid.*
[27] Section 318, *Ibid.*
[28] Section 378, *Ibid.*
[29] Section 39, *Ibid.*
[30] 1 Ran. 285.

necessity amount to murder. This case shows that it is necessary to prove 'the intention of causing death or bodily injury'.

Again, the accused inflicted four wounds none of which were too vital parts of the body and the deceased died owing to septic poisoning in respect of two of them $2\frac{1}{2}$ months after the inflicting of the injuries. It was held that the accused's intent was not to inflict bodily injury sufficient in the ordinary course of nature to cause death but to inflict bodily injury which was likely to cause death, the degree of probability as to death ensuing not being as high as to justify a finding of murder. The conviction under 302 of the Penal Code was altered to a conviction under the first part of section 304.[31]

Knowledge means that a person omits to do something in accordance with the law though he knows the falsity or wrongfulness of his actions or knows the nature and consequences of his acts that are illegal or any acts prohibited by any law.

Section 26 of the Penal Code states that "a person is said to have "reason to believe", a thing if he has sufficient cause to believe that thing but not otherwise."

The expression "reason to believe" suggests that the belief must be of an honest and reasonable man. It must have been held in good faith. It should not be merely a pretence. It is open to the court to examine the question of whether the reasons for the belief have a rational connection or are irrelevant to the purpose.[32]

Knowledge is a subjective state of mind. In the Penal Code, 'having a reason to believe' occurs in sections 136, 154, 183, 411 to 414.

A person can be convicted under section 412 of the Penal Code if he received stolen articles from a person having reason to believe him to belong to a gang of dacoits or knew or had reason to believe that possession of the articles had been transferred by dacoits requiring at least five persons acting in concert and in the absence of evidence to that effect, cannot be presumed. Unless there is some evidence of guilty knowledge or recent possession of stolen property no presumption can be made against the possessor.[33]

A rash or negligent act causing death or grievous hurt is a punishable offence under the Penal Code. section 304 A and section 338 deal with rash or negligent acts leading to death or grievous hurt respectively. In order to convict a person under these provisions, it must be proved that the rash or negligent act was the direct or proximate cause of death or grievous hurt. The expression rash or negligent has not been defined as such but has acquired a definite comprehendible meaning because of its frequent interpretations by the Courts of law. Rashness means any act done without due deliberation and caution and thereby is, in all likelihood, sufficient to run the risk of causing death or grievous hurt and can be said to be rash.[34]

It is a negligent act to carry any second person, whatever his age or build, on a bicycle when he is liable to change his position or fall off, if this is done in a public way where there is other traffic. Such an act is likely to cause injury to others.[35]

Criminal negligence is the gross neglect and failure to exercise that reasonable and proper care and precaution to guard against injury, either to the public generally or to an individual in

[31] Nga Po Chet v. King Emperor, 2 B.L.J. 239.
[32] Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002, p. 87.
[33] Maung Tun (Htun) v. The King, 1946 R.L.R. 293.
[34]https://www.indiastudychannel.com/resources/157757-A-rash-or-negligent-act-under-the-Indian-Penal-Code-as-interpreted-by-the-Courts-in-India.aspx
[35] The King v. Bas Deo and Another, 1940 R.L.R. 127.

particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[36]

In **The Union of Burma v. Maung Nyun**[37] case, the offence was one under section 304 A if the bodily injury was caused by a rash or negligent act, i.e. without any criminal intent but with the knowledge that it was likely to cause death.

Rashness and negligence are seen in sections 279, 280, 284, 285, 304 A, 336, 337, and 338 of the Penal Code.

2. Criminal Intent

(a) Concept of the criminal intent

The intention is a subjective concept: a court is concerned purely with what the particular defendant was intending at the time of committing the offence and not what a reasonable person would have intended in the same circumstances. Criminal intent, referred to in the legal world as "*mens rea*," refers to an individual's state of mind at the time he committed a crime. Those with criminal intent are fully aware of what they are about to do and the consequences that their actions can have.

To constitute a planned killing it is necessary that the accused should have had time to reflect, with a view to determining whether he would kill or not, and that he should have determined to kill as a result of that reflection; that is to say, the killing should be a planned killing upon consideration and not a sudden killing in momentary excitement and under the impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection.[38] Whoever commits murder with premeditation shall be punished with death and shall also be liable to a fine.[39]

Criminal intent can be classified as one of four different kinds of the act: purposeful, knowing, reckless and negligent. Criminal acts that are done purposefully are those that are carried out by someone who is fully aware of the consequences his actions can cause, such as the murder example provided above. Criminal intent is a necessary component in prosecuting a crime. If criminal intent does not exist, then it stands to reason that the crime that was committed cannot possibly be considered criminal in nature.[40]

(b) Levels of intent (Purposely, Reckless and Negligence)

Mens Rea in the Myanmar Penal Code 1860 sets out the definition of offences, the general conditions of liability, the conditions of exemptions from liability, and punishments for the respective offences. Legislatures had not used the common law doctrine of *mens rea* in defining these crimes. However, they preferred to import it by using different terms indicating the required evil intent or *mens rea* as the essence of a particular offence.

