The Emergence of Mens Rea in Common Law and Civil Law Systems

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Abstract

This research examines the historical development of mens rea—i.e. the mental element involved in the commission of a crime—in common law and civil law systems. The historical context for this topic is very important because it helps in understanding the essential role that mens rea plays in achieving justice. Mens rea extensively changes the concept of criminal liability, aiding in the development and maturation of criminal liability applications in justice systems around the world.

In common-law countries, the concept of mens rea began as a religious principle and then migrated into the body of criminal law that was imposed by courts. It was then developed by the opinion of judges who subsequently discussed what the law is, attached logic to the law, and thereby influenced future common-law doctrine. In common-law jurisdictions, the substantive law is found in legislation and cases. Case based law, which is found in the judicial decisions and the doctrine of precedent, forms the basis of the law where no legislation exists. The doctrine of precedent provides flexibility and contributes to the growth and changing in the common law. This gives judges more opportunity for reforming and developing mens rea, which explains the reason for having more than two types of mens rea, as in English criminal law.

In civil law systems, mens rea first appeared with the inception of Roman Law or The Law of The Twelve Tables; however, this form of mens rea is based on written codes, not judicial opinions. In such cases, judges' roles are limited to interpreting the law because they are bound by written provisions. This is the main reason for having only two types of mens rea in most civil law countries, such as France, Egypt, and Qatar.

Keywords: Mens rea, Civil law system, Common law system, Criminal Intention, Mistake, Conditional Intention.

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Introduction

As stated by John Henry Wigmore, "No concept can be understood except through its history"[(1)]. Following that logic, this research explores the definitions of mens rea and key theories behind it via a general overview of the history of mens rea in civil and common-law systems.

A major principle of criminal law states that crimes contain both a mental and a physical element. Mens rea, or the mental element, is the defendant's intent and/or knowledge at the time he committed the crime; actus reus, the act itself, is the physical element of the crime. The standard common-law test of criminal liability is usually expressed in the Latin phrase Actus reus non facit reum nisi mens sit rea, which means "The act is not culpable unless the mind is guilty." Mens rea allows the criminal justice system to decide whether the defendant deserves punishment according to their mental state at the time of committing the crime, and if so, what type of punishment(s) the defendant deserves.

It is very important to examine the history of mens rea for many reasons, especially since knowing the historical context helps us to understand the reasons for including mens rea as an element of a crime. Studying the history also helps the reader to learn the definitions of the different types of mens rea, why these types of laws exist, and how they contribute to justice. Understating the earlier meanings, roots, and justifications of mens rea will make it easier to understand the current types of mens rea in terms of justice and fairness. Examining the history also shows how common law and civil law systems define mens rea and how both systems apply the current doctrine of the mens rea in their system. The reason for this is that both systems have different approaches to the definitions, levels, and the punishments that are attached to each type of mens rea. Furthermore, it also shows the reader how culpability is attached to mens rea and how it contributes to the existence of each type.

Understanding the historical development of the different types of mens rea, such as indirect intention, recklessness, and negligence, is also valuable. The historical overview of the types and development of mens rea helps the legislators in each system to learn from their previous mistakes, such as the ones that related to negligence and recklessness, when dealing with the different types of mens rea. This will help the legislators to develop the

(1) John Henry Wigmore, Responsibility for Tortious Acts: Its History3 Selected Essays In Anglo American Legal History 476 (1909). This essay first appeared in 7 Harvard Law Review 315, 383, 441 (1894).

current doctrine of mens rea and avoid any serious mistakes in the future. For example, the common law system did not previously distinguish between negligence and recklessness because the combination between these two types leads to unwanted results. However, the current doctrine of mens rea in the civil law system still considers them to be the same and does not distinguish between these two types in terms of punishment. Therefore, it is important for each legal system to learn from the other system in order to review, develop, and correct the mens rea laws in their countries.

In the primitive age, for instance, the prevailing element in understanding crime consisted of only criminal acts, and not mens rea[2]. Criminal liability at that time depended on the existence of act, harm, and causation, without considering the mental element of the crime[3]. Because there were no criminal laws that determined either the elements of each crime or the punishment the criminals merited, primitive people could not resort to a legal system when their rights were violated, but rather they followed their instincts, instinctively defending themselves and their property[4]. Therefore, criminal justice was realized by the victim via an act of revenge. In other words, primitive criminal justice required only a criminal act, an occurrence of harm, and the existence of causation in order to impose punishment on the criminal.

With the development of two important contemporary legal systems, common-law and civil law, mens rea played an important role in applying the law. Mens rea changed the concept of criminal liability extensively; over time, the concept of criminal liability has become more mature and developed, and the concept of culpability now plays a vital role in determining punishment.

The existence of mens rea became necessary for punishing criminals because it reflects the moral side of the crime—in other words, mens rea differentiates between someone who is morally liable for causing injury and someone who is not morally liable and therefore undeserving of punishment[5]. Any person who causes injury without some blameworthy mental state, such as negligence, cannot be blamed or punished because he did not violate what is expected of a reasonable person or take the necessary precautions to prevent it[6].

(2) Ahmad Fathi Serour, Criminal Law: General Part 717 (6th ed. 2015).

(3) Abdul Momen, Criminal Intent 12 (1969).

(4) Mansour Rahmani, Criminal Law 13 (Dar Alaloom 2006).

(5) See Michael S. Moore, Intention, Responsibility, and the Challenges of Recent Neuroscience, Stan. Tech. L. Rev. 1 (2009).

(6) Stephen J. Morse, Inevitable Mens Rea, 27 Harv. J.L. & Pub. Pol'y 62 (2003-2004).

Just as each of these systems developed in different ways historically, they each approach the definition and types of mens rea differently today. This research provides how common law and civil law systems each define mens rea, discussing similarities and differences between both approaches. Moreover, this research also explores how many types of mens rea operate in other legal systems.

This paper focuses specifically on the types of mens rea in France and England. These two countries represent two different legal systems which are absolutely distinguished from each other: common law and civil law. France is considered to be the origin of the civil legal system, while England is the origin of the common-law system. Comparing the concept of mens rea in these legal system reveals how its legislative wording can be vital when determining criminal liability.

The types of mens rea are very crucial in assessing the proportionality between a crime and its punishment. Each type of mens rea reflects a particular degree of blame that deserves a particular punishment. Thus, punishment must be proportional to the defendant's level of blameworthiness. Under this concept, if the penalty is disproportionate to the offense, then it may be held unfair and unjust(7). In Solem v. Helm, for example, the U.S. Supreme Court evaluated a constitutional challenge under the 8th amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. The court relied upon three factors to assess proportionality, one of which was the gravity of the offense and harshness of the penalty(8). The court held that grossly disproportionate punishments are cruel and unusual under the 8th amendment of the U.S. Constitution, stating that the gravity of the offense is essentially assessed by the level of the criminal's culpability, i.e., whether the defendant committed the offense intentionally or negligently.

