

# DETERMINISM AND THE ANNIHILATION OF MENS REA

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*Criminalization is the process of labelling a particular human conduct illegal, involving censorship from the State showing its disapproval of such conduct. The State will often impose a punishment or sanction on the actor who violates the mandate of the State as regards the prohibited act. Philosophers and legislators alike, espouse that each person in society has their own 'individual autonomy' and that the State should restrain itself from interfering with their individual autonomy. However, it may so happen that in the larger interests of society, it may become necessary for the State to curtail certain acts of individuals, this probably constituting a cramp on complete individual liberty.*

*Individual autonomy involves concepts such as determinism and free will. Free will, simply put, means that man is free to make his own choices, and he does so independent of any rules guiding such choice. Determinism on the other hand is the belief that every event is governed by rules and that there is no 'random'. Through the ages, philosophers have remained largely conflicted about the compatibility and/or incompatibility of free will and determinism. If one were to adopt the determinist view – that every event is governed by laws – would that then mean that there is no scope for individual human choices? Would that therefore, mean that mens rea, an essential constituent of a crime, would be rendered redundant, thereby making no man capable of committing a crime? Or would it force us to go back to the drawing board and rethink the constituent elements of crime?*

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*This paper seeks to delve into these questions and more; to find out if the adoption of a determinist view would in fact annihilate the concept of mens rea.*

## 1. INTRODUCTION

Consider an individual who is faced with a choice to make. This individual lives in dire penury; is a husband and father of four. In order to provide for them, he is faced with the 'choice' of committing an act which the legal system he is a part of, has made it criminal. His legal system mandates that whoever shall intentionally deprive another of property that is rightfully theirs, commits the offence of theft and such offence is punishable with imprisonment. Our individual has two options before him. The first is that he commits the act (which is illegal according to his legal system) and feed his family. The second is that he does not. How does he choose?

Philosophers state that two concepts crop up for consideration while one is analysing the 'choices' or 'decisions' we make to do or not do something. These concepts are free will and determinism.<sup>1</sup> Going back to our example, let us say that our individual has chosen to steal, does so, is caught, tried, found guilty and sentenced. This whole process is worth looking at in the light of the aforementioned concepts. It is only natural that two sets of views emerge. The first set would believe that it wasn't in his power to do anything else, but steal. The second would believe that the individual had a choice and had it in his power not to commit the offence; and that in choosing to commit the offence he must take responsibility for his actions. Those of us that conform to the first view believe in 'determinism'<sup>2</sup> and those of us that conform to the second, 'free will'.<sup>3</sup>

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<sup>1</sup> FRANK TILLMAN, BERNARD BEROFKY & JOHN O'CONNOR, INTRODUCTORY PHILOSOPHY 127 (Harper Row Publishers 1967).

<sup>2</sup> Determinism is the belief that all events are governed by laws. These laws are not the kind of laws passed by a legislature, but are a statement of conditions under which events of a certain kind invariably occur. Thus, whenever conditions of kind 'C' obtain, then an event of kind 'E' will occur.

<sup>3</sup> Free will means that actions are determined by desires and beliefs and are not predetermined or governed by any laws. We make our own choices.

The obvious question that will then arise is how free will and/or determinism affect criminal law, criminal liability and criminalisation. This question and more will be answered through the course of this article, after examining the concepts of free will, determinism and mens-rea in detail. The methodology adopted for this article is doctrinal, by means of references made to books and articles.

## 2. DETERMINISM, FREE WILL AND THE COMPATIBILITY AND INCOMPATIBILITY BETWEEN THE TWO

### *Determinism*

Determinism is the belief that all events are governed by laws.<sup>4</sup> It espouses that there is nothing ‘random’ and that all events are the outcome or natural consequence of a set of conditions that preceded it. The determinist believes that we can find laws which will tell us what will *always* happen under certain conditions, not just what will *probably* happen.<sup>5</sup> Thus, for every event E that occurs, the determinist believes that there is a set of conditions C which determined or caused E to happen. Given the occurrence of C, the subsequent occurrence of E was inevitable and likewise, the occurrence of C was determined by a set of conditions antecedent to it, and so on.<sup>6</sup>

Thus, if we were to take the initial example of the poor individual, his actions (theft) were a natural consequence of his conditions that preceded his actions. According to determinists, there was no scope for him to choose whether to steal or not as his antecedent conditions had already determined that he would. He had no say in the matter, and his choice to steal was not of his own volition, but was the outcome of certain laws that govern actions.

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<sup>4</sup> It is not clear exactly what these laws may be, but philosophers have come up with three kinds of probable laws. They are –

1. *Genetic Laws*, in which the conditions determining the decision are earlier events, experiences, reactions, and earlier biological states and occurrences.

