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5. The researcher should use the critical method in his study and discuss in depth the subject of the research and the problems he raises.
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Quality Assurance and Education Protection

Prof. Badria A. Al Awadhi

Chief-in-Editor

In recent decades and years, global societies are witnessing a growing trend to enhance the quality of education, as this is a prerequisite for reforming education, ensuring its efficacy, and activating its role in stimulating sustainable development and marked revival and contributing to the advancement of civilization in its general sense. This has been successfully achieved as shown by international and domestic indicators and reports.

Not far from what it means in the administrative, economic and productive fields, quality of public and legal education involves a range of systems, standards, procedures, specifications and characteristics. These are adopted in business, activities, scientific and academic curricula, infrastructure, environment and administrative and human resources for the various stages and levels of the educational process, which could reflect excellence and efficiency of their graduates and the jobs they do. It also includes expertise, consultancy and services provided by educational and academic institutions to the governmental and private institutions, both domestically and internationally.

Given government and social policies and plans, and in light of the increasing competition and role of the private sector, quality systems in education, as is the case with other institutions, have become not only an institutional and legal obligation but also an approach to excellence and value-added. Educational quality systems have also spread and found their way to Arab and Gulf educational institutions and universities, in general, and Kuwaiti ones, in particular. It has led to the establishment of the Council of Private Universities (Law No. 34 of 2000) and the National Authority for Academic Accreditation and Quality Assurance in Education (NAQAAE) in 2010. Some academic institutions in Kuwait have received domestic and international accreditation. KILAW has received two quality certificates from the British Quality Assurance Agency (QAA); the first was the Institutional Quality Certificate and the second was for four of its academic programs: The Bachelor of Laws (LLB), Master of Laws (LLM), the Paralegal Diploma, and the English Foundation Program for the LLM.

This approach to adopt, promote and ensure the implementation of quality assurance will undoubtedly place a high value on education in general and legal education in particular. It also preserves the value of scientific and academic certificates and the status of graduates helping them get the jobs they look for. This approach would also open up opportunities to extend the fields of scientific research, positively influencing the relevant academic and social sectors.

However, these remarkable efforts and positive trends face several challenges, some of which relate to the weak will for reform and development, and limited resources, particularly in the field of public education. Other challenges may relate to the spread of commercialism, poor scientific level and weak oversight and responsibility as well as the desire of some to receive certificates without undergoing the necessary scientific training to meet the requirements of future jobs, which became manifest in the phenomenon of forging certificates.

The responsibility to improve and reform the level of education, enhance quality systems and meet these challenges altogether is to be shared by all parties. The society with its various institutions must cherish and promote the values of ijtihad (discretion) and educational attainment and reject fraud and forgery. The State with its various institutions must also fulfil its constitutional and social duties in sponsoring, developing and promoting education. Likewise, those in charge of educational institutions at all levels must ensure quality and protect education.

English Abstracts of Arabic Research

The Impact of Imam Malik's Doctrine on Kuwait's Criminal Law: A Practical Study

Dr. Majid Jaber Al-Anzi[*]

Abstract

This research examines the impact of Imam Malik's doctrine on kuwaiti criminal law. Through an empirical study, it handles examples of the Criminal law and Maliki's jurisprudence agreement on code of behaviour and penalty, and examples of agreement on code of behaviour but no penalty, as well as examples of their disagreement on both of code of behaviour and penalty. The importance of this study arises from the fact that much Kuwaiti legislation stems from Islamic Sharia, a law that conforms to the country's traditions, customs and morals; jurists have exerted an effort to make its provisions match up challenges on the ground, a fact that was taken into consideration by the jurists' jurisprudence as they were enacting status laws.

The study aims at identifying the points of agreements and disagreements between Malik's doctrine and Kuwaiti Criminal law to find solutions to these in the future to account for the Sharia provisions and sustain the interests of individuals and communities. It has reached several conclusions including the fact that only a few provisions of the penal code are consistent with Maliki jurisprudence, and that differences exist in other issues and rulings. The study acknowledges the importance of continuing to discuss convergences and differences between Islamic jurisprudence, Islamic provisions and status laws as this issue is of considerable interests.

Keywords: Maliki Jurisprudence, Sharia Law, Penal Status Law, Tazir, Hudud.

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Protecting Cultural Property during Armed Conflict in Syria

*Dr. Fatima Al-Dhabeiri**

Abstract

Cultural property has often been demolished and looted during armed conflicts; this type of crime is being evident during the armed conflict in Syria, where extremist groups seriously targeted historical and archaeological sites. This research deals with the legal protection of cultural property during Syria's civil war, which is considered a form of non-international armed conflict.

During this type of armed conflict, a question that usually arises is whether non-state armed groups can be compelled to respect the rules of international law in general and the rules of cultural property protection in particular. The current research examines the rules of international law that protect cultural properties during armed conflicts, focusing mainly on the responsibility of the conflict parties during armed conflicts of non-international nature.

The research reviews the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its protocols to determine the responsibility of each of the conflict parties. It also examines the provisions of international custom that recognizes the protection of cultural property during armed conflicts, which in turn obligates all parties, even those not considered parties to the relevant international conventions. Finally, it addresses Security Council resolutions that condemn violations of cultural property in Syria and impose international obligations to protect it. This system of rules emphasizes the determination of the international community to protect the cultural heritage which belongs to people and all humanity. However, the continuation of destructive operations against cultural property requires further solutions.

The research concludes that there are legal loopholes which should be plugged through the activation of existing legal provisions, as well as the formulation of detailed legal rules designed to counteract terrorist operations targeting cultural property.

Keywords: The Hague Convention, Cultural Cleansing, International Custom, Civil War, UNESCO.

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Technical and Procedural Aspects Necessary for the Enforcement of Kuwait's Cybercrimes Law No. 63 of 2015

*Dr. Faisal Faraj Al Mutairi**

Abstract

This research examines the technical and procedural aspects of activating the enforcement of Kuwait's 2015 Cybercrime Law No. 63, which has come to fill a legislative vacuum, which created a kind of disturbance and confusion among the judiciary and law enforcement agents alike. This has been confirmed by the explanatory memorandum to the act, noting that the increasing use of information networks and activities led to many risks, producing new types of crimes called "information crimes", such as embezzlement, forgery, crimes of ethics and morality, information theft and penetration of security systems.

As it is certain that the procedural law transfers the cardinal rules, which combat crimes, from stillness to movement, the stage of real application or practical implementation, the traditional penal procedural texts represented in the Kuwaiti Code of Criminal Procedures and Trials No. 17 of 1960 do not aid in combating new crimes committed using advanced technology. This, in turn, necessitates revision and development of relevant procedural rules.

In light of the above, the importance of this study lies in seeking to establish special procedural rules that mimic the virtual reality of cybercrime, away from traditional rules. The study, therefore, aims at shedding light on the issue that law enforcement agents, public prosecutors and courts engage in this cyberwarfare with conventional procedural weapons that are incompatible with virtual reality.

To that end, the study has followed a comparative analytical approach to identify the technical models and experiences put forward by some states, such as Finland and Switzerland as patterns for others to follow, model on and derive some benefit from. The study ended up with the conclusion that it would be necessary for the legislator concern themselves with the integration of substantive aspects with procedural aspects and it recommended the establishment of a Cybercrime Court.

Keywords: Computer System, Cybercrime, Electronic Inspection, Electronic Criminal Laboratory, Electronic Directory.

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Economic Analysis of the Contract Theory from A Legal Perspective.. The Probable and Improbable: A comparative critical study from the perspective of the Latin School

*Prof. Mohammad Arfan Al Khatib**

Abstract

The research topic concentrates on providing a legal reading for the economic analysis of the contract theory from a legal perspective, within the philosophy of the Latin School as represented by the French Civil Law, with projection approach on the Kuwaiti Civil Law, in an attempt to illustrate the legal stand of this economic reading, whether in concurrence or discrepancy. In the first part, we discussed the probability of looking into the legal rule as an economic indicator, in particular, as related to the two stages of concluding and implementing the contract. In the second part, we discussed the case in which the legal rule cannot be weighed economically due to its value and ethical dimension, as a parameter for justice rather than a means to maximize riches and benefits, i.e. the cases of both the performance and damages.

The research reached the conclusion that the economic analysis approach represents nowadays an added value to the legal thought. In the legal transactions, the economic theory has its side presence in the framework stage of concluding and implementing the contract; proving the possibility of connecting the economic theory with the legal theory in understanding the contract philosophy in these two stages. At the same time, this reciprocal relationship between law and economy is negated in the case of the performance and damages.

It is not possible to adjust the performance process by implementation by way of compensation; and consequently, mixing between the value dimension of implementation and the economic value of compensation. In addition, the research emphasizes the approach aspects between the French and Kuwaiti legal thoughts regarding the issue of the economic analysis of the contract, particularly, the topic of concluding and implementing the contract, regardless

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of some insignificant differentiations. At the same time, the research displayed the legal aspects of differences in looking into the cases of the performance and damages, particularly, the legal adjustment for each of them, in separation between the concept of the performance as an origin in the legal commitment, and damages as an origin in penalty for default of implementation in the French civil legislation, and approaching damages within the implementation regulations as a form of implementation in the Kuwaiti civil legislation.

Keywords: Economic analysis of law, Contract theory, Legal justice, Economic justice, French civil law. Kuwaiti civil law.

Sentence Suspension: A Suspended Justice and a System Contradicts the Purposes of Punishment and the Victims' Rights: A Critical and Comparative Review

Prof. Mouaid Alqudah and Dr. Mamoun Abu Zeitoun***

Abstract

This paper is an evaluative, critical, and comparative review of sentence suspension system under the criminal laws of Jordan and UAE. It intends to explore the correlation between this system, and both the aims of punishment and victim of crime rights and interests in achieving justice as it involves a judge's decision suspending a defendant's serving of a sentence after he or she has been found guilty.

Pursuant to the central argument of this paper, it has been shown that the current state of law on this system in both laws is not in line with the aims of punishment, and undermines the right of the victim in seeing justice being served through punishing the accused.

It has been also demonstrated that although the adoption of such system is justified by the need to protect the accused from the negative consequences associated with the execution of short-term sentences, yet the sentence of contraventions and some aspects of the monetary penalties fall outside its scope under both laws.

The analysis in this paper indicates that there is severe limits on the role of the victims of crime regarding the application of this system, and points out towards some possible deeper structural law reforms to remedy such legislative imbalances.

Keywords: victims of crime, sentence suspension, aims of punishment, conciliation, short-term sentence.

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The Subject Matter of the Administrative Reconciliation Contract: A Comparative Study

*Prof. Mouhannad Moukhtar Nouh**

Abstract

Each administrative contract must have a subject matter that should be both possible and legitimate. The idea of the possibility of a subject matter in the reconciliation contract is manifested by the need for the reconciliation to be an exchange of waiver between the two parties to the reconciliation, whether this was a mutual waiver of claims, allegations or rights. Apart from a few exceptional cases, the rule here is that waivers under civil reconciliation contracts are not to be balanced. However, when it comes to the notion of mutual waivers in the administrative contract of reconciliation, the balance of waivers is one of its distinguishing features, so that the concession of the administration does not lead to the payment of what is not required. This mechanism was provided by the French Council of State (Conseil d'État) and was called the "control of generosity".

The legitimacy of the subject matter in administrative reconciliation contracts is reflected in the fact that some issues are not suitable for reconciliation, such as administrative competences, public property and contractual liability. On the other hand, the subject of reconciliation cannot be a waiver of legality. Therefore, the main impetus for research in this area is to prove the existence of particularity subject in the administrative reconciliation contract, making it different from the subject matter in the civil reconciliation contract, and identify the reasons that led to this subjectivity and its various applications.