Section one of this research covers the history of mens rea, beginning with the approach to mens rea adopted by ancient civilizations, then discussing the emergence of mens rea in the common law system. After that, the research examines the beginning of mens rea in the civil law system, shedding light on the historical stages that mens rea has passed through until it became defined in laws. Section two of this research discusses the criminal mens rea element in terms of its definitions and characteristics in both common-law and civil-law

(7) Paull H. Robinson & Michael T. Cahill, Criminal Law 77 (2d ed. 2012).
(8) Solem v. Helm, 463 U.S. 277 (1983).

systems. Section three shows the types of mens rea in two different legal systems, those of France and England, first discussing the types of mens rea in England by focusing on the three different levels of culpability (intention, recklessness, and negligence) before explaining the types of mens rea in France (namely, intention and negligence). Finally, the research concludes by explaining how the history of mens rea affects the forming of the types of mens rea.

I. History of Mens Rea

A. Ancient Civilizations

The concept of mens rea was not completely absent in history. As years passed and civilization appeared, there were some cases where ancient civilizations considered mens rea, such as Babel, Hebrew civilization, and Athens. Many historical reports indicate that Babylonian civilization, established in 2270 years B.C., invoked mens rea for certain crimes(9). For example, the Code of Hammurabi states that "if one man strikes another in a quarrel and wounds him, he shall swear, "I did not strike him willingly", and he shall pay the physician. [Moreover,] if the man dies from his wounds, he shall likewise swear, and if he [the victim] be a free-born man, he shall pay one-half mina of silver"(10).

Additionally, in ancient Athens, the law distinguished between intentional murder and manslaughter(11), as indicated by the code of Draco(12). The concept of mens rea was also present in Greek philosophers' minds, e.g. Aristotle and Plato in 350 B.C. Plato says: "Voluntary and involuntary wrongs are recognised as distinct by every legislature who has ever existed in any society, and regarded as distinct by all law"(13). Aristotle says in his book Nicomachean Ethics that "[w]rongdoers should not be punished where innocent ignorance has been the cause of their acts"(14). This means that there is a distinction between the person who commits a crime accidentally and he who commits a crime intentionally(15).

(9) Mohamed Elewa, Studies in International and Comparative Criminal Law: The Concept of Mens Rea in International Criminal Law 16 (1st ed. 2013).

(10) Code of Hammurabi, section 206-207.

(11) Elewa, supra note 9, at 15.

(12) Draco was the first legislator of Athens in ancient Greece. He replaced the customary law system that prevailed at the time with a written code in 622 B.C.

(13) Elewa, supra note 9, at 17.

(14) Elewa, supra note9, at 17. See also Aristotle, Nicomachean Ethics (written in 350 B.C.).

(15) Elewa, supra note9, at 17.

B. Common Law

The root of mens rea in common law dates back to 597 A.D. with St. Augustine[16] and his writings about "evil minds"[17] St. Augustine discussed the necessity of the existence of guilty minds in certain crimes, stating that "Nothing makes the tongue guilty, but a guilty mind"[18]. Although St. Augustine focused on perjury in his writings, his statement that no one can be considered guilty unless it is proven that he fully intended to commit the act became a general rule for many other crimes, influencing many later publications and leading to the appearance of the phrase mens rea for the first time in the Leges Henrici writings[19]. Later, St. Augustine's followers in the Anglo-Saxon era rephrased his previous statement about perjury so that it included all types of crimes[20].

Initially, however, only the Church adopted St. Augustine's writings on mens rea, and only applied them to spiritual matters like forgiveness and amnesty. This made it a concept without a legal basis to impose sentences on criminals because it was distinct from the formal laws enacted by the kings[21]. In other words, the king and his servants punished criminals who committed wrongful acts regardless of the criminal's mens rea. Only the church viewed culpability as the fundamental bases upon which the criminal must be punished.

By the thirteenth century, the importance of mens rea migrated to criminal law as the concept of malice appeared as one of the main factors of mens rea. This development is attributed to the writings of Henry Brackton, one of the famous common-law judges[22]. Brackton states in De Legibus et Consuetudinibus Angliae (On the Lawsand Customs of England):

[W]e must consider with what mind (animo) or with what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined

(16) One of the Christian philosophers and saints who influenced Western Christian philosophy.

(17) Jean K. Gilles Phillips & Rebecca E. Woodman, The Insanity of the Mens rea Model: Due Process and the Abolition of the Insanity Defense, 28 Pace L. Rev. 463 (2008).

(18) Id.

(19) This legal treatise is a collection of laws from the time of Henry I. It was written in 1115, and it shows the legal customs of Medieval England. It is unknown who wrote these documents. However, it was apparently written by someone who worked within the royal administration. See also Paul H. Robinson, Mens Rea, U.PA. L. Rev. 996 (2002).

(20) Eugene J. Chesney, Concept of Mens Rea in the Criminal Law, 29 J. Crim. L. & Criminology 630 (1939).

(21) Id. at 631.

(22) He was one of the main factors that affected the development of common law in terms of dealing with mens rea, from the perspective that a crime is not committed unless there is a willingness to commit it.

accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (nocendivoluntas) intervene, nor is a theft committed except with the intent to steal[23].

Brackton believed that criminal acts must be measured based on the level of malice in the criminal's mind. He emphasized the presence of willingness when discussing arson, for example, as he required the existence of intent as an element of that crime. Brackton also demanded legal exemption from criminal liability for those who commit crimes through insanity or as minors because they lack the required mental capacity and awareness[24]. Throughout these writings, the concept of mens rea influenced common-law judges, both in terms of the existence of an intent to commit a crime and in terms of the requisite legal exemptions of criminal liability.

After the thirteenth century, the concept of mens rea contributed to more accurately distinguishing between criminal liability and civil liability. In civil violations, compensation was due to the victim regardless of whether or not the injurer intended to cause harm. In regard to criminal acts, by contrast, legislators decided that there must be a moral blameworthiness[25] that reflects mens rea and its moral liability[26]. Ideas related to mens rea and legal exemptions from criminal liability were developed more and more, and eventually, courts started exempting defendants from criminal liability in certain cases, such as those where defendants committed crimes under duressor of insanity; for a criminal to be punished or held liable for his criminal acts, the courts decided, he must have committed the crime with free will.

In the sixteenth century, many English books were influenced by Brackton's thoughts concerning the importance of intent when committing crimes. One common-law scholar explained in analyzing the crime of trespass: "The intent cannot be construed, but in felony it shall be. As when a man is shooting at the butts, and kills a man, it is not felony; and this will be so, as he had no intent

(23) Chesney, supra note 20, at 631.

(24) Phillips & Woodman, supra note 17, at 464.

(25) This idea stipulates that the offender must be morally bound to his actions and this cannot happen unless there is an evil intention to commit crimes that lies in the offender's mind. This idea served to differentiate between criminals who commit an act deliberately and those who made a mistake due to their mental illness.

(26) Phillips & Woodman, supra note 17, at 465.

to kill him; and thus of a tiller on a house, who unwittingly with a stone kills a man, it is no felony"[27].

In the eighteenth century, moral blameworthiness became a basic rule of mens rea in English criminal law. Blackstone's writings were very clear regarding this matter: "So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will"[28]. All of these discussions clarified that mens rea became generally accepted by judges despite the debates related to its details.