Guilt with respect to almost all offences created under the Penal Code is fastened either on the grounds of intention, knowledge, or reason to believe. Almost all offences under the Penal Code are qualified by one or other words such as 'wrongful gain or loss', 'dishonesty', 'fraudulently', 'reason to believe', 'criminal knowledge or intention', 'intentional cooperation', 'voluntarily', 'malignantly', 'wantonly', 'maliciously'. All these words indicate the blameworthy mental condition required at the time of the commission of the offence; nowhere

[36]https://www.indiastudychannel.com/resources/157757-A-rash-or-negligent-act-under-the-Indian-Penal-Code-as-interpreted-by-the-Courts-in-India.aspx
[37] 1948 B.L.R. 780.
[38] Than Myint v. The Union of Burma, 1953 B.L.R. (H.C.) 342.
[39] Section 302(1)(b) of the Penal Code, 1860.
[40] https://legaldictionary.net/criminal-intent/

to be found in the Penal Code, its essence is reflected in almost all the provisions of the Penal Code 1860. Every offence created under the Penal Code virtually imports the idea of criminal intent or *mens rea* in some form or other.

The levels of *mens rea* and the distinction between them vary between jurisdictions. Although common law originated in England, the common law of each jurisdiction with regard to culpability varies as precedents and statutes vary.

Section 378 of the Penal Code states the ingredients of the offence of theft. The heart of this section is the word 'intending (purpose) to take dishonestly' which is the gist of the offence.

The ingredients of theft are:-

1. Dishonest intention to take property;
2. The property must be moveable;
3. It should be taken out of the possession of another person;
4. It should be taken without the consent of that person;
5. There must be some removal of the property in order to accomplish the taking of it.

The intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person.[41]

When a person has a claim of right which he believes to be good and has attempted to assert that right by doing an act which in good faith he believed that he had every right to do, and for such reason, the Court is of opinion that he did not act dishonestly, then the person is innocent of theft. But where in asserting his right to some property that a person believes to be good, he does something which he knows he has no right to do, e.g., by taking the law in his own hands and removing the property from the possession of his opponent who claims the property himself, he may be guilty of theft.[42]

Very high degrees of negligence are required to be proved. It can be seen in **Maung Bo Kya v. The Union of Burma**[43] case. This was to find out whether the death of the person in question was directly caused by the rashness and negligence of the person charged therewith, or in other words whether the death of the person in question was the proximate and effective cause of the accused's rash and negligent act without *actus interveniens* of a third person's negligence. A very high degree of negligence is required to be proved before an accused person can be charged under section 304 A of the Penal Code.

3. Reduced intent or negligence requirements

In the Myanmar Penal Code, every offence committed by any person with the intention of committing an offence shall be punishable more severely than offences committed without intending to commit them or by negligence. If an accused person commits a murder without intending to kill the victim, he shall be punished for culpable homicide under section 304 in which the punishment is less than the punishment of murder. This means that causing death without intention tends to reduce the punishment. An offence of causing death by negligence shall be punishable more than reducing the punishment of culpable homicide that does not amount to murder. Section 304 A mentions causing death by negligence.

---

[41] Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002, p. 1908.
[42] Rangasawmy and one v. King Emperor, 6 Ran. 54.
[43] 1956 B.L.R. (H.C.) 101.

Section 304 A specifically deals with the rash or negligent acts which cause death but falls short of the culpable homicide of either description. It is clear from the evidence of Rifleman Taw Aye together with the statement given by the accused himself that the deceased Rifleman Kyi Win knocked off the fiber hat worn by the accused. He did this with the point of his bayonet fixed to his rifle. It was done in jest though previously to that Rifleman Taw Aye had warned the deceased not to play about with his rifle. When his fiber hat had fallen on the ground Rifleman Tin Hla picked it up. He had just been loading the magazine of his rifle and having done so, he also, in jest, went to the deceased and said words to this effect: I know it is not right but I have a mind to shoot at you and, so saying, he pulled the trigger. The result was, that a shot rang out and Rifleman Kyi Win died of the wound he received before reaching Mingaldon hospital. The accused had no intention to kill his friend but an offence under section 304 A of the Penal Code makes no reference to the knowledge or the intention of the killer. The accused had been loading his magazine with cartridges and though fully aware of this he had pulled the trigger after pointing the rifle at his friend. His act was therefore most rash.[44]

Generally, Section 304 A is taken into consideration in cases of road accidents, accidents in factories, etc. As the appellants, Maung Than Sein, and Maung Sein Maung, negligently rode in a lorry, Maung Hla Thaung was hit by their lorry and this resulted in death from this accident. Therefore, they were sentenced to imprisonment with rigorous labour for a term of five years.

In the case of **Maung Than Sein and one v. The Union of Myanmar**,[45] while Maung Than Sein prepared to drive the lorry, Maung Sein Maung turned on the engine under the lorry. On turning on the engine, the lorry went backward because the back gear was activated. At that time Maung Hla Thaung was at the back of the lorry and he was hit and then died within a few hours. Thus, Maung Than Sein and Maung Sein Maung were sentenced to imprisonment with rigorous labour for a term of five years under section 304 A of the Penal Code. The learned lawyer said that this sentence was correct and in line with the provisions of section 304 A but the term of imprisonment was a little bit severe for what they did.