2. *Structural Laws*, in which the conditions for the decision involve some present psychological trait of the person making the decision. The conditions may include his desires, beliefs, character traits, personality traits and goals.

3. *Physiological Laws*, in which the conditions determining the decision might be complicated neurological or glandular states.

<sup>5</sup> TILLMAN, *supra* note 1 at 128.

<sup>6</sup> *Id.*

Attention may now be drawn to the word 'intentionally' in the law of the legal system he is a part of that defines theft. Is our individual innocent now as he had no intention to steal, but was forced to as he was simply acting out an already determined event, which he had no say in? This question will be analysed in a subsequent portion of this paper.

### *Free Will*

The idea of free will espouses that the choices and decisions we make, are made of our own volition. It means that man as a rational being, is able to determine the choices he should make, independent of the operation of any external laws. It is in some senses, the opposite of determinism.

Free will entails that there are actions that are voluntary (the logical corollary being that there are actions that are involuntary). It is the voluntary feeling or actions for which blame and praise are given. According to Aristotle, it is of utmost importance to the legislator to understand this, especially when he is assigning rewards and punishments.<sup>7</sup> He also goes on to explain what an involuntary act is. He says that it is an act done under compulsion, through ignorance or an act that is compulsory because its origin is from without, being of such nature that the actor contributes nothing to it.<sup>8</sup>

### *The Compatibility and Incompatibility of Determinism and Free Will*

Philosophers are conflicted when it comes to whether these concepts complement each other or are opposed to each other. Three theories have been proposed that seek to explain the relationship between free will and determinism.<sup>9</sup>

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<sup>7</sup> Aristotle, *The Voluntary*, in FRANK TILLMAN, BERNARD BEROFKY & JOHN O'CONNOR, INTRODUCTORY PHILOSOPHY 132 (Harper Row Publishers 1967).

<sup>8</sup> *Id.* at 133.

<sup>9</sup> *Id.*

### A. Incompatibilism

According to this view, free will and determinism are incompatible and cannot exist together. Those who believe this state one of two things.

- (i) They accept determinism and believe that there is no such thing as free will (Those who fall under this category are worth studying in light of the fact that their belief would render mens rea redundant).
- (ii) They reject determinism and hold that there are at least some human decisions not governed by laws. This is the libertarian approach.

### B. Compatibilism

These philosophers believe that there is no conflict between free will and determinism. They believe that they complement each other. Compatibilists include David Hume and J. S. Mill.

### C. The Two Level Theory

They believe that free will and determinism are independent. Human actions, they say, cannot be explained in terms of *causes*, but in terms of *reasons*.

## 3. MENS REA

One of the essential elements required to convict a person is that his guilt be proved beyond a reasonable doubt. In order for an act to be criminal, there must be an occurrence of the external physical act, along with the presence of the internal mental element. An act becomes criminal only when it is done with a guilty mind (*mens rea*).<sup>10</sup> The external physical act is the conduct forbidden by law which is committed by the accused, also known as *actus reus*.<sup>11</sup> The state of mind required by the criminal statute that accompanies

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<sup>10</sup>K. I. VIBHUTE, P S A PILLAI'S CRIMINAL LAW 53 (Lexis Nexis Butterworths Wadhwa 10<sup>th</sup> ed. 2009).

<sup>11</sup>THOMAS GARDENER AND TERRY ANDERSON, CRIMINAL LAW 34 (Thomson Wadsworth 2006).

this act is the mental element or mens rea.<sup>12</sup> A person is culpable when he does the act-

- Purposely
- Knowingly
- Recklessly
- Negligently<sup>13</sup>

Hall Jerome defines mens rea as “the mental state exhibited in any conduct or behaviour which violates any penal law.”<sup>14</sup> Salmond explains mens rea with reference to the maxim *actus non facit reum, nisi mens sit rea*.<sup>15</sup> He says that a man is not responsible for an act in itself, but for acts coupled with the mens rea or guilty mind with which he does them.<sup>16</sup>

Mens rea can, thus, be said to mean evil intent, criminal purpose and knowledge of the wrongfulness of conduct.<sup>17</sup> Proving mens rea is no easy task, and the lack of expertise exhibited in doing so is often the cause of many acquittals. Mens rea may be attempted to be proved in two ways. The first is by showing the acts of the defendant and the circumstances that existed at the time of the crime so that the judge may draw a *reasonable inference* that mens rea existed.<sup>18</sup> The other is through the production of evidence.<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70 (The Bobbs-Merrill Company, 2<sup>nd</sup> ed. 2008).

<sup>15</sup> The act is not culpable unless the mind is guilty.

<sup>16</sup> P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 366 (Universal Law Publishing Company, 12<sup>th</sup> ed. 2010).

<sup>17</sup> GARDENER, *supra* note 11 at 37.

<sup>18</sup> *Id.* at 38.