C. Civil Law

Mens rea first appeared in civil law with the inception of Roman Law or The Law of The Twelve Tables[29], which served as the basis for what is now known as civil law. In 450 B.C., a conflict arose between the people and the rulers because a certain subset of Roman rulers monopolized the government and the judiciary[30]. The Roman people forced the rulers to establish a committee of 10 persons which would enact a law that would govern Rome justly and reasonably. The committee then made The Twelve Tables, which included all of the rules that would govern Rome in the courts of law[31].

Mens rea played an obvious role in The Twelve Tables. For the first time, there was a distinction between voluntary and involuntary acts; for example, the definition of the crime of arson (Chapter VII, Law XIII) stated that anyone who intentionally set a fire and was fully aware of his actions must be sentenced to a penalty of deliberate burning[32]. The distinction was not only applicable to arson, but also to wilful murder and involuntary manslaughter.

(27) Chesney, supra note 20, at 633.

(28) See Kelly A. Swanson, Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses—In re C.R.M., 611 N.W.2d 802 (2000).

(29) However, other historical studies show that The Twelve Tables were not the only documents that mentioned mens rea, but there were also many studies that showed that the Second King of Rome, Numa Popilius, mentioned mens rea in one of his writings in 715 BC. The text states: "Si quis hominem liberum dolo ciens morti duit, parricida esto." This means that anyone who commits a murder intentionally must be executed, whereas if the murder was committed through negligence, then the murderer must offer a goat as a compensation to avoid punishment. For more information, see Carl Ludwig Von Bar, A History Of Continental Criminal Law, 12 (1916).

(30) Carl Malamud, The Future of Law Libraries: Twelve Tables or 7-11, Harv. L. Rev. 3 (2011).

(31) E. B. Conant, The Laws of the Twelve Tables, 13 Wash. U. L. Rev. 1 (1928).

(32) See Twelve Tables, VII, Law XIII. The text provides the following: "Anyone who sets fire to a barn or a heap of grain near a house is sentenced to be bound, flogged and burnt alive (talio!), provided that he acted knowingly and deliberately. But if he did it by chance, that is, negligently, he is ordered to pay compensation. But if he is a man of straw he is punished, though more lightly." See also Elewa, supra note 9, at 17.

For example, the Tables provided that "si telum manu fugit magis quam iecit, arietem subicito," roughly translating to "the arrow that is voluntarily shot from the accused's bow to kill someone differs from the arrow that hits the victim unintentionally"[33]. Concerning this text, Cicero[34] said, "This Law is very important for humanity as it distinguishes between the entitlement for punishment to those who commit a crime intentionally and those who committed the crime as a result of their bad luck"[35]. The essence of this distinction was that wilful murder included malice while involuntary manslaughter resulted from bad luck that led to committing the crime.

Cicero's thoughts contributed to the development of the Law of The Twelve Tables. He mentioned mens rea in many of his writings that discussed this law, which is considered the foundation of the civil law system, when he said, "a man cannot be condemned because he was free of fault (culpa) . . . Nothing is more disgraceful than that one who is free of fault should not be free of punishment"[36]. In 64 B.C., Cicero also emphasized another distinction concerning mens rea, stating that the person who shoots someone with an arrow to murder him, but the arrow hits someone else instead and kills him, cannot be liable for the person's death because he did not intend to murder him and there was no malice[37].

D. French Criminal Law

That was the beginning of mens rea in civil law. Over the course of the next few centuries, however, French law also came to be one of the pillars of civil law, especially after the French Revolution. French law passed through three different stages and each of them addressed mens rea in different way.

1. The Ancient Era

In the period before the French Revolution, the influence of Roman law dominated the French judiciary in different provinces. There was a distinction between intentional and unintentional crimes[38], where in an intentional act always included the element of bad faith or the intent of harm, whereas an

(33) () Elewa, supra note 9, at 18.

(34) () Marcus Tullius Cicero (106- 43 BC), was a Roman writer, philosopher, and lawyer who contributed to the development of Roman law and the Roman Renaissance.

(35) () Elewa, supra note 9, at 18.

(36) () Id.

(37) () Id.

(38) () Momen, supra note 3, at 21.

unintentional act did not. The judiciary of this period also added two ambiguous types of mens rea: "undetermined intent" and "presumed intent". However, the judiciary did not offer a clear explanation of the meaning of these types of mens rea(39).

2. The Revolutionary Era

After the French Revolution, Law No.29 of 1791 was issued by the Revolutionary Assembly(40). This law granted the judge full discretion to determine issues of criminal intent for misdemeanours and violations(41). Regarding felonies, however, the jurors, not the judges, had a vital role in proving the existence of mens rea. This situation led to obvious practical disadvantages(42). The jury often misunderstood criminal intent and confused it with motivation. As a result, if the motivation for committing an act was found to be honest, the jury frequently found that there was no criminal intent.

3. 3. Napoleonic Era – Law 1810

Those difficulties led to repeal of the provisions that grant the jurors the authority to proving mens rea(43). The criminal code of 1810 had not addressed mens rea in its provisions. But the preparatory works of this law clearly indicate that this was the legislator's aim in avoiding the practical disadvantages that previously arose (e.g. the jurors' misunderstanding of mens rea and the weak explanations for it). However, the text of Article No.64 of this law included at the beginning that this deletion was informal and that mens rea still had an effective importance in the law(44). Namely, at that time, mens rea created many controversial issues about its nature and types. French scholars addressed mens rea in different ways, making it very hard to understand. Therefore, the legislature wanted to ensure that mens rea was still an important element of crimes, however, it did not want to interfere in controversial matters about it(45). In effect, therefore, the role of mens rea was left to judges and legal scholars to discuss(46).

(39) Id.
(40) Catherine Elliott, French Criminal Law 7 (2d ed. 2011).
(41) Momen, supra note 3, at 21.
(42) Id.
(43) Elliott, supra note 40, at 66.
(44) Momen, supra note 3, at 22.
(45) Id.
(46) Serour, supra note 2, at 644.

II. Current Definitions of Mens Rea

It should be noted that many criminal scholars differ in their definition of mens rea. Therefore, the definition of mens rea depends more on its interpretation by the legal scholars in each legal system. When criminal codes define types of mens rea or levels of culpability, they do not have a conceptual definition of mens rea. Many criminal codes either include the intention and fault types of mens rea, as it happens with most Arab Countries, or they include the levels of mens rea as they are included in the Model Penal Code in the United States, which separates the four levels of mens rea from each other. This section explores how common law and civil law systems define and interpret mens rea today.

A. Common-Law System

In the common-law system, mens rea is generally defined as the mental state that a defendant possesses when he commits a crime, whether it is a general intent to commit the conduct or specific intent to cause the criminal result(47). The etymology of mens rea consists of two Latin words:mens-mentis ("mental") and res-rei ("thing"). Therefore, mens rea literally means "mental thing"(48).