The topic was tackled from two perspectives. Whereas the first explored the concept of the existence and possibility of a subject matter for an administrative reconciliation contract, the second examined the idea of the legitimacy of the subject itself in the contract. The researcher adopted a comparative approach to draw a comparison between the French legal system and the legal system in two Arab states, namely Syria and Qatar. The French legal system introduced a sophisticated treatment of the subject matter in administrative reconciliation

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contracts, a matter that was lacking in the Syrian and Qatari legal systems.

The most important conclusion drawn in this study was the lack of effective judicial control in both Qatar and Syria over the subject of administrative reconciliation, the activation of which this research recommended. The study also recommended that administrative reconciliation should never be a means of wasting public funds. Moreover, it called for total accuracy with adapting contracts of reconciliation when handled by the judiciary in Syria and Qatar, especially with the existence of modern trends in France permitting reconciliation in the context of abolition cases, within a limited scope, for which the administrative judiciary in both Syria and Qatar had not established clear principles of such trends.

Keywords: Administrative Contract, Mutual Waivers, Administrative Justice, Dispute Resolution, Public Funds.

Law Applicable to the Retention-of-Title Clause: A Study of UAE's Private International Law

*Prof. Noor Al-Hajjaya**

Abstract

The issue of the retention-of-title clause (Romalpa Clause), which is often included in the international sales contract in instalments until the buyer has paid full price, raises the problem of determining the law that governs it in terms of private international law. Since the UAE legislator has not provided a rule of attribution on this subject, it is felt necessary that light be shed on the relevant law under this important issue.

Indeed, I have come to realize that this the retention-of-title cannot be governed by a single law as it relates to more than one law that must be implemented in a distributed manner. Its source is a convention that requires the application of the contract law to the terms of its validity and its effects between the contractors. Whereas the Money Location Act governs its effects on third parties, particularly the creditors of the non-bankrupt buyer, those effects on the bankrupt buyer's creditors are governed by Bankruptcy Law.

Keywords: Retention Clause, Contract Law, Location Law, Bankruptcy Law, Attribution Rules.

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Rules Governing the Authority Assessing Sufficiency of Evidences for Criminal Procedure (Part 1)

*Dr. Ashraf Mohammed Abdul Qadir Samhan**

Abstract

This study is an attempt to identify the parameters of the authority that assesses the availability of sufficient evidence for criminal procedure to establish objective controls to limit abuse and arbitrariness in using this authority to guarantee rights and freedoms. To this end, it was found necessary to tackle this topic from four perspectives: (a) who estimates the sufficiency of evidence required for criminal action (b) the problem of banning weight of evidence in some systems (c) the nature of the authority assessing the adequacy of evidence for criminal action and the extent it is subject to judicial control and (d) means of monitoring the judiciary including the form of authorization for a criminal procedure and the reasoning about (in)sufficiency of evidence.

The researcher used two approaches. First, an analytical approach focusing on the authority assessing sufficient evidence for criminal action, discussed in its entirety, both in terms of determining the responsible authority as sometimes multiple authorities might be using the same discretion, and the extent to which the authority is subject to censorship with all its various means. Second, a comparative approach comparing the way this authority is regulated in different Arab laws to find out what had been provided in this regard so far to derive some benefit from the legislative and judicial experiences under study.

The study provided a set of interesting findings. First, the need for a proper and balanced assessment of the availability of the suspicion by the criminal control officer. Second, the trial court has no right to substitute for the control officer and decide, for itself, whether outward appearances were sufficient to assess the existence of suspicion, nor it can interpret these appearances, in one manner rather than another. Third, to ensure the effectiveness of the prosecutorial authority in assessing the availability of sufficient evidence, its power to weigh evidence, which might be denied by the judiciary in some

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countries, has first to be recognized. Fourth, the reasoning of authorization to inspect plays an essential role in providing sufficient evidence to justify it.

This is reasoning proper, represented by the citation of real and legal reasons that led to the action to activate the role of the various oversight bodies of this authority. Fifth, the argument for insufficient evidence required for inspection is also objective rather than procedural, meaning that it should be raised before the trial court besides exercising oversight of the availability of sufficient evidence of arrest. This is carried out through requests for the release of the detainee and through the grievance submitted to higher competencies within the authority of the investigation, through which the oversight role of the Attorney General in assessing the need for arrest or release can be activated, and finally through challenging detention orders or refusal to release.

Keywords: Weight of Evidence, Suspension, Inspection, Arrest, Detention.

Bribery in Accordance with the Laws in Force in the West Bank - Palestine

*Dr. Mustafa Abdel Baki**

Abstract

Bribery is an agreement between two parties; one offers an advantage or service to the other who accepts it for doing or refraining from doing a job relating to his/her job or mission. The importance of this research stems from the dialectic based on the appropriateness of limiting the crime of bribery to public officials and the likes, as a crime against public office and public administration, or extending it to private sector workers as well. Its scope will be limited to the crime of bribery in terms of its concept, nature and elements, per the laws in force in the West Bank compared to the 2003 United Nations Convention against Corruption, the Arab Convention against Corruption of 2010 and the Model Penal Code. By adopting a comparative, descriptive, analytical approach, the research is divided into two sections; the first section highlights what the crime of bribery is and the second deals with its elements.

Many conclusions have been arrived at in this research. These state that the spread of bribery undermines a fundamental pillar of society, namely, the confidence of citizens in the State and its employees; and that the exclusion of legislators the private sector workers from criminalization may harm employers. The recommendations put forward by the author call for standardizing the definition of the 'civil servant' in public service laws and penalties; not only criminalizing actual staffing, but rather explicitly stipulating the inclusion of private sector workers. It also calls for imposing other consequential penalties on the perpetrator of the crime of bribery as well as denying them any public service jobs such as denial of candidacy and voting in general and local elections, and that the legislator imposes penalties for the moral person in case of committing the bribery crime.

Keywords: Public Servant, Bribe-giver, Bribe-taker, Corruption, Anti-Corruption.

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The Problem of Interest on Bank Loans in Qatari Law: An Analytical Study

Dr. Mohamed Abou El Farag and Dr. Tarek Rashed***

Abstract

This paper discusses important legal problems relating to the adoption by the Qatari judiciary of a position on the issue of interest on bank loans, namely, that banks should not take interest on loans granted to clients. Perhaps, the reason for adopting such a position is the lack of any legal regulation of bank loans to enable them that allows for charging interest on loans they grant, unlike what is prevalent in comparative legislation such as those in the United Arab Emirates and the State of Kuwait.

This study examines the legal system of bank loans in comparative legislation and analyzes the judgments issued by the Qatari judiciary regarding the subject matter of the study. It emphasizes that Article 70 of the Central Bank of Qatar and the Regulation of Financial Institutions (Law no. (13) of 2012) have been representing the legal basis for the legality of banks> agreements with their customers on bank loans interests. It also highlights its disagreement with the decisions issued by the Qatari Court of Cassation that decided the illegality of interest on bank loans and decided to apply the provisions of the Civil Code of Qatar to grant compensation to banks because of the borrower>s late repayment of debt.

Keywords: Banking Loans, Interests, Law of Qatar Central Bank, Qatari Judiciary Rulings, Banking Credit, Civil Loans.

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Impact of Procedural Solutions on Jurisdictional Res Judicata

*Dr. Yasser Bassem Thanon Al-Saba'wi**

Abstract

This study studies addresses the issue of procedural solutions and their impact on Jurisdictional Res Judicata. In this sense, the concept of procedural solutions corresponds to the concept of exceptionality, so that the term procedural solutions go to the state of extraordinary or exceptional status in a civil action. This extraordinary character does not deny the right holder or legal status the normal status in the case, noting that solutions must be achieved prior to the judgment in the civil proceedings. This occurs within the framework of the relative rule of judicial judgments and respect for res Judicata in a set of comparative legal systems reinforced by jurisprudence and judicial applications in several countries, including French, Egyptian and Iraqi laws, regarding these as main legislation, whenever possible.

The study comprises two sections. The first concerns the definition of procedural solutions and second one handles the effect of procedural solutions on res judicata. Following close analysis, some conclusions have been made including the difference existent between procedural solutions and procedural extension, reflected in the need for the latter to be third-party while the same was not necessary for procedural solutions. In addition to the difference sought by the case of procedural representation, the solution has a status in the case other than in procedural representation.

The researcher puts forward a number of recommendations. These include a call for the Iraqi legislator to formulate a general theory of procedural solutions in the civil case, provided that these are stipulated in the Civil Procedure Law so that the texts contained in it would be the general reference wherever its applications were received, whether in litigation or liability of execution.

Keywords: Exceptional, Procedural Extension, Procedural Representation, Proportionality of Judicial Judgments, Final Judgments.

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Criminal Policy against Archaeological Sites Crimes

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Abstract

This study aimed at discussing an important issue specifically prevalent in the field of criminal protection of archaeological sites. It attempted to evaluate the criminal policy in the protection of archaeological sites locally, in the Libyan legislation and local legislation in the Emirate of Sharjah regarding the protection of antiquities, internationally, in cases of armed conflicts (international and non-international) and the case of occupation.

The study falls into three sections. These sections were devoted to the crime prevention policy, criminalization policy and examination of punishment policy against such crimes, respectively. It identified a range of failures in the abovementioned kinds of policy in both Libyan and Sharjah legislation. The researcher recommended that a set of fundamental amendments be made to the legal texts of this legislation. In contrast, the study recorded the international community's intense interest in providing criminal protection to archaeological sites. The researcher recommended that more efforts be exerted on the ground to increase the level of effectiveness of criminal policy against such crimes and reduce the rate of damage to archaeological sites in situations of armed conflict and occupation.

Keywords: Tourism, Antiquities, Real Estate Antiques, Antiquities Crimes, Armed Conflicts, Protection of Antiquities.

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Appropriateness of Traditional Attribution Rules for the Provision of Ship Leases

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Abstract

Economic and social openness between states have led to the flow of goods and services across borders, which required multiple means of transport. Hence, the need for maritime transport has increased and there has been a multiplicity of shipping contracts and transport contracts based on charter party agreements. The latter is at the forefront of these contracts, especially in the context of irregular shipping.

Because maritime transport is linked to states and persons of different nationalities, it has granted transportation an international status. Undoubtedly, the internationalization of these contracts raises problems of conflicts of laws because legislative systems differ from country to another, particularly those relating to rules governing transport issues. This study, therefore, highlights these rules through detailed analysis and comparison aiming at clarifying the appropriateness of these rules to the nature of the transport contract and determining their ability to achieve the legal security expected of the contract parties.

This study came up with a set of conclusions. The most important of which was that the rules of attribution adopted by the Jordanian legislator as well as most Arab legislators, were not in line with the nature of ship lease contracts. It, therefore, recommended the need to adopt flexible rules in line with the most recent legislative developments.

Keywords: Shipping, Conflict of Laws, Ship Flag, Objective Rules, Charter Parties.

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English Studies and Research

Restorative Justice: Is it Time to Stake out its Flat Turf on Criminal Justice?

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Abstract

This article is an attempt to re-conceptualize the restorative justice as a neoteric paradigm in resolving criminal cases. Although the basis of this paradigm has been structured on a robust and cogent theoretical basis, it has been at stake and wound up in a duel with the current conventional criminal justice, governing, up to now, criminal justice, and throwing back its echo of acceptance to the public.

As a final not and conclusion that this duel was no more than an elusive opposition by arguing that it went off the hook by its going hand-to-hand with the conventional retributive justice with respect to the two theories of retributivism and utilitarianism.

In practice, there has been a remarkable progress with adopting this model of justice, relatively. It is said "relatively, for the reason that it still poses good philosophical reasons that make the legal systems throughout the world somehow reluctant to start establishing its turf, in spite of its strong theoretical basis.