<sup>19</sup> *Id.* at 39.

#### 4. DETERMINISM AND THE ANNIHILATION OF MENS REA

*Whether mens rea is essential to say that an act is a crime.*

An acceptance of mens rea as an essential requirement for an individual to be said to have committed a crime impliedly rejects the determinist view. As mentioned earlier, an act done without the presence of a guilty mind is not a crime.<sup>20</sup> It would mean that in the eyes of the law an individual is said to have free will and is capable of making his own rational decisions, aware of the consequences that would ensue if he were to fail (endorsing the free will belief).

Though statutorily in the Indian Penal Code, 1860, the words ‘mens rea’ are not explicitly mentioned, it is incorporated through the employment of qualifying words and phrases such as wrongful gain<sup>21</sup>, dishonestly<sup>22</sup>, fraudulently<sup>23</sup> and reason to believe.<sup>24</sup> There have also been various judicial decisions that have held that mens rea is essential for an act to be a crime. In 1895, Lord Wright in *Sherras v. De Rutzen*<sup>25</sup> held that mens rea was a requirement in order for an act to be a crime.<sup>26</sup> This was upheld in subsequent cases such as *Brend v. Wood*.<sup>27</sup> The Privy Council in *Lim Chin Aik v. Regina*<sup>28</sup> also held that mens rea was an essential ingredient of an offence.

The aforementioned statutes and judicial pronouncements clearly endorse the free will belief, and there is no conflict between the endorsement of this belief and the law, as the law itself provides for the presence of mens rea as an essential for there to be a crime. However, there have been situations

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<sup>20</sup> VIBHUTE, *supra* note 10.

<sup>21</sup> PEN. CODE. § 23.

<sup>22</sup> *Id.* § 24.

<sup>23</sup> *Id.* § 25.

<sup>24</sup> *Id.* § 26.

<sup>25</sup> (1895) 1 Q.B. 918.

<sup>26</sup> “... there is a presumption that mens rea or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence...” per WRIGHT J. in *Sherras*.

<sup>27</sup> (1946) 110 J.P. 317.

<sup>28</sup> (1963) 1 All. E.R. 223.

where the actual act was given more credence over the guilty mind of the person. This was elucidated in India in *State of Maharashtra v. Mayer Hans George*.<sup>29</sup>

In this case, the respondent was a German smuggler who left Zurich by plane on 27<sup>th</sup> November, 1962 with thirty four kilograms of gold concealed on his person to be delivered in Manila. The plane arrived in Bombay on 28 November, 1962 but the respondent did not come out of the plane. The Customs Authorities examined the manifest of the aircraft to see if any gold was consigned by any passenger, and not finding any entry they entered the plane, searched the respondent, recovered the gold and charged him with an offence under sections 8(1) and 23(1-A) of the Foreign Exchange Regulation Act (7 of 1947) read with a notification dated 8 November, 1962 of the Reserve Bank of India which was published in the Gazette of India on 24<sup>th</sup> November. The respondent was convicted by the Magistrate, but acquitted by the High Court on appeal.

It is pertinent to note here that one of the reasons for the acquittal by the High Court was the absence of mens rea. The High Court stated that the accused could not have committed the crime due to the absence of mens rea. This judgment of the High Court embraces the free will theory, in that it concedes that the accused had no *intention* of committing the crime, and to that extent his actions were involuntary.<sup>30</sup>

The State appealed to the Supreme Court, one of its contentions being that mens rea ought not to be of paramount importance when it comes to making an act criminal as it would, such as in this case, defeat the purpose of the law. This judgment is peculiar as it remains unclear what their Lordships wished to lay down regarding mens rea. Their Lordships found the respondent not guilty, yet allowed the appeal, which is the cause for the vagueness. However,

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<sup>29</sup> A.I.R. 1965 S.C. 722.

<sup>30</sup> CHANDRASHEKHARAN PILLAI, GENERAL PRINCIPLES OF CRIMINAL LAW 3 (Eastern Book Company 2nd ed. 2011).

... mens rea being a necessary ingredient of the offence, the respondent who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. The respondent is therefore not guilty.

it is easily discernible from this judgment, that mens rea need not be an essential constituent of a crime, where the legislature says so.<sup>31</sup> This reasoning of the court was upheld in *Nathulal v. State of Madhya Pradesh*<sup>32</sup> and *Kartar Singh v. State of Punjab*.<sup>33</sup> It may also be noted here that Lord Wright in *Sherras*<sup>34</sup> went on to say the same thing.<sup>35</sup>

This would imply that the court has acknowledged that there are certain acts that cannot be said to be of one's own volition and are determined by some other, antecedent rules (determinism). This is evidenced by the court (or legislature) annihilating the necessity of mens rea to be present in order for an act to be an offence. However, it cannot be said if any of the Lordships mentioned till now subscribe to a particular theory of the compatibility or incompatibility of determinism and free will.