Paul Robinson, a prominent American legal scholar, says that the term mens rea first appears in Henrici Leges'(49) description of perjury in the passage "Reum non facit nisi mens rea," which means that the offence (perjury) is not committed without a mental component(50) St. Augustine also used this terminology when he discussed perjury, after which this terminology became known in British criminal law as one of the most important principles of criminal liability (i.e. "Actus non facit reum nisi mens sit rea"or "The act is not guilty unless the mind is guilty", or "Actus reus non facit reum nisi mens sit rea," which means "The act is not culpable unless the mind is guilty"(51).

(47) David C. Carson LL.B. & Alan R. Felthous M.D., Introduction to This Issue: Mens Rea, 21 Behavioral Sciences and the Law 559, 559 (2003).

(48) Ike Oraegbunam & R. Okey Ounkwo, Mens Rea Principle and Criminal Jurisprudence in Nigeria, 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 227 (2011). Available at http://www.ajol.info/index.php/naujilj/article/view/82407.

(49) One of the legal treatises written in the era of King Henry I. It contains 1115 pages that discuss many legal subjects and how to implement the law. It is considered to be one of the first legal treatises to impact England.

(50) Robinson, supra note 19, at 996. See also Oraegbunam & Ounkwo, supra note 48, at 227.

(51) Id.

The term mens rea soon became widely used in the common-law system, and many countries today continue to use the same Latin terminology or a similar phrase such as "guilty mind." Some countries, such as France, use the term "mental element," which means the same thing but is written in the vernacular.

Although legal scholars and judges have offered many variations, the standard definition of mens rea is that which occupies an offender's mind when he commits a crime, including a person's awareness of and intention to commit a criminal act(52). Courts and judges define mens rea in many different ways, such as those mentioned in the Nigerian court case of Abeke v. State, in which the court described mens rea as the state of mind that the accused must have possessed at the time of performing whatever conduct requirements ?as stated in the actus reus(53).

Moreover, many common-law scholars believe that the definition of mens rea is ambiguous(54). Some scholars believe that this is because legislators frequently ignore the definition of mens rea in the criminal code. But the most important reason for its ambiguity is that mens rea has two definitions, one broad, one narrow. The broad meaning expresses the offender's blameworthiness, and describes any person's violation that is sufficient to warrant blame and punishment(55). This broad definition, in principle, could include legal excuses such as insanity, coercion, and intoxication(56). If mens rea broadly focuses on morals and ethics, capturing all mental characteristics that make a person eligible for punishment, then it should embrace the principle that only a rational and sane person can be punished(57). Under that definition, which is commonly used in common-law countries(58), criminal responsibility is an element of mens rea and cannot be distinguished from it(59). Whenever the defendant has any lack of responsibility, such as insanity, the court cannot find that he possessed the mens rea required to commit the crime.

(52) See http://criminal.findlaw.com/criminal-law-basics/mens-rea-a-defendant-s-mental-state.html.

(53) Oraegbunam & Ounkwo, supra note 48, at 229. See also Abeke v. State, (2007) 9 NWLR (part 1040) 411 at 429-430.

(54) William J. Stuntz & Joseph L. Hoffmann, Defining Crimes 89 (2d ed. 2014).

(55) Robinson, supra note 19, at 995.

(56) Id.

(57) Ashraf Shams Aldein, Explanation of the Criminal Law in Qatar: General Part 207 (1st ed. 2010).

(58) Robinson, supra note 19, at 995.

(59) Criminal responsibility is a synonym for capacity; it is related to the criminal's mental state, and whether he was of sound mind when he committed the crime, making him capable of receiving punishment. Rhamanee, supra note 4, at 192.

A second, narrower definition of mens rea describes it as the person's state of mind while committing the offense[60]. This definition, which is also called the "elemental element," contains only the types of mens rea that exist while committing a crime, without considering whether or not the person deserves punishment. It refers to a particular state of mind that the defendant must possess with respect to the elements of the crime (e.g. the mindset of any person who intentionally kills another person). This is the prevailing definition in a number of countries, including the United States. It distinguishes between the offender's criminal responsibility and his state of mind when he committed the crime. Legal excuses such as insanity and others should be included in a separate section from the description of the crime and should be approached and treated differently[61]. This is because they must not be confused with the elements of a crime, especially when they are subject to different procedural rules regarding the burden of proof. The test to prove those excuses is different than the test to prove mens rea.

B. Civil Law System

In Arabic, mens rea is translated as "alrkn almanwe". Alrkn means"element", while almanwe means "moral"[62]. Although this phrase means "the moral element," the common understanding in civil law is that mens rea refers to the mental element and not the moral aspect[63].

The mental element of mens rea in the civil law system is most commonly described as the element that includes criminal intent or fault. The first type of mens rea, criminal intent, refers to instances in which the offender intended to commit the criminal act and its results with an awareness of all of the physical elements stated by law[64]. The other type of mens rea, fault, refers to instances in which the person committed the crime accidentally as a result of conscious or unconscious fault.

Scholars in the civil law tradition differ regarding the proper definition of mens rea. Broadly, they approach mens rea according to two definitions, psychological and normative[65]. In the psychological definition, mens rea is

(60) Robinson, supra note 19, at 995.
(61) Id. at 996.
(62) Mahmoud Najeeb Houssni, Introduction to Islamic Jurisprudence 502 (1984).
(63) Serour, supra note 2, at 643.
(64) Rahmani, supra note 4, at 646.
(65) Momen, supra note 3, at 147.

limited to the psychological relationship between the criminal and the elements of crime. Through this relationship, the criminal commits the offense that leads to the criminal result and then becomes guilty according to the law(66); this is similar to the narrow definition of mens rea in the common-law system. In the normative definition, mens rea does not only depend on psychological aspects, but there are also other normative elements that must be considered when defining mens rea, such as criminal responsibility(67); this approach has been adopted by the supporters of normative theory, similar to the broad definition of mens rea in common-law system(68). Some scholars maintain that mens rea combines both the psychological and normative definitions.

We can conclude that the previous definitions lack some explanation and differ in many matters. First, what is the type of the relationship between the criminal and the crime? Is it mental or psychological? Is it just about what the person was aware of or should have been aware of, or is it about the person's reasons, motivations, and intention?

Second, what is the timing of this relationship? The civil law definitions do not mention the timing of this relationship, whether it describes the moment in which the crime is committed, shortly before it, or a long time before it. In the case of a criminal attempt, for example, the offender should be punished even if the crime was not committed. In this case, mens rea must exist before completion of the crime. Similarly, countries including France, Egypt, and Qatar have adopted a type of mens rea that takes a premeditated form which is an antecedent to the crime, making it important to determine the timing of this relationship.

Resolving these conceptual difficulties with mens rea is beyond the scope of this research, although these criticisms may be useful for future research about the definition of mens rea. As noted above, one of the most important causes of the ambiguity of mens rea is its nature. Presumably because of this nature, local and international legislatures do not discuss its definition, leaving the definition of mens rea ambiguous. Because the subject of this research is the history of mens rea, the definitions of mens rea will be left for future research.

(66) Id.
(67) Id.
(68) Id.

III. Types of Mens Rea

C. Mens Rea in England

The types of Mens rea found in modern English criminal law are similar to those found in other common-law systems, but it is different in some details. Mens rea in England currently consists of three forms: intent (whether direct or indirect), recklessness, and negligence, but that division witnessed many developments throughout history. Mens rea used to contain only two types, which were intent and recklessness. Eventually, the English courts separated negligence from recklessness (they considered recklessness as having two forms: subjective recklessness and objective recklessness, which is negligence).