Keywords: Restorative Justice, Retributive Justice, Empowerment Theory, Criminal Justice, Just Desert, Victimology

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Introduction

It is conceded that the Social response to crime through the classic retributive justice system lacks perfection, and has, ever and anon, been under the Jurists' microscope. Not only do the jurists view this system with skepticism as its structure can best described as offender-oriented, but also, the public does see it as unjust, posing misgivings about its effectiveness in fighting crimes. In this context, the vital question revolves around what the fair and efficient response to wrongful and criminal acts is. As a result of the legal system development in the comparative lawful systems and the flexibility this development needs, these systems have been commencing to recant sticking to the deeply-seated traditional legal system ,allowing to restorative justice interventions that have become a phenomenon many countries have been competing with each other to adopt and integrate in their legal systems and their policy of punishment.

While the retributive justice has marginalized the victim during the court-based-process in favor of the offender ,one of the most significant various developments in the field of criminal law since the1960 s and1970 s has been the revival of the victim .This revival yielded a new area of study ,which was victimology ,and an array of programs aimed at repairing the injuries caused by the offender and suffered by the victim .In fact ,the revival of the victim is nowadays considered as a volte-face on the deeply-rooted conceptions of the criminal justice.

Due to the rising growth of the criminal justice interventions ,the need is dire to re-conceptualize the current retributive criminal justice ,and if the volte-face on its settled conceptions should be complete or not .Reconceptualization of the criminal justice necessarily requires a theoretical approach to answering the question :how and why do the retributive criminal justice and the restorative criminal justice interventions function as they do?

The implementation of the Empowerment Theory may produce a good explanation of why the restorative justice interventions outweigh its counterpart's traditional mechanisms .It is deemed ,from our point of view, that there is more in this theory than meets the eye ,which can create the public confidence in the criminal justice .But the debate is still heated over the efficiency of each other in promoting the ultimate goals of the criminal justice ,and the questions still remain about whether the restorative justice is the inevitable alternative to the retributive justice ,or it is to be placed with the other paradigm later or sooner ,or it is complementary to the criminal

justice ,or it is justice that is parallel to the retributive justice with independent institutions and mechanisms.

All of these questions may suggest that both of them be in a polar opposite, but they are not .Manifestly ,the divergent aspects of each other are explicit and open ,and effortlessly spring to the eye .Even if the divergence reflects a planned choice ,this does in no case mean to place one of them on the scaffold, or to be substituted for the other.

This paper ,by contemplating the outcomes the criminal justice seeks to gain, intends to assert that the restorative justice interventions may ,in practice, efficiently operate if it is integrated into the realm of the current criminal justice ,and as a piece of it ,and may co-opt the retributive justice .Despite of its divergence to the retributive justice ,the restorative justice model as a process-based approach can improve the social responses to the criminal acts by first abandoning the dominant idea that both of them are in flat contradiction to each other .This is to say because the convergence between both of them still lurks in the outcomes all of the different criminal justice paradigms have sought to .Simply ,they differ in the process and come in close in the ultimate goals of criminal justice.

The road map of this paper starts in part one with the discussion of what the restorative justice is ,and how it does work .In part two ,the paper will focus on the Empowerment Theory so as to explain the theoretical foundation of the restorative justice ,and why it deserves veneration .In part three ,we will give an explanation of the plausible reasons of why the restorative is ,in some of its aspects ,divergent to the retributive justice .Afterward ,and in the same part ,the discussion will take another trend by rebutting the argument whereby the restorative justice is found pitted against retributivism and utilitarianism, which are considered the theoretical rationalization of the retributive justice. Lastly ,the paper is to conclude that there has ,in practice ,been a difficulty due to some suspending questions or misgivings to perceive the restorative justice as a solo paradigm governing criminal proceedings.

1. The "Elusive" Concept of Restorative Justice:

It is no secret the lawmaker often deliberately eschews laying down a definition for some legal concepts, leaving this task to scholars and judiciary, as an eloquent and comprehensive definition has always proven elusive and unapproachable. The reason why we say so is because of the different lenses through which we see and comprehend things.

As regard to the field of restorative justice, there has been no consensus about its definition, or at least a well-accepted one[1]. This due to the fact that there is more than an idea, philosophy, and an array of values and processes than a sole tangible and unvarying set of practices[2], which portray an optimistic picture for this glittering development in the realm of criminal justice.

Leading restorativists have perceived it as a new paradigm, which was naturally born as a reaction to the deficiencies of the retributive criminal justice, in particular with respect to the victim's rights. Barnett, Eglash, Christie and Wright were among the first who viewed restitution as a venerable value, steering their discussion to talk about what they called as a "crisis", taking place in the criminal justice system, and about the alternative model that might be replaced with the retributive one.

While Barnett believed that the crisis could be resolved through adopting the concept of restitution[3], Christie frankly talked about the conflict stolen by the state, and this led to depriving the society of an opportunity for norm-classification, and the most crucial discrepancy between the retributive justice and restorative justice lies in the contrasting values that motivate the two[4]. Eglash, in the same stream, articulated the values of restorative justice by extremely standing against the retribution upon which the traditional criminal justice was, and has still been built. According to his point of view, he focused, as grasped by us, on holding a comparison between three types of justice, namely, the retributive, distributive and restorative. He argued that while the first two types concentrate upon the criminal acts, ignoring the victim's involvement in the justice process, the third type focuses on the harmful repercussions of these acts, and requires that all parties engage in the criminal process[5]. Unlike the offender's passive participation and the victim's non-involvement, manifested in the first two types, the restorative justice, as a social value, gives the offender and the victim a chance to restore their ruptured relationship by keeping the offender up with a means to repair the

(1) Donald J. Schmid, (2002). Restorative Justice: A New Paradigm for Criminal Justice Policy, 34 VUWLR, P. 91-134, at 93.

(2) Carrie Menkel –Meadow, (2007). "Restorative Justice: What Is It and Does It Work?" 3 Annu. Rev., Law Soc. Sci, 10.1-10.7, at 10.19.

(3) Barnett, R., (1977). "Restitution: A New Paradigm of Criminal Justice, Ethics" International Journal of Social, Political and Legal Philosophy, (87) 4, 279-301, at p. 245.

(4) Christie, N., (1977). "Conflicts as Property" British Journal of Criminology, (17) 1, 1-15, at p. 8.

(5) Eglash, A., (1977). "Beyond Restitution: Creative Restitution": in J. Hudson and B. Galaway (eds), Restitution in Criminal Justice, Lexington, MA:DC Heath and Company.

injury caused by the criminal act to the victim[6]. The victim should be helped by the offender or the society, and the offender is required, as Wright stated, to make amends to both[7]. He added that the fine line between the criminal act and other harmful actions is "artificial"[8], and crimes are still actions, incriminated by law, that bring about the harm to others, and the conviction of the offender means that the sanction shall be imposed[9]. Wright proposes that that the restorative justice may constitute a new paradigm of justice where the response to criminal acts will not be by adding harms to the offender, but by doing "as much as possible to restore the situation"[10].

The theoretical founders strongly believe that the restorative justice is a model to re-think of the punishment for wrongful acts[11], and to re-conceptualize the role of justice in repairing the social bonds by contending that the crime is a violation of people and interpersonal relationships[12], and not a violation run by a systematic rules[13]. Howard Zehr, who has been considered a keenly prominent proponent of the restoration value, imparts a social tint to the crime by stating that the crime is a "wound in human relationships"[14], and it triggers an obligation to repair and store the social bonds[15] through prompting the victim and the offender to meet each other. While the focus, according to his philosophy, should be on the restoration of human ties, another well-known proponent, John Braithwaite, proposes the focus be on reintegrating the offender into their own community[16].

Although the restorative Justice has a revered practice throughout the world,

(6) Mirsky, L., (2003). "Albert Eglash and Creative Restitution: A Precursor to Restorative Practices". http://www.realjustice.org/library/eglash.html. visited on 10th of December 2016.

(7) Wright, M., (1977). "Nobody come: Criminal Justice and the Needs of Victims", Howard Journal, (16)1, P.22.

(8) Wright, M., (1996). "Can Mediation be an Alternative to Criminal Justice": in B. Galaway and J. Hudson (eds), Restorative Justice: An International Perspective, Monsey, NY: Criminal Justice Press. P. 132.

(9) Ibid, at 136.

(10) Ibid, at 112.

(11) Carrie Menkel-Meadow, Op.cit, at 10.2.

(12) Zehr, H., and Mika, H., (1998). "Fundamental Concept of Restorative Justice" Contemporary Justice Review. (1) 1, P. 47-55.

(13) Zehr, H., (1990). Changing Lenses: A New Focus for Crime and Justice, Scottsdale, Pennsylvania, Waterloo, Ontario, Herald Press. P. 181.

(14) Ibid.

(15) Ibid.

(16) Braithwaite, J. (1997), Crime, Shame and Reintegration, Cambridge University Press.

and has been approached by many countries and cultures[17], the scholars have to date been unsuccessful to agree with a sole irrefutable and conclusive definition of it. The reason might be ascribable to their failure to produce an underlying theory explaining and justifying the restorative justice. As articulated earlier, it is evident that the practical and theoretical forefathers of restorative justice have endeavored to theorize and conceptualize this new paradigm of justice, but their discussion revolved around setting the restorative justice off against the retributive justice. Thus, the social movement seeking a turning point in the way the traditional criminal justice operates gave a fresh impetus, for them, to have revisited criminal justice systems. Outside the customary limitations of sentencing in the criminal courtroom setting, the social flavor is manifestly extant in the restorative justice to the extent that it might be perceived as a community-based- justice, motivated by august goals and values.

In this context, it is useful to draw attention to a frequently invoked definition produced by Marshall, who gives, as it were, "the prospective justice" run by the parties of an offence, or more broadly by the community a splendid triumph over "the retrospective justice". In his definition, Marshall stated that the restorative justice is: "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future"[18].

This definition accentuates the process requirement that all parties embroiled in a dispute be given an opportunity to be heard about the repercussions of the crime, and what is necessary to be done to restore the victim, the offender and the community[19]. It is a painful fact that when a crime or even a serious wrongful act, not necessarily labeled as a criminal act, occurs, its aftermaths inevitably befalls the victim, the offender, interested people and a larger segment of the community in which it is committed. Consequently, these wrongful acts, whether labeled as criminal acts or not, will result in gashing the social bonds, and the restorative justice as a process then restores the dispute to its own stakeholders (the parties and the community)[20] to identify

(17) Read in this context Jon'a F. Meyer, (1998), "History Repeats Itself", J. Contemp. Crim. Just. (1), 42-57,

(18) Tony F. Marshall, (1999), Restorative Justice: An Overview (HMSD, London), P. 5

(19) Chris Cunneen, (2007). "Understanding Restorative Justice through the Lens of Critical Criminology" in C. Cunneen and T. Anthony (eds), The Critical Criminology Companion, Hawkins Press. PP. 290-302, at. 290.

(20) Bazemore, G., (1998). "Restorative Justice and Earned Redemption: Community, Victims, and Offender Reintegration" (41) American Behavioral Scientist, Pp. 768-813, at 376.

the needs and responsibilities[21] as they are regarded as being jointly and solely empowered to decide how to fine-draw the dispute's after-effects that ensue as a result, generally speaking, of serious bad conducts. At its most utopian, the restorative justice was contrived to be a socially-institutionalized- process that could, should right conditions are met, be seen as a means of avoiding severe criminal punishments and imprisonment[22] and concentrating, instead, on the humanity of the victim and the offender[23].