*Whether the adoption of determinism would render no man capable of committing a crime*

How would this then affect the nature of crimes? Noted philosopher Bertrand Russell discusses this issue, from which we may try to arrive at an answer. He acknowledges that there is a conflict between the two concepts, determinism and free will, yet does not wish to state his views on the compatibility or incompatibility of the two.<sup>36</sup> What is important to remember is that even if determinism were adopted (and free will rejected), and it was given that there was no voluntary choice exercised by man and his actions were a consequence of prior, existent conditions; determinism, as it were, would not dissolve the difference between right and wrong or good and bad,

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<sup>31</sup> *Id.* at 7.

Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their acts or omission to assist the promotion of the law.

<sup>32</sup> A.I.R. 1966 S.C. 43.

<sup>33</sup> (1994) 3 S.C.C. 569.

<sup>34</sup> (1895) 1 Q.B. 918.

<sup>35</sup> See note 20.

“...but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals...” per WRIGHT J.

<sup>36</sup> BERTRAND RUSSELL, PHILOSOPHICAL ESSAYS 36 (Routledge 1996).

even if it did do away with the question of choice (and therefore mens rea).<sup>37</sup> It is this retention of right and wrong which is seminal when it comes to criminalisation (with or without mens rea) as the importance of ethics<sup>38</sup> in criminal justice is widely accepted today.<sup>39</sup>

The practical application of Russell's explanation is seen in legal systems incorporating principles such as *doli incapax*<sup>40</sup> and accordingly different *punishments* to perpetrators of crimes who are minors or who are not of sound mind. These punishments often include remanding the perpetrator to a special institution, such as a juvenile detention facility or a mental institution.<sup>41</sup> This goes to show that the criminalising body realises that such individuals usually have no control over their actions. They act based on their condition. We may extend this to mean prior conditions that resulted in their acts (crimes). This would thus, accept the determinist view. Regarding mens rea, it would already be mentioned by the criminalising authority that it is not required. However, despite this, it is important to note here that the mere adoption of the determinist view would *not* render a man incapable of committing a crime, for even if he does not possess the guilty mind, the determinist view may take away the voluntary and involuntary; but it does not dissolve the differences between a good and a bad act, which the criminalising authority uses to label a particular act a crime. The only requisite for a person to be guilty would be the commission of the act, and not possessing a guilty mind.

## 5. CONCLUSION

It is clear that the adoption of the determinist view would annihilate mens rea, however, it wouldn't necessarily annihilate the criminal nature of acts.

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<sup>37</sup> *Id.* at 42.

<sup>38</sup> *See generally*, CYNDI BANKS, CRIMINAL JUSTICE ETHICS 3 (Sage, 2<sup>nd</sup> ed. 2009).

Ethics is also known as moral philosophy and is a branch of philosophy concerned with the study of questions of right and wrong and how we ought to live. It involves making moral judgments about what is right and wrong or good and bad.

<sup>39</sup> *Id.*

<sup>40</sup> A legal presumption that a child (usually below seven years of age, although this may vary in different legal systems. It is seven years of age in India) is incapable of committing a crime as it lacks the required mens rea and mental capacity to understand the nature of its actions.

<sup>41</sup> HALL, *supra* note 14 at 458.

In truth, it may be stated that legal systems provide for handling crimes whether a determinist or free will view is adopted. This article does not seek to state whether the two concepts are compatible, incompatible or exist independently, however, upon exploring the existence of one and not the other, it can be safely said that mens rea is not an essential element to be present in *all* acts that the state wishes to criminalise.

This point makes itself conspicuous if one were to cascade through the various provisions of the Indian Penal Code, 1860, some sections of which provide that there be mens rea in order for the act to constitute a crime and others that do not. Thus to answer the question this paper set out to, even if we were to adopt a completely determinist view we would have to concede that given the very nature of determinism and what it comprises, individual choice would not exist and this would in fact render mens rea redundant. However, it must be noted that this would *not* render a man incapable of committing a crime, for the legal system has found a way around this.

All that needs to be done, as Lord Wright has pointed out, is that the law simply states that mens rea be omitted while considering if an act is a crime or not. After all, the law can be what it wants to be, and mens rea, as we have seen, is a fluid concept and not as rigid as it was once thought to be. This has been adopted in the United States where the Supreme Court in *Powell v. Texas*<sup>42</sup> stated that mens rea was not essential for all crimes and therefore, states were allowed to make criminal laws that do not require proof of mens rea. This would make jurists rethink about the essentials of a crime, although, it cannot be denied that mens rea and actus reus are still key essentials. What matters is which element the legal system chooses to give more importance to.

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<sup>42</sup> 392 US 514, 535, 88 S. Ct. 2145 (1968).