1. Intent

English law does not differ greatly from other systems in its definition of intent as a form of mens rea; it defines intent is the highest level of mens rea, it is expressed by the intent to achieve a particular result through a particular act(69). It refers to the criminal's desire to achieve a criminal result. Therefore, intent differs from motive since motive generally does not have legal value for defining criminal liability.

Many cases expressed the difference between intent and motive, as in the case of R. v. Inglis. There, the defendant argued before the English courts that his motive was to relieve the victim from his pain, but the court refused such a defense(70). The court stated that, "[T]herefore we must underline that the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well-established partial defenses, like provocation or diminished responsibility, mercy killing is murder." Here, we find that motive is different from intent and plays no role in criminal liability.

A question arises about the extent of intent in mens rea. If we say that intent is the awareness of the act, the criminal result, and the desire to achieve a criminal result(71), then will the defendant be punished because of the criminal result which he knew about, even if he did not desire that result? English courts have answered this question "yes," noting that intent has two forms, direct and indirect intent (also called "oblique intent"). Direct intent is the desire

(69) Elewa, supra note9, at 33.

(70) R. v. Inglis [2011] 1 WLR 1110(Court of Appeal).

(71) Serour, supra note 2, at 646.

to achieve a criminal result, while indirect intent includes results which the defendant might not want to achieve but which he knows are virtually certain to occur as a result of his conduct[72]. The English legal system does not attach any legal significance to direct and indirect intent but the American Model Penal Code does with terms like purposely (direct intent) and knowingly (indirect intent).

Direct intent is found in the majority of cases in England[73]; take, for example, a person who intends to kill his wife, so in order to achieve this result, he takes a knife and kills her. By contrast, indirect intent is the will to perform an act with the awareness that the criminal result will be virtually certain to occur as a result of his act, even if he does not want to achieve it directly[74]. For example, if the person intends to kill his wife while she travels by plane, and puts a bomb in the plane to kill her, that represents a direct intent to kill his wife. However, the other passengers die as a result of an indirect intent to kill, because the defendant was virtually certain that there were other passengers who would die as a result of his criminal act[75].

For indirect intent crimes, there is a long debate over the extent of knowledge that should be found in the criminal mind when he commits a criminal act- to what degree must the defendant be certain that the result will occur as a result of his act? Although the standard has been subject to many changes and developments, the current standard was applied in court in the case of R. v. Nedrick[76] and was amended later in R. v. Wollin.[77]In these cases, the court determined that the defendant must be "virtually certain" that the result will occur because of his act.

The following table points out England's historical development of the standard of knowledge in indirect intention[78]:

(72) Glanville Williams, Oblique Intention, 46 Cambridge L. Rev. 417 (1987).

(73) Simon Parsons, Intention in Criminal Law: Why Is It So Difficult to Find, 5 Mountbatten Journals of Legal Studies 5.

(74) Kevin Jon Heller & Markus D. Dubber, The Handbook of Comparative Criminal Law 536 (1st ed. 2011).

(75) See Parsons, supra note 73, at 6.

(76) R v. Nedrick [1986] 83 Cr App R 267 (Court of Appeal).

(77) R v Woollin [1999] 1 AC 82 (House of Lord). The court stated: "Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."

(78) () Available athttp://www.lawteacher.net/PDF/criminal-law/MensReaIntentionTable.pdf.

Table No.1

Hyam v DPP (1975)	**Enough that D foresaw that his actions were likely or highly likely** to cause death or substantial bodily harm.
R. v Moloney (1985)	Jury to ask themselves: (1) Was death or serious bodily harm the **natural consequence** of D's act? And (2) Did the D foresee this? If yes to both questions, then they can infer intention.
R. v Nedrick (1986)	If the jury was satisfied that D recognized that death or serious bodily harm would be a **virtually certain result** of his act, then they **may** infer that D intended to cause that result, but are not obliged to do so.
R. v Scalley (1995)	Judge failed to explain that if jury was satisfied that D did see death or serious injury as virtually certain, then they **could** infer intention but did not have to.
R. v Woollin (1998)	Jury should be directed according to the Nedrick **"virtual certainty"** test to find intention.

In summary, the first type of mens rea is intent, and it includes direct intent, which is the desire to cause a criminal result, as well as indirect intent, which is the will to perform an act while foreseeing that the result is virtually certain. The criteria for determining whether the defendant foresees his criminal result is a subjective test that depends on the qualities of the accused.

2. Recklessness

Recklessness is the second type of mens rea in the English system and it has been subject to varied explanations in history. Glanville Williams, a prominent common-law scholar, defines recklessness as follows:

"Reckless" is a word of condemnation. It normally involves conscious and unreasonable risk-taking, either as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass. The reckless person deliberately takes a chance(79).

(79) Elewa, supra note 9, at 51.

As this definition makes clear, we find that recklessness is different from intent, which is the highest form of mens rea. Intent supposes a direct desire for a particular result, while recklessness depends on the subjective estimation of matters and choices[80]. The criminal is punished because he chose to make an unjustified choice (or risk) that led to undesirable consequences.

Recklessness is further divided into two types: objective recklessness and subjective recklessness. In its subjective form, recklessness means consciously taking unjustified risks. In its objective form, by contrast, it becomes a synonym for negligence. From this definition, recklessness originally included recklessness itself (subjective recklessness) and included all forms of negligence (objective recklessness), but they were later separated. Objective recklessness was adopted in the Caldwell case, while in the Cunningham case, the judges addressed subjective recklessness for the first time.

Through this definition, according to the English system, recklessness involves blaming and condemning what the defendant did, whether it is subjective or objective recklessness. The difference between recklessness and intent in the English system is as follows:

1. When the defendant desires to achieve the criminal result (direct intent);
2. When the defendant foresees the criminal result as virtually certain (indirect intent);
3. When the defendant foresees the criminal result as possible (subjective recklessness); or
4. When the defendant does not foresee the criminal result, but he should have (objective recklessness, negligence)[81].

a. Subjective Recklessness

The cornerstone of subjective recklessness is found in R. v. Cunningham. The court in this case had to address the question of whether the defendant possessed sufficient malice to commit the crime[82] ("malice" generally refers

(80) Id.

(81) Id. at 52.

(82) R v. Cunningham [1957] 2 QB 396 (Court of Appeal). The court stated "… recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

to intent or recklessness)[83]. The defendant was convicted according to section 23 of the Offense Against the Person Act of 1861[84]. The Court of Appeal quashed the defendant's conviction because the trial judge directed the jury to interpret the word "malice" as meaning "wicked." The court found that malice means either (1) an actual intent to do the particular kind of harm that in fact was done, or (2) recklessness as to whether such harm might occur or not (i.e., the accused has foreseen that the particular kind of harm might be done, and yet has gone on to risk it)[85]. The court in this case defined the subjective test to evaluate recklessness: did the defendant foresee the possibility that the result would occur because of his conduct?