At the opposite riverbank, instead of introducing a definition of the restorative justice, some scholars have merely referred to a set of principles by which this paradigm is stamped[24]. This tendency might be a sound approach due to the lack of a decisive definition, yet, it does not change the fact that to outline the key principles reflects a recognition of the restorative justice's momentum as a novel model, which gives a positive and affirmative role to the affected parties of an offence in controlling, inter alia, the process of decision-making, rather than state-centered-control of it.

Other definitions tend to focus on the core value and goal rather than the process, and the restorative justice, accordingly, is referred to as a system or practice that lays emphasis on the healing of the wounds suffered by the victim, the offender and the community that are revealed by the offender's bad conduct[25]. Therefore, much consideration has, in both practice and theory, been given to heal those directly affected by bad acts on a basis of social reform[26].

From our point of view, to suggest a precise definition of the restorative justice might, in the ocean of this heated debate among scholars, be seen as a hard task, but it is not so. The proponents of this neoteric paradigm, as articulated above, have focused basically on either the ultimate goal of it as a hallowed value or the process through which it functions, but all are swimming in the same river. It is observed that those who focus on the value in building a

(21) Zehr, H., and Mika, H., Op. cit. Pp. 47-55.

(22) Zehr, H., Op. Cit, at 178.

(23) Martha Minnow, (1998), Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, (23) New. Eng. L. Rev. Pp. 967-969.

(24) See, for instance, Allison Morris, and Gabrielle Maxwell, (2001). "Restorative Justice Conferencing" in Gordon Bazemore and Mara Schiff (eds), Restorative Community Justice, (Anderson Publishing Co, Cincinnati) Pp. 174-175.

(25) See Donald J. Schmid, Op.cit. P. 93.

(26) Carrie Menkel –Meadow, Op.cit, at 21:27.

definition of it disregard the fact that the new paradigm is, per se, a process-based one, and the others who focus on the process disregard its sought-after goals and values.

A variety of differing practices have usually been included in pursuit of the restorative justice's core value and goal. To repair, restore, reconcile and integrate the victim and the wrongdoer to each other and to their relevant community connote the significance of the restorative justice. But, this significance is not deemed unique or merely excluded to this paradigm, and thus, it is not wise to build a definition taking it all for granted that the restorative justice as a buzzword stands on the opposite side of the retributive justice since those practices are still present in the latter as latent values, but not so visible as they are in the restorative justice. So, the question being posed in this context is: why are these practices obviously present in the restorative justice?

Simply, because the restorative justice interventions bring forward a new approach of administrating the criminal justice process, and leave behind the usual barriers of the punishment, which is the controlling trait of the conventional criminal justice. Moreover, because these interventions might take place in any part of the stages of the criminal justice process(27).

Ideally, the restorative justice interventions endeavor to bring together the victim and offender as well as their shared community to trigger a state of social reconciliation. To attain this long-sought state, sitting of the parties involved in a criminal dispute is the springboard to achieve it. In such sittings, the offender may confess the offence he perpetrated, and the harm he caused to the victim, and accordingly, the effects and repercussions of his wrongdoing could be acknowledged by him(28).

On the other side, the victim's narration of the harm he suffered might arouse the offender's consciousness and then make amends with a feeling of regret. In theory, the restorativists emphasize that this kind of acknowledgement of fault will inevitably lead to empathy as the wrongdoer's recounting of his motivation is a vehicle for the family members and the community to see, as one scholar stated, through his eyes(29). This explains why the restorative

(27) Jennifer Gerada Brown, (1994), The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, (43) Emory L. J. 1247, 1262.

(28) Patrick Glen Drake, (2006), Victim-Offender Mediation in Texas: when "Eye for Eye" becomes "Eye to Eye", (47) S. Tex. L. Rev, 647.

(29) Kate Bloch, (2010), Reconcepualizing Restorative Justice, (7) Hasting Race and Poverty Law Journal, P. 205.

justice is reasoning because the creation of the empathy state may lead to restoration, which is the ultimate goal of it, and gives the stakeholders the chance to choose the appropriate means to repair the harm caused by the offence, not as a state-imposed punishment, but as an agreed upon contract among the concerned participants.

No one can deny that these values are noble, and simultaneously no one can dogmatize they are only confined to this new paradigm, and the retributive justice is bereft of the means to attain them. It is not enough to adopt the new paradigm to argue that the attainment of these values through the restorative interventions is a sitting duck.

However, to achieve this reasonable consecutiveness (acknowledgment, empathy and restoration), the archetypal patterns of the restorative justice process includes the mediation between the offender and the victim, group or family conferences(30), and the circles of the restorative justice(31). It has been argued that the last two means might become wider by giving the families of the two parties involved in a certain dispute and the community an opportunity to establish criminal justice(32).

For the reason that the restorative justice is structured, as it seems, on an extreme deviation from the conventional criminal justice, we believe that this deviation lies solely in the process through which this model of justice

(30) In the USA, and precisely in 1996, a pioneer program used the family group conferences for juvenile wrongdoers in 12 communities in the 1st Judicial District of Minnesota. This program used the mediation type administrated by neutral facilitators, whose task was to assist victims, offenders and their concerned participants to caucus and engage in direct dialogue about the crime and its repercussions. See Fercello and Umbreit, "Client Evaluation of Family Groups Conferences in 12 sites in the 1st judicial District of Minnesota" (Centre for Restorative Justice and Peacemaking, Minnesota, 1981). However, in the USA, the main focus is nowadays on the cases of juveniles, and on the less serious crimes perpetrated by adults. See Jean E. Greenwood, and Mark S Umbriet, (1998), National Survey of Victim Offender Mediation Programs in the US, VOMA Connection, at 7. http://www.voma.org\doc/connect visited on 14th December 2017.

(31) Kate Bloch, Op. Cit, at 204. Circle sentencing is a type of the conferences of restorative justice, which has been resorted to in Canada since 1991 in the cases, in which the aboriginal offender involved, then extended to involve aboriginal and non-aboriginal offenders. It has been, as an informal process of justice, considered as an alternative to court sentencing process, and focused only on the serious crimes because they are lengthy and require devoted involvement from all participants. This process has not been excluded to juveniles, rather it extended to involve adults as well. Heino Lilles, (2000). "Circle Sentencing: Part of the Restorative Justice Continuum" in Allison Morris and Gabrielle Maxwell (Eds), Restorative Justice for Juveniles: Conferencing, Mediation, Circles (Hart, Oxford), Pp.2, 3.

(32) Kimmett Edgar & Tim Newell, (2006), Restorative Justice in Prisons: A Guide to making it Happen, Pp. 11-12.

works, thus, it is deemed that any definition of the restorative justice be seen as process-based.

2. The Empowerment theory as a Theoretical Foundation of Restorative Justice

The far-reaching transformation in the form of the restorative justice that has happened on, and then conceptualized, the criminal justice in European countries, USA and Canada in a specific category of crimes is remarkable. This transformation was actually concomitant, by scholars and theorists, with rational impulse to justify the brisk and eager strides towards this model of justice. Undoubtedly, the theoretical basis of the restorative justice has best been rationalized through the implementation of the Empowerment theory as without which or without any rationalization, this paradigm would be seen as if it cropped up, and then would suddenly disappear.

1.1. Gist of Empowerment Theory

Empowerment is defined as "the capability of some people and organizations to induce intended, foreseen and unforeseen effects on others"[33]. It might also be defined by us as: a process of enabling the people and societal institutions by furnishing them with tools of change and leverage.

Wallestein perceives empowerment as a social process that aims at catalyzing the participation of individuals and community toward increasing the personal and social influence, the quality of community life and the social justice[34]. It has become a vital construct to ameliorate the status quo of both community and individuals[35].

The Empowerment could, as Moscovitch and Drover stated in the gist of their book[36], be comprehensible through exploring the concept of both power and powerlessness. They clarified that the nature of the class-dominated- society implies that a small number of individuals do have either political or economic power, while the vast majority of people do have little or nothing. On the

(33) Cornell Empowerment Group, (1989), Empowerment and Family Support, (1) 2, Networking Bulletin, P. 7.

(34) Wallestein, N. (1992), Powerlessness, Empowerment and Health: Implications for Health Promotion Programs, 6 (3), American Journal of Health Promotion, Pp. 197-205.

(35) Douglas D Perlens, Marc A. Zimmerman, Empowerment, (1995), Theory, Research, and Application, American Journal of Community Psychology, P. 571.

(36) Moscovitch, A., Drover, G., (1981), Inequality: Essay on the Political Economy of Social Welfare, Toronto. University of Toronto Press.

individual level, the powerlessness can be perceived as the anticipation of the individual in a certain community that his/her own actions are in vain to influence the outcomes of his/her life events(37). Avidly, Lerner went one step further by making a difference between the real powerlessness and surplus powerlessness(38). Whilst the real powerlessness stems, according to his belief, from the repressive control used by some persons or institutions, the surplus powerlessness revolves around the ingrained thought that the change will not take place, and thus, this passiveness gives rise to absolute apathy and unwillingness to strive for gaining some leverage(39), in particular when the individuals with a fragile economic and political power are bereaved of the means for fetching more control and more resources in their lives(40).

In a bulk of research, empowerment has been linked up with the personal leverage, through which the individuals' opportunities to have control over their own lives, becomes an enhanced reality(41). The people are aware of what they need better than anyone else, and then should be given the power to delineate, and work on, them. For this end, the people are in a dire need to get information about themselves and their environment in order for them to be eagerly prone to work with others and induce, as best described, a process of change(42).

The theories of Empowerment include both process and outcomes, and they vary in their outward patterns, but the discrepancy between empowering the process and empowering the outcomes is a pivotal issue to define the Empowerment Theory(43). For the individuals, to empower processes might mean participation in the community's institutions, while it means, for the community, the collective leadership and shared decision making. On the other side, the empowered outcomes are pointed to the operationalization of empowerment that leads to examining the ensuing effects of empowering processes. The "specific-situation perceived control" might, for individuals,

(37) Keiffer, C., (1984), Citizen Empowerment: A Development, Prevention in Human Services, 3 (16), Pp. 9-35.

(38) Lerner, M., (1986), Surplus Powerlessness, Oakland, (A) Institute for labor and Mental Health.

(39) Ibid.

(40) Albee, G, (1981), Politics, Power, Prevention, and social Change, in Prevention through Political Action and Social Change, J. Joffe, G. Albee, (eds), Hanover and London, University Press of New England.

(41) See Rappaport, J., (1987), Terms of Empowerment: Examples of Prevention Toward a Theory for Community Psychology, 15 (2) American Journal of Community Psychology, Pp. 21-48.

(42) Cornell Empowerment Group, Op. Cit, Pp. 8-10.

(43) Douglas D. Perkins, and Marc A. Zimmerman, Op. Cit, P. 570.

be, as Douglas and Zimmerman contend, the sound connotation of the empowered outcomes(44). In their outmost reaches, the empowered outcomes for community include the existence of both organizational partnership and accessible community resources.

1.2. Interpretation of the Empowerment Theory from a Legal Perspective

The legal empowerment is about strengthening the capacity of all persons to exercise their legal rights as either individuals or members in a community. It is a theory that is oriented to making certain the law is not restricted to courts(45), but it is comprehensible and approachable to all lay people. As a theory, the legal empowerment is common throughout the world under different appearances, including but not limited to, legal empowerment as such, access to fairness, poverty, empowering women, human rights, and legal equity.

The empowerment provides an individual with the necessary legal tools with which to better challenge the dilemmas that afflict him. In other words, to legally empower persons is to help them ferret out solid resolutions for daily legal problems even when the environment is stained with arbitrariness or unfairness as with this theory and in this situation, it can be said that justice is possible. It has been theorized that on account of the lack of power, the people might be incapable of seeking justice, and the fact that the incapability of seeking justice encompasses a wide segment of population, requires no proof. Thus, the change is, in this case and in ad hoc cases, is extremely required. The question raised in this context is what should be done to create such change. Often, non-judicial strategies would be more effective than allegation in resolving a dispute, in particular when the humane relations need to continue with the consent of the community or parties.