According to the witness's statement, it was clear that Maung Sein Maung was just a person who had been ordered to turn on the engine and he could not know the reverse gear was engaged; he was a driver who could not know whether the back gear was engaged or not. Due to his negligence, the accident happened and caused Maung Hla Thaung's death. Therefore, Maung Sein Maung was acquitted after setting aside the sentence on him. Maung Than Sein had committed an offence under section 304 A but this accident happened because of his slight rashness or negligence and also the deceased's unfortunately standing behind the lorry. Therefore, the sentence on Maung Than Sein was reduced to the time of imprisonment he had been served.

This case shows the requirements (less rashness or negligence) to reduce the degree of negligence.

The accused did not drive the tractor recklessly or negligently. He carefully drove the tractor because the road was gravel. The victim negligently sat in the tractor and even played negligently at that time. Therefore, he fell off and died. The court held that the accused could be acquittal because of the deceased's negligence. [46]Therefore, causing death through the victim's negligence can free the accused from criminal liability.

In Section 80 of the Penal Code, "nothing is an offence which is done by accident or misfortune and without any criminal knowledge or intention in the doing of a lawful act in a

[44] Maung Tin Hla v. The Union of Burma, 1964 B.L.R. 988.
[45] 1966 M.L.R. 149.
[46] The Union of Myanmar v. Myat Min Soe, 1995 M.L.R. 93.

lawful manner by a lawful means and with proper care and caution. It is the absence of such proper care and caution, which is required of a reasonable man in doing an act, which is made punishable under Section 304 A.[47]

Findings

There is no provision in the Myanmar Penal Code regarding the classification of parties to the offence. However, it cannot be said that the classification of offenders who commit or assist in committing an offence under the Penal Code is not recognized. It indirectly infers from the different expressions and sections in each case. Therefore, if such classification of parties to the offence is provided in the Penal Code, it will be convenient for the judge to decide the criminal responsibility of various types of offenders to the offence. It will be beneficial and helpful to interpret the legal decrees.

Conclusion

This paper explores the four elements to be the structure of offences such as *actus reus*, *mens rea*, concurrence, and causation. In general, a person commits an offence when both elements like actus reus and *mens rea* meet in an event. It is only where these two *actus reus* and *mens rea* coexist that a person commits an offence. (E.g, robbery, murder, dacoity, etc.). However, it may be noted that there may be a situation where *mens rea* does not exist in the incident. That is also considered to be an offence. (E.g. an offence of causing death by negligence).

References

Law

Penal Code of Myanmar, 1860.

Books and Journals

Ratanal & Dhirajlal's Law of Crimes, 25th Edition, Bharat Law House, New Delhi, India,2002.

Sakshi Vishwakarma, Classification of parties to crime under common law and the Indian penal code, journal of legal studies and research criminal law review, volume 3 issue 4 – August 2017.

Websites

http://suddarthandkoor.com/types-of-criminal-law/

http://www.differencebetween.net/language/words-language/difference-between-motive-and-intention/

http://www.shareyouressays.com/knowledge/legal-provisions-regarding-causing-death-by-negligence-in-india-section-304-a-of-ipc/115831

http://www.thecriminaljusticecourse.site/the-theory-of/the-many-shades-of-intention-what-does-it-take-to-will-a-crime

https://legaldictionary.net/criminal-intent/

https://www.indiastudychannel.com/resources/157757-A-rash-or-negligent-act-under-the-Indian-Penal-Code-as-interpreted-by-the-Courts-in-India.aspx

Cases

Kyaw Hla Aung and one v. The Union of Burma, 1949 B.L.R. (H.C.) 582.

Maung Bo Kya v. The Union of Burma, 1956 B.L.R. (H.C.) 101.

Maung Kan Tint v. The Union of Burma, 1965 B.L.R. 44.

Maung San Maung v. The Union of Myanmar, 1966 M.L.R. 629.

[47] Maung San Maung v. The Union of Myanmar, 1966 M.L.R. 629.

Maung Than Sein and one v. The Union of Myanmar, 1966 M.L.R. 149.

Maung Tin Aung v. the Union of Burma, 1958 B.L.R. (H.C.) 607.

Maung Tin Hla v. The Union of Burma, 1964 B.L.R. 988.

Maung Tun (Htun) v. The King, 1946 R.L.R. 293.

Nga Po Chet v. King Emperor, 2 B.L.J. 239.

Rangasawmy and one v. King Emperor, 6 Ran. 54.

Shwe Ein v. King Emperor,1 Ran. 285.

Than Myint v. The Union of Burma, 1953 B.L.R. (H.C.) 342.

The King v. Bas Deo and Another, 1940 R.L.R. 127.

The Union of Burma v. Maung Nyun,1948 B.L.R. 780.

The Union of Myanmar v. Myat Min Soe, 1995 M.L.R. 93.

U Nyi Pu v. East End Films, 1938 R.L.R. 12.