This test was also addressed in R. vBriggs[86], which held that the defendant is reckless when he performs a deliberate act knowing that there is some risk of damage resulting from that act, but not withstanding continues in the execution of that act. This test was extended in the case of R. v. Daryl Parker to cover the doctrine of "willful blindness"[87]. However, it was amended in R. v Stephenson to exclude willful blindness from recklessness[88]. The court in this case clearly adopted the subjective test of recklessness, stating that "A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is, however, not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take"[89]. Accordingly, the public prosecution must prove whether the accused foresaw the risk as possible from his actions, but was not virtually certain of the risk that may occur due tohis act.

b. Objective Recklessness

English law considered negligence to be a form of objective recklessness; in

(83) Glanville Williams, Criminal Law: The General Part 127 (2d ed.1998).

(84) Offence against the Person Act, 1861. "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm".

(85) Elewa, supra note 9, at 52. See also JW Cecil Turner, Kenny's Outlines of Criminal Law, 186 (1952).

(86) R v Briggs [1977] 1 WLR 605 (Court of Appeal).

(87) See R v Daryl Parker [1977] 1 WLR 600 (Court of Appeal). "A man is reckless in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act."

(88) R v Stephenson [1979] 1 QB 695 (Court of Appeal).

(89) See R v Stephenson [1979] 1 QB 695 (Court of Appeal).

the Caldwell case, for example, the defendant was accused according to the Criminal Damage Act(90). The House of Lords confirmed his conviction and decided that "A person is reckless if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he 'either has not given any thought' to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it"(91). According to these criteria, negligence is a form of recklessness, albeit objective recklessness.

This situation continued until the case of R v. G&R, where the court decided to differentiate between objective recklessness and subjective recklessness(92). The court stressed that negligence cannot be considered as a form of recklessness because recklessness merits a more severe punishment, one suitable for the higher degree of mens rea(93). The court found that the previous test blurred the differences between negligence and recklessness. It was confusing and very difficult for juries to understand. Also, it caused injustice as it incriminated those who genuinely did not foresee a risk of harm, penalizing them with a more severe punishment than they deserved(94). Applying a severe punishment based on any form of negligence would be unjust.

Thus, subjective recklessness is now considered the only form of recklessness. It requires that the criminal be aware that there is an unjustified risk that will

(90) Metropolitan Police Commissioner v Caldwell [1982] AC 341 (House of Lord). See also The Criminal Damage Act 1971:
(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence; (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.

(91) Metropolitan Police Commissioner v. Caldwell [1982] AC 341 (House of Lord).

(92) R v. G and Another [2004] 1 AC 1034 (House of Lord). The court states:
B]y the use of the word 'reckless' in section 1 of the 1971 Act, Parliament had not intended to change] the law in regard to the measures required for the offence of recklessly causing damage to property, so that foresight of consequences remained an essential ingredient of recklessness in the context of the offence . . . [Thus,] in order to convict of an offence under section 1 it had to be shown that the defendant's state of mind was culpable in that (1) he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or (2) in respect of a result if he was aware of a risk that .it would occur, and it was, in the circumstances known to him, unreasonable to take the risk

(93) SeeR v. G and Another [2004] 1 AC 1034 (House of Lord).

(94) SeeR v. G and Another [2004] 1 AC 1034 (House of Lord).

result from his act, yet he disregards the risk and continues the act[95]. This degree of knowledge in recklessness (or possibility) is lesser than the degree of knowledge in indirect intention (virtual certainty).

3. Negligence

Negligence is defined as the failure to take the precautions and care required by law[96]. In other words, negligence is the failure to act as a reasonable person would in circumstances where the law requires such an act[97]. Accordingly, negligence differs from other forms of mens rea because the defendant is punished according to his negative state of mind[98]; namely, the defendant is punished due to his failure to foresee the risk that he should have foreseen. Negligence is the least serious form of mens rea and the lowest level compared to intention and recklessness. Most negligence crimes in England are related to traffic violations[99].

Accordingly, the person is punished for negligence because he deviated from the reasonable behavior expected of reasonable person, neglecting to take the required precautions even if he did not foresee the risk, which he should have foreseen if he took the required precautions. [100]This highlights a major difference between negligence and recklessness; negligence refers to in advertently taking an unjustifiable risk, while recklessness is advertently taking an unjustifiable risk. Therefore, if the defendant was unaware of the risk but he should have been aware of it, then he is negligent (objective test to be applied). However, if the defendant was aware of the risk and still took it, he is reckless (subjective test to be applied)[101].

D. Mens Rea in France

Mens rea in France is called "l'intention de commettre une infraction criminelle," meaning "the intention of committing a crime". Mens rea in France is divided into two main parts, distinguishing between crimes that are committed intentionally and crimes that are committed negligently[102] While

(95) Heller & Dubber, supra note 74, at 537.
(96) See Dennis Baker, Glanville Williams: Textbook of Criminal Law 88 (4th ed. 2015).
(97) Elewa, supra note 9, at 66.
(98) See Williams, supra note 83, at 100.
(99) Heller & Dubber, supra note 74, at 537.
(100) Elewa, supra note 9, at 67.
(101) Id.
(102) Elliott, supra note 40, at 64.

felonies, by default, involve criminal intent, misdemeanors often involve negligence if the definition of the crime in question explicitly includes negligence.[104][103]In crimes where the sanction is serious, intent is the only type of mens rea that can be applied.

1. Intent

Intent is the first type of mens rea, and it is the highest level of mens rea in French criminal law. French law states that "There is no felony or misdemeanor in the absence of an intent to commit it"[105]. Intent refers to both the defendant's awareness that the act they are committing is criminal and prohibited (la conscience) and their desire to commit that criminal act (la volonté)[106]. As such, intent is divided into five types: general intent, specific intent, Conditional intent, intent with premeditation, and undetermined intent.

a. General Intention

The definition of general intent dates back to the nineteenth century, as defined by the French lawyer Emile Garcon: "It is the desire to commit the crime as defined by the law; it is the accused's awareness that he is breaking the law"[107]. According to this definition, there are two main elements that must be found in order to establish general intention: awareness and desire[108]. The element of awareness means that the criminal is aware that he is violating the law, although this awareness is presumed according to the legal rule that ignorance of the law is no excuse. According to this theory, the element of awareness is achieved when the crime is committed[109]. But this presumption is not an absolute because of the exclusion according to Article 122-3 of the French penal law, which provides that the person will not be punished if he

(103) Elewa, supra note 9, at 161.

(104) French Criminal Code, Art. 121-3:

> There is no felony or misdemeanor in the absence of an intent to commit it. However, the deliberate endangering of others is a misdemeanor where the law so provides. A misdemeanor also exists, where the law so provides, in cases of carelessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

(105) French Criminal Code, Art. 121-3.

(106) Elewa, supra note 9, at 161.

(107) Elliott, supra note 40, at 66.

(108) Heller & Dubber, supra note 74, at 217.

(109) Id.

proves that he committed the crime through a mistake in the law[110].