Paralegals play often a pivotal role for the programs of legal empowerment that combine a board of attorneys with a forefront of paralegals or non-attorneys who are much close to a community the wrongdoing or offence was committed in, and possess a wider range of tools than other attorneys do. This combination is supposed, in a legal context, to strike balance between

(44) Ibid

(45) Open Society, Justice Initiative, Legal Empowerment: An Integrated Approach to Justice and Development, (2012). Available on https://www.opensocietyfoundations.org/sites/default/files/lep-working-paper-20120701.pdf. Visited on 23\11\2017.

the rights and obligations of individuals[46], and both are to be energetically buttressed by their communities and self-organizations.

The legal empowerment is actually focused on the marginalized or lowered members of a community, and it is thought a set of means might, in a legal proceedings, be resorted to snowballing the voices of those members by increasing the involvement of local communities in the process of criminal justice.

We think the empowerment as a tool of change is built, in the criminal proceedings under the guise of the restorative justice, on three elements:

First: the acknowledgement of the problem and its implications does require a swerving, to some extent, from the conventionalism of the current criminal justice, and for getting this acknowledgement, it is important that the individuals and local community be realized that their role in triggering the legal influence is an inexorable matter, because they are more able to understand what they need than anyone else. To trigger the legal influence is not a passing vogue, yet it is a long-life pursuit, and this is what they should comprehend.

Second: involvement in the process of criminal justice, and not only leaning upon others in making judgements about their own lives. Significantly, it seems for us that the purport of this involvement exceeds the bounds of this outward purpose. The restorative justice interventions play a vital role in generating what is called "the hypothesis of the reversal of moral disengagement". In his meticulous analysis of why restorative justice interventions do function as they do, Barton gives much regard to this hypothesis to vindicate the new paradigm[47]. When an offence or wrongdoing is committed, both parties (offender and victim) are prone to curbing their consciousness by different means as an attempt to justify their behavior. The restorative justice interventions play, as he contends, a momentous role in moral re-engagement. In well-run restorative meetings and group circles or conferences, the victim and other affected persons recount to the offender the harm and distress caused by him, and this might prompt him to internalize the tools of moral re-engagement regarded as very important in the criminal justice as a means to both reintegrate the offender into the community and restore the victim.

At the first blush, it might thought that this hypothesis was merely invented

(46) Ibid.

(47) Charles Barton, (2000), Theories of Restorative Justice" Vol. (2.1) No. 1, Australian Journal of Professional and Applied Ethics, Pp. 41-53.

as a need for the mechanisms of the offender's, not the victim's, moral disengagement to be challenged. The truth is the well- run meetings between the victim and the offender are considered as a good techniques for the victim to obviously see the genuine penitence and humanity of the offender, and this technique could subsequently lead to a change in the victims' view of the offender. This process has been seen as crucial for the victim to forgive, and probably reconcile, the offender.

Third: commitment to the outcomes brought about by the various tools of empowerment. Of course, not only is the desired commitment legal, but also what is hidden beyond this commitment will be meaningful and evocative of vivid moral ends.

Morality is a socially constructed actuality, and it an inescapable means for social cohabitation. Even though the outmost end of the restorative justice is to reach a satisfactory socio-legal settlement among the stakeholder embroiled in a dispute, this settlement would be inchoate if it were not concomitant with a moral transformative in the offender's behavior. As the restorative justice interventions are prospectiveness-oriented, the settlement must be associated with moral enculturation, ensuring that the bad behavior will not be repeated by the offender in the future. Otherwise, the offender will surely fail to revert to the moral ligament, and thus, fail to give weight to social and moral values, and become a source of threat and gloom, not only for himself, but also for the victim and their shared community(48).

Reverting to the moral ligament is dependent upon the proper means to be accepted by the offender for repairing the harm. On the other side, for the victim to be content with any settlement, he needs to see the offender come back to the moral ligament so that he feels peace and not susceptible to any imminent threat.

3. Phases of Divergence and Convergence of Restorative Justice with its Retributive Counterpart

In this section, the paper turns to striking a comparison between both paradigms (retributive and restorative). This comparison is not an end in

(48) For more details see Von Willigenburg, I., (1996), Criminals and Moral Development: Towards a Cognitive Theory of Moral Change, in Henry Tam (Ed), Punishment, Excuses, and Moral Development, Brookfield, Ashgate Publishing Company, Pp. 127-141.

itself as much as it is essential to emphasize that as a process-based approach, the restorative justice does cross swords with the retributive justice, but both are in agreement whenever the matter relates to both salient theories of retributivism and utilitarianism that infused life in the retributive paradigm. In reality, to prove that the restorative justice has virtues, does not absolutely connote that it outperforms the other. Rather, it is our purpose is to foment the heated discussion of the new paradigm to know how and why it has still gained tremendous plausibility.

3.1. The virtues of Restorative Justice vs. the Vices of Retributive Justice

The light-footed movement, by a considerable number of legal systems, towards the restorative justice interventions has been perceived as a great stride in attempt to reforming the concept and ends of the current criminal justice. The incessant critique and the bone of contention have, in this context, been focused on the fine-grained anatomy of the current traditional criminal justice. Most restorativists have concluded that the conventional responses to the crimes have a little chance to do better than they have so far done.

Undoubtedly, the new paradigm brings the victims forward as a key constituent in the criminal process. Indeed, the revered virtues of the restorative justice go beyond the victim to encompass the offender and their concerned communities. Generally speaking, the victims and their families do not have a legal status in the criminal proceedings, and have no bearing on the case, whatever it is, except through the court appearance to give testimony, and without this appearance, they are flatly absent from the legal process(49). Furthermore, the prosecutors do not consult the victims in their dealing with the cases of victims' serious concern. In most cases, they show little concern to the victims' view, remarkably in both determining the plea of bargain and making the final decision(50). Given the prosecution do the best to get the victims acquainted with the headway of their case, there is an evident disregard for the victims stemming from the "marginalization" idea that is homegrown in the criminal

(49) Zvi D. Gabbay, (2005), Justifying Restorative Justice: A Theoretical Justification for the Use of Restoration Justice Practices, (2) Journal of Dispute Resolution, P. 351.

(50) George P. Fletcher, (1995), with Justice for Some Victims' Rights in Criminal Trials, Addison-Wesley, Pp. 190-193.

law per se[51], they still remain a foreign element in defining the crime and in the procedural laws, governing the criminal proceedings[52].

In fact, the theory of criminal law is inherently structured on proving the elements, constituting crime, and if these elements have been proved beyond reasonable doubt, the process will then be turned towards determining the appropriate punishment to be imposed on the offender. Therefore, the focus is firstly and lastly on the offender, and on guarding the state interests, and not those, which are relevant to the victim.

Arising from this theory, Barton argues that the conventional retributive justice system fails to acknowledge that the wrongful and criminal acts are considered as a violation of certain individuals, to be precise the victim of the crime, not the state, and thus it is the victim who is the primary and legitimate suitor against the offender in a criminal justice reaction[53]. In a nutshell, the crime is, in the retributive justice, seen as a violation of the rules and as a harm to the state, while it is, in the restorative justice, seen as a violation of both the victim (whenever he is identifiable) and the society.

On the strength of this discrepancy between both paradigms, it is conspicuous that the state's status in the retributive justice is central as long as it is controlled and run by the state itself and legal professionals, while in the other model, justice is overseen by the state, but usually driven by the community. Since the 1970s, this bare fact has been of minute scrutiny, and regarded as a springboard towards forsaking the extreme adherence to the punishment imposed by the state as a sole and most legitimate expression of the ability to fulfill the appearance of justice.

We believe that to grapple with this fact, it is essential to dispel the fog spreading all over the restorative justice by arguing that according to the current criminal justice, the parties of a dispute do feel that they have no power over the responses and outcomes, which are decided and then imposed upon them by others. The decisions made by the professionals will give rise to less contentment of the parties, perhaps unjustly, than the same decisions would have if they were reached by them through a dynamic process bringing together the victim and the offender.

(51) George P. Fletcher, (1999), "the Place of Victims in the theory of Retribution", 3 Buff. Crim. L. Rev. P. 51.
(52) Zvi D. Gabbay, Op. Cit, P. 35.
(53) Charles Barton, Op. Cit, Pp. 41-53.

The reason why this fundamental dichotomy normally occurs, is because the professionals, no matter how much competent they are in their field, have no detailed knowledge to successfully address the needs of justice and welfare related to the main parties in a criminal dispute. The stakeholders themselves and their close communities of care have detailed knowledge for needs and circumstances, and thus they can keep up with the adequate and profitable responses to the criminal conduct, its roots, and its ensuing consequences(54).

The symbolic meanings, manifest in what the restorative justice interventions endeavor to, are of reverence whenever they boost the chances of repentance and forgiveness among the stakeholders as well as reintegration of the offender into the community in contrast with the retributive criminal justice which condones these meanings and gives heed only to blaming, stigmatizing, and punishing the offender.

The long-term protection of the public mandates a concentration on both parties as the restorative justice discards the discrepant outcomes by contriving the proper atmosphere to arrive at win-win outcomes in lieu of win-lose outcomes, characterizing the retributive criminal justice.

3.2. Compatibility of Restorative Justice with the Theoretical Basis of Retributive Justice

In all legal systems dominant in the world, and through history, the philosophers developed their theories to explain and justify the criminal penalty. In fact, both theories of retributivism and utilitarianism played an unprecedented role in the sentencing-policy in most legislations. In practice, these two theories have had a robust influence in justifying the punishment inflicted upon the offenders, who committed any of the crimes enumerated in the Penal Act. Because of the restorative justice as a process-based- approach is structured on bringing forward an alternative process to the role of punishment, the question posed here is: what is the nexus between these two theories and criminal justice. In what follows, we seek to hunt up what legalizes the use of restorative justice by proving that it goes hand-in-hand with the key elements for the theories of retributivism and utilitarianism that must continue to perform a role in the criminal justice system(55).

(54) Ibid.

(55) Morris B. Hoffman, (2007), Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (29) Fordham URB. L. J. Pp. 2063, 2081.

3.2.1. Compatibility of Restorative Justice with Retributivism

The basis of the retributivism theory is built on the hypothesis that the injury caused as a result of the act is turned to society, not the victim[56], and without focusing on the crime and the injury inflicting on society, Hegel, who was way ahead of curve with his research into criminal justice, promulgated that the punishment would then be no more than a personal retaliation[57]. Therefore, the reaction of the public and the infliction of the punishment on the offender pursuant to the principle of the "just desert" are the gist of retributivism, and to concentrate on other goals other than this core will inexorably be irrational[58]. In other words, justice cannot be grabbled without the offender, and the punishment to be inflicted upon him is imperative, and by inflicting the "just desert", society expresses its abhorrence of the offender's conduct. As long as the punishment is fit and equal to the crime, any other merits will be inferior to the main goal for the "just desert"[59]. This reasoning outwardly seems in contrast to the restorative justice leaning on a specific harm caused to a specific victim.

However, our argument herein tries to find what makes the restorative justice compatible with retributivism. The first points of convergence between this new paradigm of justice and retributivism can evidently be found in their basic structure. The punishment, as Hegel states, is not imposed on the offender by society, but by the offender himself, who deliberately breached the law and faced up with the repercussions of this breach[60]. Breaching the law and the morally culpable conduct of the offender oblige the state to punish him. Therefore, the criminal offence is, as Gabbay states, a call for action that requires punishing the offender by the state[61], and accordingly, he added, the punitive structure is very compatible with the offender accountability principle on which the restorative justice is based as well[62].