For the second condition—desire—the traditional definition refers to the desire to commit a criminal act, not necessarily for achieving a criminal result[111]. For example, when a person throws stones at another person and causes his death, in order to prove the general intent in this crime, the public prosecution need only prove that the accused person intentionally threw the stones. It need not show that he intended to kill[112]. This definition works in accordance with the common-law definition of general intent in the U.S.A. (although it does not appear in the Model Penal Code). The only exclusion from this element is the mistake in the facts as to whether the defendant could meet the requirement for this excuse. In other words, the defendant is able to prove that he made a mistake regarding the nature of his conduct by showing that he did not intend to violate the law[113]. The person will not be punished for theft if he mistakenly believes that he is the owner of the stolen property.

b. Specific Intent

If general intent supposes that the defendant was aware that his act violated the law—and it is a presumed awareness—and he intended to commit the act but not the result, then specific intent agrees with general intent on the element of awareness, but it differs on the element of will, as specific intent involves a particular will to achieve the criminal result that is prohibited by law, not only the criminal act[114]. For example, according to Article 221-1, "The willful causing of the death of another person is murder. It is punished with thirty years imprisonment"[115] In this example, there must be an intent to cause death for it to be considered a murder, so proving the presence of a will to achieve the criminal result is necessary for accusing the person. It is not enough, therefore, to prove only that the defendant intended to commit the criminal act that caused the victim's death.

The most common examples that distinguish between general intent and specific intent are found in the crime of theft. When a person steals someone

(110) French Criminal Code, Art. 122-3." A person is not criminally liable who establishes that he believed he could legitimately perform the action because of a mistake of law that he was not in a position to avoid."
(111) Elliott, supra note 40, at 66.
(112) Elewa, supra note 9, at 162.
(113) Id.
(114) Heller & Dubber, supra note 74, at 217.
(115) French Criminal Code, Art. 221-1.

else's property, general intent requires the prosecution to prove only that the accused intended to take someone else's property, whereas specific intent requires the prosecution to prove that the accused person did not only want to take someone else's property, but also that he intended to own the stolen property. So, the person who takes something that belongs to others with intent to return it cannot be considered a thief because theft is a crime with a specific intent, which includes owning the stolen item(s).

It is worth noting that French law considers most serious crimes to fall under the banner of general intent, while specific intent is found in particular crimes that require a particular result(116). The type of intent is usually determined by the legislative wording in the description of the crime itself. The legislature cites a phrase that indicates specific intent, as in the crime of providing false information to French authorities(117). Here, the legislature states that the defendant's act must be committed in order to incite hostilities or acts of aggression against France(118). Sometimes the judge knows the specific intent of a crime even if the result is not stated. When there is a criminal result, the crime must have a specific intent(119).

In summary, intent includes two elements, which are awareness and desire, and it is divided between general and special intent. General intent agrees with specific intent on the element of awareness, but they differ on the element of desire. According to the law, general intent involves a desire to achieve a criminal act, but specific intent involves a desire to achieve a particular criminal result.

c. Conditional Intent (Dol éventuel)

Conditional intent is one of the types of mens rea in which French legislature adopts the idea of indirect intent and what is called "dol éventuel"(120). This means that the defendant foresees the result of his criminal act and although he does not desire that result, he continues the act(121). In other words, the

(116) Elliott, supra note 40, at 67.

(117) French Criminal Code, Art. 411-10. "Supplying the French civilian or military authorities with false information liable to mislead them and damage the fundamental interests of the nation, in order to serve the interests of a foreign undertaking or organization or an undertaking or organization under foreign control is punished by seven years' imprisonment and a fine of €100,000."

(118) Elliott, supra note 40, at 70.

(119) Id.

(120) Elewa, supra note 9, at 164.

(121) Heller & Dubber, supra note 74, at 218.

defendant does not desire the criminal result but foresees that result as possible and treats it with indifference(122). This type of mens rea does not fall within the definition of special intent; rather, under the new French criminal law, indirect intent may amount to a lesser fault, treated as an aggravating factor with respect to involuntary murder and non-fatal offences against the person(123).

Conditional intent is an ambiguous type of mens rea. Initially, this type was subject to many changes regarding the standards that governed it. Early French jurisprudence stated that conditional intent occurred when the defendant "accepted" the possibility that harm would occur as a result of his act even if he did not desire the occurrence of the result(124). He was therefore criminally accountable, not only on the grounds of the expectation of the result, but also his acceptance of its occurrence(125). In this regard, conditional intent was similar to recklessness in English criminal law with one difference—acceptance of the result. The French legislature considered conditional intent to be one form of intent. Mere recklessness (or subjective recklessness), by contrast, was defined as conscious negligence, and the law treated it in the same way as unconscious negligence, which occurred when the defendant foresaw the possible result and consciously disregarded it. There was no difference regarding the punishment for these two types of negligence.

Here we find some similarities between the English and French criminal laws. They both considered negligence and recklessness the same; however, English criminal law considered negligence (objective recklessness) to be a kind of recklessness (subjective recklessness), while French criminal law considered recklessness (conscious negligence) to be a kind of negligence (unconscious

(122) Elewa, supra note9, at 164.

(123) See French Criminal Code, Art. 221-6. "Causing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by article 121-3, constitutes manslaughter punished by three years' imprisonment and a fine of €45,000. In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or regulations, the penalty is increased to five years' imprisonment and to a fine of €75,000." [emphasis mine] See also Articles 222-19 and 222-20 of the new French Criminal Code. Also, this type constitutes an independent offense in Article 223-1 of the French Criminal Code: "The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000." See also Elliott, supra note 40, at 70.

(124) Serour, supra note 2, at 658.

(125) Id. at 659.

fault).

However, the current French Criminal Code has made three important changes. First, it separates conditional intent from the category of intention. Second, it abandons the acceptance theory; acceptance is no longer required for conditional intent. Third, it separates recklessness (conscious negligence) from negligence (unconscious fault) with regard to punishment. Now it considers recklessness (conscious negligence) to be an aggravating factor in negligence offenses. With these two changes, conditional intent merged with conscious negligence and became an aggravating circumstance for specific crimes, as discussed before. Although conditional intent is no longer a type of intention, the French scholars still theoretically consider it as a type of intention.

d. Intent with Premeditation

Aggravated intent represents the situation where some additional mental states are required beyond general and specific intent, such as premeditated intent(126). Legislatures make this type of intention as a matter of procedure because it helps the judge to determine a suitable punishment for the offender(127). For example, if a criminal committed a crime with premeditated intent, then he deserves a more severe sanction than the criminal who committed a crime without premeditation(128). Therefore, aggravated intent is connected to premeditation; take, for example, a criminal who prepares a plan to kill someone and waits for him(129). In the crime of assassination, according to Article 221-3 of French Criminal Code(130), the sanction for aggravated intent is life imprisonment, while the crime of murder is imprisonment for not more

(126) Elliott, supra note 40, at 71.

(127) Elewa, supra note 9, at 163.

(128) Elliott, supra note 40, at 71.

(129) Id.

(130) French Criminal Code, Art. 221-3.

> Murder committed with premeditation is assassination. Assassination is punished by a criminal imprisonment for life. The first two paragraphs of Article 132-23 governing the safety period apply to the offence under the present article. Nevertheless, where the victim is a minor who is under fifteen years of age and the assassination is preceded by or accompanied by rape, torture or acts of barbarity, the Cour d'assises may by a special decision either increase the safety period to thirty years, or, where it imposes criminal imprisonment for life, decide that none of the measures enumerated under Article 132-23 shall be granted to the convicted person. Where the sentence is commuted, and unless the decree of pardon otherwise provides, the safety period is equal to the length of the sentence resulting from the pardon.

than 30 years[131].

e. Undetermined Intent

Undetermined intent happens when the intended result is different than the achieved result[132]. It occurs when the defendant intended to achieve a particular criminal result, but the achieved criminal result was different than what he intended. This means that the criminal result that occurred exceeded the criminal result that the defendant intended and predicted as a result of his actions[133].

When a criminal physically assaults someone with the intent of only causing injury (the result that he intends), but because of that assault the victim died (the result that the criminal does not intend), it cannot be said that the criminal intended the death, and therefore he cannot be accused of intentional murder. Also, it would not be fair to punish him for the accidental death because he intended to cause injury[134]. Therefore, the legislator punishes the criminal for an independent crime, which is the crime of assault that led to death[135]. This crime requires a maximum sentence of 15 years, which is higher that than the punishment imposed on a person who caused serious but non-fatal injuries to a person; this punishment is a maximum of 10 years imprisonment[136]. It is also less than the punishment for murder, which is a maximum of 30 years[137].

2. Negligence

On 11 July 2000, French legislators amended the standard for negligence[138]. The legislation now distinguishes between negligent crimes as a result of a direct contribution and negligent crimes as a result of the defendant's indirect contribution[139]. When the crime is a result of the defendant's direct contribution, the third paragraph of the French law applies[140]. It occurs when the defendant fails to exercise the required diligence and care imposed by the

(131) French Criminal Code, Art. 221-1.
(132) Elewa, supra note9, at 163.
(133) Id.
(134) Id.
(135) French Criminal Code, Art. 222-7. "Acts of violence causing an unintended death are punished by fifteen years criminal imprisonment."
(136) French Criminal Code, Art. 222-9.
(137) French Criminal Code, Art. 221-1.
(138) Elewa, supra note9, at 166.
(139) Elliott, supra note 40, at 78.
(140) French Criminal Code, Art. 121-3.

law or regulations with regard to his role[141].

Harm that results from a direct contribution means that the defendant should have done a particular act or behaved in certain way, but failed to do so, thereby causing harm. This is the ordinary form of negligence. On the other hand, harm that is the result of an indirect contribution takes place when the defendant performs an action that deliberately (or consciously) violates the law and regulations, or when he performs an action that exposes others to a risk of which the defendant must have been aware[142]. This form is different than direct harm because the defendant was deliberately careless or he committed misconduct that exposed others to serious risk of which he must have been aware[143].

To put it differently, the French legislature divided negligence into three types based on the type of causation (or contribution):

1. Ordinary negligence—the risk that the defendant should have foreseen. There must be a direct causation between the fault and result.
2. Gross negligence[144] —the risk that the defendant must have foreseen. There could be a direct or indirect causation between the fault and result.
3. Conscious negligence (similar to subjective recklessness in English criminal law)—when the defendant deliberately (consciously) takes the risk. This could be a direct or indirect causation between the fault and result. This type of negligence is considered as an aggravating circumstance for manslaughter and non-fatal injuries, or even an independent offense, according to Article 223-1.

Conclusion

The emergence of mens rea in criminal law added a new element—compared with actus reus—that did not exist before, dispensing with earlier systems of criminal law that depended on bloody disputes and revenge. Today there is universal agreement that mens rea is an important requirement for achieving criminal justice. William Holds worth, a law historian and a former professor at Oxford University, writes that "in these various ways the law, starting from

(141) Serour, supra note 2, at 694.

(142) Elliott, supra note 40, at 78.

(143) Serour, supra note 2, at 694

(144) Williams, supra note 83, at 105. Glanville Williams defines the term "gross" as "the conduct that diverged widely from that of the reasonable person."

the idea that a mens rea or element of moral guilt is a necessary foundation of criminal liability, has so defined and elaborated that idea in reference to various sorts of crimes, that it has come to connote very many shades of guilt in different connections"[145].

The historical overview in this research is very important because it explains the current approaches to mens rea in common-law and civil law systems. Since common law is based on judges' opinions, it provides flexibility for changes in the law. This gives judges more opportunity for reforming and developing mens rea. Judges can create new types of mens rea without being bound by codified provisions. The doctrine of mens rea in common-law thus has become more responsive and flexible to new cases that address unprecedented issues about a defendant's mental state. This explains the reason for having more than two types of mens rea, as in English criminal law. Another example can be found in the United States of America where the Model Penal Code provides four level of culpability: purpose, knowledge, recklessness and negligence.

By contrast, mens rea in civil law emerged from codified laws like The Twelve Tables. This also reflects the nature of civil law that is based on written provisions. Civil law is rigid and very slow in terms of responding to major changes in the community. The historical overview of the civil law tradition shows that it divides mens rea into two types: intent and fault. This is one of the reasons for having only two types of mens rea in most civil law countries, such as France, Egypt, and Qatar. The legislator is bound by these historical sources of the law, making him hesitant to add new types of mens rea. The judges are also bound by the types of mens rea in the criminal code. This explains why the mens rea doctrine in the civil law tradition is very slow and rigid compared to the common-law doctrine. Although some scholars have added new types of mens rea, the court still considers them as either intention or fault such as conditional intent, conscious faultand indirect intent.

It is very clear from this research that mens rea is important in achieving criminal justice because it reflects the moral side of the crime. In other words, mens rea differentiates between a person who is morally liable for causing injury and someone who is not morally liable and thereby undeserving of punishment[146]. Therefore, advanced criminal justice systems punish people

(145) Id. at 644.

(146) See Moore, supra note 5, at 1.

based not only on their actions but also on their mindset while committing a crime. The general theory around which the judge executes the punishment is that every person who deserves to be punished should be punished, and every person who does not deserve to be punished should not be punished. The basis of current criminal liability is captured by the phrase "Actus non facit reum nisi mens sit rea"[147], or as prominent lawyer Joel Bishop[148] said, "There is no crime, whether major or petty, without existence of evil mind beyond it"[149]. Mens rea is therefore considered as an essential element of criminal offenses, and the history of mens rea shows how this element contributed to the development of criminal liability.

(147) Chan Wing Cheong, The Requirement of Concurrence of Actus Reus and Mens Rea in Homicide, 2SING. J. Legal Stud. (2000).

(148) Joel Prentiss Bishop (1814-1901) is an American lawyer and legal jurist. He is considered to be "the foremost law writer of the age."

(149) Chesney, supra note 20, at 627.

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Table of Contents

مجلة فصلية أكاديمية
محكّمة تعنى بنشر البحوث
والدراسات القانونية والشرعية

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الأفراد	٣ دنانير	٤ دنانير	١٥ دولاراً
المؤسسات	١٥ ديناراً	١٥ ديناراً	٦٠ دولاراً

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