From the perspective of restorative justice theorists, the criminal offence obligates the state to set an action in motion in order to face up to the crime

(56) George Wilhelm Friedrich Hegel, (1967), Philosophy of Right, (T.M. Knox Trans, Oxford Uni. Press) Pp.140-141.
(57) Ibid, at 140-141.
(58) Immanuel Kant, (1986), the Metaphysical Elements of Justice, (John Ladd Trans. Macmillan) P. 101.
(59) Ibid, at 102.
(60) George Wilhelm Friedrich Hegel, Op. Cit, at 70.
(61) Zvi D. Gabbay, Op.Cit, at 376.
(62) Ibid.

and repudiate its effects and this is exactly the case in the retributive justice. However, the fine line between the two paradigms is that the restorative justice goes beyond the crime itself and look back at the offender requiring his accountability.

No doubt both paradigms contemplate the past events to prescribe the moral obligations, and the nexus between the past criminal conduct and the prospective commitment imposed on both society and offender is a central pivot for the two paradigms. Hence, the idea of state obligation is incarnated in both paradigms, but the restorative justice is oriented to close and intimate communities and parties' family. In theory, it never rebut the state obligation, rather, it does actually cement the justification of the imposition of obligations upon the offender.

In this context, it seems, at the first blush, that there is a gap between restoration of justice and reparation of the harm, but a different reading for the concept of justice can bridge this artificial gap between them, and considering the suffering of the victim as a fundamental part of the retributivism theory could fortify it. Most significant is to grasp that the relation between the offender and the victim is rather special, giving the offender a form of preeminence that means his appearance because of his being a main party in the legal action, is more important than the victim owing to his spreading throughout the process of establishing justice, including but not limited to, interrogation, apprehension, arrest, trial, and then the punishment. This preeminence extends to encompass reparation of the victim(63), and thus, as long as the punishment to be inflicted upon the offender is the "just desert", any other elements such as the suffering and struggle for repairing the harm are elements determined by the theorists of retributivism(64).

Going deeply into the nexus between the two paradigms appears for us that there has been a common misunderstanding of the restorative justice's perception of the punishment, and therein lies the perplexity. Whilst the retributive justice endeavors to restore justice through the infliction of the punishment, it has wrongly thought that its counterpart rummages around looking for alternatives to the punishment to avoid thereof. The fact is that the restorative justice never reject the punishment in itself. Rather, it draws attention to a new perception of the punishment by creating newfangled forms of it.

(63) In the same stream, see George P. Fletcher, (1999), Op. Cit, at 57-58.
(64) See Zvi D Gabbay, Op. Cit, at 377-378.

The chronological development of the punishment's conception has been continuously recurrent due to the unremitting change of the punitive philosophy with which the conception of the punishment is accordingly changeable. The most noticeable definition of the punishment connects it with the intention of imposing pain whether through incarceration or fine, and the intentional infliction of pain seems as though it is an explicit condition for determining the punishment.

Adhering to this definition might be rather illusive as it makes its scope very narrow and exclusive to monotonic patterns of it. This saying entails that non-punitive measures, rehabilitation, and the mechanism of reintegration are excluded from the purport of the punishment because the intention of pain therein is absent. We think that sticking to this narrow definition is inconsonant, apart from the restorative justice, with the calls for reforming criminal justice, and stands even as an impediment to the adoption of what is called "alternative penalties system" most legal systems have, nowadays, shown an intense interest in making them an indispensable part of their punitive premise. In this inventive system, many penalties have been inserted into the legal provisions as alternatives to the conventional penalties, namely short prison sentences, infused into mind as if they are the sole penalties that must ever be dominant. Thus, who can say that community service, censure, reprimand, judicial supervision are not penalties. Of course, according to the narrow definition of the punishment, they are not so, even if they are somehow painful by reason of the lack of the intention to trigger pain. On the same order and for the same reason, the restorative justice interventions will surely lose their equilibrium.

Moving away from the narrow definition of the punishment, becoming somewhat archaic to shedding a penetrant gaze on the broad definition of it proves that restorative justice does never disown the punishment. Rather, it gives great momentum to its concept, and presents newfangled patterns that allow a legal system maneuvering and steering in different directions on occasion. According to the broad definition, the punishment is defined as an unpleasant burden imposed upon the offender, and this definition has three characteristics:

First: the intention to trigger pain has no longer been part of the punishment.

Second: the adjective "unpleasant" has less bitterness than the word "painful" does have.

Third: the classic or archetypal forms of punishment, such as incarceration and fines, have been superseded by an elastic term (unpleasant burden), allowing to encompass innovative ways of it.

Accordingly, the restorative paradigm puts the offender on the path that is not paved at all, brimful of challenges, some of which are tangible and others are symbolic, but all can best described as "unpleasant".

The face-to-face meetings with a resentful victim, family, and close community might be regarded as a burden on him, and in order for him not to be a burden to his community, he should comply with the process of his reintegration into the community(65). The social reactions to his obnoxious behavior place the offender in an unpleasant position as though he is in a bitter duel. Furthermore, the experience through which he has gone is beset by challenges of how to learn the right things and eschew the other wrongs, it is not a journey of overwhelming happiness. Rather, it is a journey to a happy destination.

The effectiveness of such unpleasant burdens, including compensation of victim of crime by the offender, might not fructify as we wish, unless they are complementary to the classic sanctions, and this has been the case to this point. To consider such unpleasant burdens as part of the punitive system is a way to romanticize our criminal justice as a whole.

3.2.2. Compatibility of Restorative Justice with Utilitarianism

Unlike the retributive theory that clarifies the robust relation between the offender's past conduct and the violated norm, the utilitarianism theory goes beyond the phase of the infliction of the punishment, whereby the punishment is rejected, unless the general goal all legal systems endeavor to, which is to boost the whole happiness of the community(66) has been achieved. Then, should this goal be ruled out, the punishment will be no more than an "evil" deed as vividly described in this respect by Bentham(67).

However, for the reason that the punishment is designated to be as a tool to face up to the offender's moral past conduct, its focus is to be on the wrongdoing,

(65) In the same vein see Kathleen Daly, (2000). Revisiting the Relationship between Retributive and Restorative Justice, in Heather Strang & John Braithwaite, Restorative Justice from Philosophy to Practice, Pp. 39-40.

(66) Jeremy Bentham, (1982). N Introduction to the Principles of Morals and Legislation, (J. H. Burns and H. L. A. Hart (eds), P. 158.

(67) Ibid.

not wrongdoer. In return, the Utilitarianism theory was not dreamt up to restore morality as the law is, for utilitarianism theorists, not about morals, but about defending the public's liberty and keeping society integral. Furthermore, Gabbay differentiates between the conduct in itself that breached the law and the offender, who perpetrated the wrongdoing(68).

He added as long as the Utilitarianism is irrelevant to morality, but relevant to the offender violating the law, the punishment should be given as much latitude as it is crucial to attain the public welfare(69). It has, therefore, been conceded that since the retributivism perceives the offender as the one who violated the law, the utilitarian punishment "must" be "fit" the offender, not the offence.

For this end, the criminal legal system persistently try to broaden the circle of the punishments imposed upon offenders. Subsequently, it can be stated that the restorative justice and the Utilitarianism are compatible. It emphasizes the role of the wrongdoing as a basis for the offender's moral obligation towards both victim and society, but simultaneously, it does never disown the utilitarian aspects of the punishment. Rather, it tries to re-boost such aspects.

Likewise, the restorative justice never accepts the infliction of the punishment merely because the offender deserves it. Rather, it accepts the assumption that the past wrongful behavior creates prospective obligations, but it does not perceive such obligations as the only goals for them. The infliction of the punishment does not imply that the offender is a morally pariah. Therefore, the restorative interventions are considered as forward-looking aiming at reintegrating the offender into society as one of their key objectives.

Of the utilitarian objectives that can potentially be attained by the infliction of the punishment is the general deterrence (deterring the other potential offender from committing the crime and allaying the severity of the crime that was committed(70). Another objective is termed "specific deterrence", which means deterring the offender from re-offending in future. Obviously, restorative justice seems as though it goes hand –in- hand with the utilitarianism theory, whereby punishing offenders is justified, if by doing so crime can be scaled down. Remarkable studies have empirically demonstrated that restorative

(68) Zvi D. Gabbay, Op. Cit, at 382.
(69) Ibid.
(70) Jeremy Bentham, Op. Cit, at 165.

interventions shrink the rates of recidivism(71). In other words, the restorative processes have astonishingly seen as a desired means of responding to crime achieving the specific deterrence.

On the other hand, heavy doubts have spread over the efficacy of restorative justice to achieve the general deterrence, and whether it is a remedy of great efficacy in its confrontation with potential offenders, and whether it is, as a soft power, capable of attaining this noble goal instead of mere intimidation.

Indeed, indefatigable efforts, theorized about social reactions to crime, have been devoted to dispersing such doubts. The people respect the law when they feel that their intimate community condemns any violation of law, or when they believe that the others they respect perceive the law as being deserved of compliance.(72) Other social theories concentrate on the hypothesis, whereby people obey the law when they view themselves as moral human beings, and herein the internal morals, considerably revered by their community, and the external norms labeled "the same actions right or wrong"(73). Thus, when the violation of law and immorality are in parallel, they will refrain from committing crimes.

In this context, Melia recapped that debate on the relation of the restorative justice with Bentham's general deterrence by inventing the "positive general deterrence" that was premised on social theories. According to this term, the general deterrence can best be sought by strengthening and buttressing the fundamental norms proscribing the criminal conduct instead of resorting to mere intimidation and threat of inflicting pain in case of non-compliance(74). And this is the case in the restorative theory.

(71) See for details Jeff Latimer, Craig Bowden, and Danielle Muise, (2005), the Effectiveness of Restorative Justice Practices: The Meta- Analysis, (85), the Prison Journal, at 127, 135. Stacy L. Young, Timothy G. Plax, and Patricia Kearney, (2006), How Does Meta-Analysis Represent our Knowledge of Instructional Communication? In Barbara Mac Gayle et al. (Eds), Classroom Communication and Instruction Processes: Advances through Meta-Analysis, at 379. A bulk of the research refers to a positive connection between the restorative justice and recidivism or decrease in recidivism, but very few studies indicate the opposite.

(72) Paul H. Robinson, and John M. Darley, (1997), the Utility of Desert, (91) New. U. L. Rev. 453, at 468-470.

(73) Ibid, 469.

(74) Manual C. Melia, (2004), Victim Behavior and Offender Liability: A European Perspective" (7) Buff. Crim. L. Rev. Pp. 513, 514.

4. Serious Misgivings Standing under the Blue Sky of the Restorative Justices

Notwithstanding the go-getting strides towards the reconceptualization of the current criminal justice as a court sentencing process, and then kneeling down in front of the restorative justice, perceived as a long-sought objective, its implementation as a substitute for the retributive justice has evermore been encircled by enigmatic misgivings and issues. In practice, on account of these misgivings, its path is not, as many believe, paved. Rather, it remains wilding and beset with real risks, in particular, when it is intended to be the sole paradigm that should flood the other, namely the retributive criminal justice.

Due to the nature of the restorative justice viewed as an informal form of justice, the settlement reached by the concerned participants, including victims, offenders, and their close community as well as their family, might be of skepticism. This is because the preference of the victim could be ardently preponderated through its processes. Although the restorative interventions anticipate the participants will hold negotiations about what the acceptable resolution is for the participants, the ensuing settlement, whether it is lenient or rigid, is usually contingent on the victim's consent(75). Therefore, the case-by-case negotiations will definitely give rise to inconsistent and arbitrary outcomes, particularly in the absence of guidelines or restrictions on the sphere of settlement.

Additionally, some researchers referred, in an important study, to another potential risk(76). They concluded that such alternative resolutions could aggravate the risk of prejudice against susceptible disputants. To demonstrate the seriousness of this risk, they invoked some studies on social sciences revolving around the effect of prejudice on the concept of justice. These studies had come to a conclusion that the formal justice is disposed to curb prejudice, while informality is disposed to increase it(77). Subsequently, the existing prejudice might actually threaten the preeminence of the restorative justice as any mere appearance of it will certainly overturn the concept of justice as a rubric, none of the dominant legal systems must go beyond. Suffice

(75) For more details see Richard Delgado, (2000), Prosecuting Violence: A Colloquy on Race, Community, and Justice, (52) STAN. L. Rev, 751, Pp. 759-760.

(76) Richard Delgado, Chris Dunn, Pamela Broun, Helena Lee, and David Hubbert, (1985), Fairness and Formality: Minimizing the Role of Prejudice in Alternative Dispute Resolution, Wis. L. Rev. 1359.

(77) Ibid.

it to say that it a cogent argument that the restorative justice was developed to empower the poor and marginalized people in the whole society, and the appearance of prejudice undermines its stature in the eyes of the public, because its interventions might make the parties of a certain dispute vulnerable to social, or even racial discrimination.

The fact is, however, that although the restorative justice brings forward an impressive image in the context of ameliorating the current criminal justice, this image has still been blur. Of no less importance for re-boosting this ambitious paradigm is to address other relevant philosophical issues prior to deciding that it should deflect the other paradigm from being dominated over criminal justice. These issues revolve, first and foremost, around the concept of justice per se, and the issue herein is who decides the sought justice, and who has interest in restoration (victim, offender, their close community, in which the offence was committed, or society as one entity).

Another issue relates to the role of state in having control over punitive policy as to strike balance between the victim-offender restitution, and justice or societal order requires that the state to be on, not behind, the scene as being a legitimate guardian standing beside individuals' fundamental rights and freedoms.

In practice, it seems that restorative interventions might run smoothly without philosophical complications whenever the victim is identifiable, or ambitiously whenever the harm inflicted certain individuals. However, to give the restorative justice, as a sole paradigm, a free rein to be dominated over criminal justice, must not be taken as a given in dealing with all criminal cases. The pivotal question posed in this context is what the case is if the crime was committed against society itself, and this is conceivable whenever there is no specific victim in some crimes, known as victimless crimes[78], such as prostitution, outrageous actions perpetrated in public, and gambling. The offender owes, indeed, debts to society in such cases[79]. Even in the crimes where the social fabric is affected such as hatred crimes, the question herein flares up about who has the power to forgive the offender. It is true that in such cases the victim is specific, but the circle of affected people is clearly so

(78) For more details see Richard Dagger, (1980), Restitution, Punishment, and Debts to Society, in Joe Hudson and Burt Galaway (Eds) Victims, Offenders and Alternative Sanctions (Lexington, Lexington Book) P. 5.

(79) Ibid, at 3-7.

widening, and the question remains standing: can the individual condone the repercussions of the crime on behalf of other affected people?

5. Conclusion

Since its incipiency, the restorative justice paradigm has seemed as though it moves apart, and awash in irreconcilable contradictions with its retributive justice counterpart.

This saying might be true if it is viewed from a conceptual perspective, and not true from another perspective. From perspective of its general concept, the restorative justice is a paradigm that brings forward a newfangled vision for administrating the criminal lawsuit, solely based on process. This, therefore, required re-conceptualization of restorative paradigm being as it much focuses on indispensable values alongside resolving the dispute on a basis of social reform.

In return, this study has concluded that the restorative justice system is compatible with retributive justice with respect to the two theories of retributivism and utilitarianism, upon which the latter is based, and on account of this conventionally rooted theoretical basis, the retributive justice has gained general acceptance and hence got the upper hand to other models. Thus, both theories cannot be invoked to devalue the essence of the restorative justice paradigm.

Another conclusion is that the restorative justice in its current guise is congruous with the needs of criminal justice. Yet, for the reason that there have been some philosophical issues and real risks, invincible as yet, the restorative justice model has still been tottering to be overwhelmingly incorporated into the realm of the current criminal justice systems, notwithstanding how much veneration it does have.

It is believed that the typical approach is not to rummage around looking for a model that overcomes the other models. In this context, our incipient perception is built on four elements:

- First, the restorative model should be seen as part of, not as a substitute for, the current criminal justice.
- Second, the judiciary should have a pivotal role, even remotely, in administrating restorative justice intervention.

- Third, the implementation of this model as a first step should be confined to non-serious or non-severe crimes wherever the victim is identifiable.
- Fourth, failure to reaching the sought outcomes makes the implementation of the retributive justice an inescapable matter.

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Table of Contents

An Exploratory Analysis on Arbitration law in Bahrain: A Significant Step towards Liberalism

*Dr. Qais Khaleel Sallam Maaitah**

Abstract

Arbitration is now considered to be an effective form of alternative dispute resolution under international law. The GCC countries have several mechanisms in order to provide arbitration as a means of resolving commercial disputes. However, only Bahrain has made efforts to bring its arbitration regime in accordance with the UNITRAL Model Law on International Commercial Arbitration. Law 9/2015 is the most recent legislation that will significantly improve the arbitration regime in Bahrain.

This paper aims to analyze and assess arbitration law 9/2015 implemented in Bahrain in 2015, in order to check its efficacy as well as identify the areas where improvement is needed in order to make arbitration more effective in the country. The best practices related to international arbitration practice need to be implemented in Bahrain in order to achieve the highest levels of success. An exploratory qualitative study has been undertaken to study the law by referring to research resources on arbitration and international legal frameworks.

The findings from the paper suggest that the new law will be beneficial as foreign investors are protected as they can refer to the law by hiring legal representatives that do not have license or registration to operate in Bahrain for international commercial arbitrations.

Consequently, the benefits are that preferred legal counsel of foreign investors can participate in such proceedings. Another benefit of the new law is that arbitrators will be immune from liability which happens due to actions and decisions taken during the arbitral proceedings.

Keywords: arbitration regime, commercial disputes, commercial arbitration, dispute resolution, UNCITRAL Model Law.

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1 Introduction

Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates sought to establish an economic and political policy coordinating organization called the Gulf Cooperation Council (GCC) in the year 1981. The aim of the GCC has been to foster closer economic and political cooperation. The legal systems in the GCC have transformed with the passage of time. The results have been beneficial for foreign investors and businessmen as the legal systems in the GCC have helped to reduce risk and volatility while providing conventional legal protections.

The rapid development of oil resources in the GCC has seen an impressive increase in the standards of living in the GCC region. This has generated a wealth of international contracts which contain arbitration clauses designed to use arbitration that is one of the most valued methods of conflict resolution in international commerce in the GCC states. Consequently, the advantages of arbitration have been that commercial parties can avoid the tedious litigation process in favor of arbitration which is a flexible and cost effective method for commercial parties.

Bahrain is the only GCC state to have passed Law No 9/2015 which promulgates a standalone arbitration law which significantly alters its arbitration regime. The law is applicable to locally seated arbitrations and if the parties agree then it is applicable for foreign seated ones also.

The law is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on international commercial arbitration of 1985. The aim of this study is to assess Law No 9/2015 and analyze its impact on the arbitration regime in Bahrain. It will seek to identify the strengths and weaknesses of the law.

1.1 Objectives of The Research

The objectives of the research are to analyze Law no 9/2015 which is the new arbitration law promulgated in Bahrain. The goal will be to test the efficacy of the law and its potential impact on the use of arbitration in Bahrain. Finally, the study will make recommendations regarding the best ways that the law can be enhanced for the benefit of commercial parties and other stakeholders in Bahrain.

1.2 Background Study

Bahrain is an Arab constitutional monarchy situated in the Persian Gulf. It is an island country that is a member of the GCC. The modern history of Bahrain began when it signed a treaty with Britain in 1880 to become a protectorate until achieving independence in the year 1970. The year 1999 witnessed Sheikh Hamad ibn al-Khalifah becoming the head of state. Several changes were introduced in the country such as giving Bahraini citizens the right to vote in a National Charter Referendum in 2001 and New Constitution on 2002.

The state became a constitutional monarchy in the year 2002. Arbitration was adopted in Bahrain before World War I with a customary council being in charge of resolving disputes related to water sites in accordance with local traditions(1). The Code of Commercial and Civil procedure regulated arbitration in Articles 223 to 243. The provisions of the UNCITRAL Model Law were applicable in all international commercial arbitrations unless specified by the parties. The previous laws on arbitration were incomplete such as the Chamber of Commerce and Industry of Bahrain has the right to solve disputes submitted to them by arbitration(2). The Act of Establishment and Organization of the Stock Exchange cites arbitration as a method for settling disputes. Article 13 provides the development of an Arbitration Commission for settling disputes that occur as a result of transactions in the Exchange.

Arbitration can also be used to collective labor disputes in accordance with labor law(3). Law 9/2015 is the most recent legislation that will significantly improve the arbitration regime in Bahrain. The new arbitration law needs to be analyzed and assessed in order to check its efficacy as well as identify the areas where improvement is needed in order to make arbitration more effective in the country. The best practices related to international arbitration practice need to be implemented in Bahrain in order to achieve the highest levels of success.

1.3 Problem Statement

Arbitration is an alternative dispute resolution (ADR) which is used to settle disputes. The dispute can be decided by arbitrators that are neutral persons

(1) Rogers Catherine A., Ethics in International Arbitration, Oxford University Press, 2014, p.45.
(2) Rogers Catherine A., Op. Cit., p.92.
(3) Rogers, Catherine A., Op. Cit., p.109.

selected by the parties. They can award "arbitral awards" which is legally binding on both sides and enforceable in the courts. The GCC has made several strides in updating the legislation regarding arbitration because of its importance in resolving commercial disputes(4).

The GCC is an important regional bloc that comprises of the world's richest countries in terms of oil reserves. Bahrain is one of the GCC members that have several mechanisms for arbitration. Law 9/2015 is the most comprehensive arbitration law that has been promulgated by the Kingdom of Bahrain. It is based on the UNCITRAL Model Law on International Commercial Arbitration. The new law has not been tested yet which means that there is the need to study and analyze it in order to determine its key strengths and weaknesses.

1.4 Research Questions

The following are the research questions that will be answered in this study:

- What is the impact of Law 9/2015 on Bahrain's arbitration regime?
- What are the strengths and weaknesses of Law 9/2015?
- What are the ways that arbitration regime in Bahrain can be strengthened?

1.5 Importance of The Study

Bahrain is an important player in the world because of its huge oil reserves. Additionally, it remains a developing country that needs various products from industrialized countries. The world is now becoming economically interdependent with the result that an effective legal framework for the promotion of international trade and investment is acknowledged in order to promote economic growth and stability.

International trade is strong linked with arbitration which means that legal frameworks in Bahrain must play a strong role in contributing towards economic growth(5). The important of this study will be to identify the impact of Law 9/2015 on Bahrain together with its key strengths and weaknesses. However, the scope of this study is only applicable for Bahrain. Further research will be needed in order to identify the ways that other GCC countries can enhance or modify arbitration in order to achieve greater levels of economic trade and investment.

(4) Whaley Douglas J. and Stephen M. McJohn, Problems and materials on commercial law, Wolters Kluwer Law & Business, 2016, p.78.

(5) Stipanowich Thomas, Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals, (2014), p.67.

2 Literature Review

2.1 Theoretical Background

There are many forms of business dispute resolution procedures. These include alternative dispute resolution mechanisms (such as mini-trials, mediation, conciliation etc.), litigation, arbitration and negotiation(6). One way to settle disputes or breach of contract is arbitration which refers to an independent arbitrator that can be selected by the parties. The goal of the arbitrator will be to focus on coming up with a decision based on arguments and evidences presented to the arbitration tribunal(7). It is agreed upon by the parties that the decision of the arbitrator regarding the dispute will be binding and final.

Commercial arbitration is a type of arbitration that is designed to be used in a business or commercial relationship, and not in labor laws, family laws or personal relationships(8). To prohibit the use of arbitration as a dispute resolution mechanism in areas like family law, the adjective of commercial is included with arbitration. There is growing number of international transactions and international businesses in today's globalized world.

Even if a contract or a transaction is well planned, there is still a possibility of a conflict or dispute. Thus, the parties should keep in mind this possibility and understand the need to incorporate dispute resolution mechanisms in their business contracts beforehand. The arbitration agreement can be made either in advance or after the conflict arises(9). Traditionally, arbitration has been limited to trade, business or commercial relationships but with the growing dissatisfaction of the public with the civil court system, arbitration has been adopted as an alternative dispute resolution measure.

2.2 Commercial Arbitration

Historically, the use of arbitration as a means to resolve disputes was a simple self-regulated system. It was a usual practice for the traders to turn to a third party to resolve their conflicts related to commercial transactions(10). The third

(6) Aboul-Enein M.I.M, Peaceful Settlement of Commercial Disputes: Commercial Arbitration and other ADR Techniques, (1st ed, 2005), p.34.
(7) Aboul-Enein M.I.M, Op. Cit., p.36.
(8) Aboul-Enein M.I.M, Op. Cit., p.43.
(9) Berg Albert (ed), International Commercial Arbitration: Important Contemporary Question. (1st ed, 2003), p.56.
(10) Berg Albert (ed), International Commercial Arbitration: Important Contemporary Question (1st ed, 2003), p.64.

person was a neutral party who would act as an arbitrator and find a solution to resolve their conflict. However, with the growing number of international transactions and international businesses, there was a need to have international regulations. The domestic statutes alone could not cope with the issues of enforcement of arbitral awards and arbitration agreements.

This is where the concept of international commercial arbitration was introduced. The first protocol on the arbitration clauses was the Geneva Protocol that was introduced in 1923[11]. It enabled the international enforcement of arbitral awards and arbitration agreements. The scope of the international enforcement of these agreements was extended by the Geneva Protocol introduced in 1927.

The UN Convention on the Enforcement and Recognition of Arbitral Awards, which was introduced in 1959, was UN's first major effort to international arbitration[12]. The formation of these international treaties, especially the NY Convention, was influenced by the arbitral institutes like the London Court of International Arbitration that was established in the year 1892. The concept of modern international arbitration has its roots in the Jay Treaty of 1794 between the United States and Great Britain, which led to the formation of three arbitral commissions to settle claims and questions arising out of American Revolution[13].

In the nineteenth century, numerous arbitral agreements were made that established ad hoc arbitration tribunals to handle particular cases or to deal with numerous claims. Commercial arbitration was historically used to resolve disputes amongst medieval merchants in marketplaces and fairs in the European continent, in England and in the Baltic and Mediterranean Sea trade[14]. The use of commercial arbitration was made possible after the courts were given the power to implement the parties' decision to arbitrate.

The first law related to this was passed in 1889 and was called the English Arbitration Act which was then merged into the act of 1950[15]. This law was

(11) Berg Albert (ed), Op. Cit., p.67.

(12) Bron Gary, International Arbitration and Forum Selection Agreement: Drafting and Enforcing (2nd ed, 2006), p.89.

(13) Bron Gary, Op. Cit., p.90.

(14) Binder Peter, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction (2nd ed, 2005), p. 87

(15) Binder Peter, Op. Cit., p.88.

adopted by many nations in the British Commonwealth. This law was also followed in the U.S by an arbitration law of New York that was introduced in 1920 and the Federal Arbitration Act that was introduced in the year 1925. The Federal Arbitration Act dealt with the implementation in the federal courts of arbitration agreements. It also dealt with awards involving foreign and interstate commerce and maritime transactions. Most states in America adopted, at time with little alterations, the Uniform Arbitration Act that was introduced in 1955 and was later altered in the year 1956.

Earlier, the common law allowed the arbitration agreement to be revoked, but this Act made the arbitration agreement irrevocable. This Act also allowed the substitution of arbitrators in case the parties failed to choose an arbitrator(16). The courts thus play a crucial role in enforcing arbitration agreements and provide judicial assistance against the non-compliant party. The modern arbitration law is included in the arbitration statutes of almost all the nations worldwide.

2.3 Scope and Function

Arbitration has usually been used to settle controversies and arguments between different exchanges in commodities and securities trade and between affiliates of trade associations. A standard arbitration clause is often included the form contracts that refer to the particular rules of arbitration(17). Many arrangements between different parties in commerce and industry also allow the use of arbitration in disputes arising out of agreements and contracts for distribution arrangements, financial operations, engineering and construction projects, sale of manufactured goods and numerous other undertakings.

The first step of the arbitration process is initiation and filing. The second step involves the selection of an arbitrator. The third step is the preliminary hearing. An initial hearing is conducted with the parties by an arbitrator(18). He discusses procedural matters such as depositions and witnesses and issues related to the case. The fourth step involves preparation for presentations and information exchange. The fifth step is when hearings take place. The parties can present evidence and testimony to the arbitrators during the arbitration hearings. Unless the nature of the conflict is very complex, this is normally the

(16) Binder Peter, Op. Cit., p90.
(17) Bunni Nael, Construction Arbitration in the Middle East, (2004) 6 DIAC Journal 6, p.98.
(18) Bunni Nael, Op. Cit., p.54.

only hearing that takes place before the arbitrator[19].

In post hearing submissions, both parties can present more documentation, if allowed by the arbitrator. After the post hearing submissions, the arbitrator finally renders the award. Selecting an arbitrator is a crucial aspect of the arbitration process because the arbitrator has to be unbiased and neutral. The arbitrator's fairness, knowledge and ability are the most decisive and crucial elements in any arbitration process[20].

Usually, an arbitrator is selected by both the parties involved. The selected arbitrators then choose a chairman and form a tribunal. The agencies administering and overseeing commercial arbitration often select the arbitrators under already established regulations and rules of the arbitration process. These organizations (that include chamber of commerce, produce exchanges, trade associations) maintain a board of skilled and proficient arbitrators[21]. The parties have the choice to either select the arbitrators themselves or to entrust the selection and appointment of the arbitrators to these agencies. The arbitration process faces many challenges. It is challenged at times on the grounds that the arbitrator was biased. Such challenges can be generally maintained only after the conclusion of the arbitration process as the courts are hesitant to interfere in the arbitration procedure before rendering the awards.

The arbitration procedure is regulated by the rules mentioned in the arbitration agreement. The arbitrators can also determine the rules of the arbitration process. The arbitrator has the power to request the third persons and the parties involved to present documentary proof[22]. If one of the parties does not appear at the hearing without a legitimate reason, the arbitrator in most cases can proceed with the procedure and give an award after completing his investigation regarding the dispute. Under the arbitration practice and the law in most nations, an award is binding and valid when given by the majority of arbitrators.

The statutory law of many nations and the regulations of the organizations overseeing and administering business arbitration include provisions on the

(19) Caron David and Caplan Lee and Pellonpaa Matti, The UNCITRAL Arbitration Rules (1st ed, 2007), p.98.
(20) Caron David and Caplan Lee and Pellonpaa Matti, Op. Cit., p.99.
(21) Caron David, Caplan Lee and Pellonpaa Matti, Op. Cit., p.99.
(22) Drahozal Chistopher and Naimark Richard (eds), Toward a Science of International Arbitration: Collected Empirical Research, (1st ed, 2005), p.92.

notification, certification, form and the delivery of award. The arbitrator has to comply with these requirements[23]. The recognition and the enforcement of an award are denied if it is not in line with the public policy. The authority and power of an arbitration award is similar to that of a court decision.

2.4 Advantages and Disadvantages

The significance and usefulness of arbitration is shown by its growing use by the legal profession and the business community worldwide. Although the usual way to resolve conflicts is to submit them to the court of law, but arbitration has become popular over the past few decades as a way to resolve international business disputes[24]. The impartiality of the international arbitration institutes or arbitrators, the flexibility in arbitration procedure, the implementation of arbitral awards in foreign nations, confidentiality of the arbitration process and the ability to quickly resolve conflicts are the most advantageous attributes of the international commercial arbitration procedure. However, there are certain short comings of this process as well[25].

There are numerous advantages of arbitration. First, arbitration saves a lot of time. The speed with which the disputes between the parties can be resolved through arbitration is faster as compared to other court procedures that involve long delays[26]. Second, the arbitrators have expert knowledge and information regarding the usages and customs of a particular trade which makes much of the documentation and testimony by others completely unnecessary, thereby eliminating some costs that are usually linked to court procedures[27]. Third, the arbitration procedure maintains privacy and confidentiality.

The issues discussed during the arbitration proceedings that might not be favorable to one of the parties aren't revealed to the outsiders. This helps to maintain the reputation and image of the parties that could easily be tarnished in normal court procedures[28]. Litigation in the public courts often attracts a lot of media attention, hence parties can benefit from arbitration by resolving their disputes privately. Fourth, the arbitral process is a flexible procedure. It

(23) Drahozal Chistopher and Naimark Richard (eds), Op. Cit., p.34.

(24) Lew Julian, Mistelis Loukas and Kroll Stefan, Comparative International Commercial Arbitration, (1st ed, 2003), p.23.

(25) Lew Julian, Mistelis Loukas and Kroll Stefan, Op. Cit., p. 24

(26) Lew Julian, Mistelis Loukas and Kroll Stefan, Op. Cit., p.30.

(27) Morrissey Joseph and Graves Jack, International Sales Law and Arbitration: Problems- Cases and Commentary, (1st ed, 2008), p.21.

(28) Morrissey Joseph and Graves Jack, Op. Cit., p.102.

has no set standards, rules and regulations that are necessary to follow.

The international business arbitration allows the parties freedom to select a proficient decision maker and to agree on the procedural regulations and schedules. Fifth, since this is an informal process, it does save a lot of time as compared to the court hearings. Sixth, the arbitration process is a simplified procedure(29). It does not involve multiple hearings, mounds of documentation and paperwork. Thus, an arbitration process may help to eliminate some or all of those expensive and time-consuming tools of litigation. Sixth, arbitration is a fair procedure.

The parties select the arbitrators themselves or agree to entrust a third party to choose an arbitrator. Thus, choosing a party is done on mutual agreement and consent and eliminates the subjectivity and partiality from the procedure(30). However, the arbitration process has many disadvantages as well. First, there can be a divergence in the court decisions and the municipal laws that leads to various interpretations of similar arbitration questions(31). This serves as an obstacle to the wider application of the commercial arbitration law. Second, the final award rendered by the arbitral tribunal is binding and irrevocable.

Even if the arbitrator has made an obvious mistake, it is not easy to appeal arbitration rulings(32). Thus, the finality of the awards is a disadvantage of the arbitration procedure. Third, there can be concerns about the lack of justice and impartiality regarding the arbitrators. Fourth, if the arbitrators, clients and counsels are busy, it is not easy to schedule hearing dates; this can make the pace of the arbitral process slower and can add to procedural delays(33). Fifth, since there is a lack of formal evidence procedure, it means that instead of depending on a jury or judge, the parties have to depend solely on the experience and skill of the arbitrators. No depositions or interrogatories are taken.

The arbitration procedure does not include a discovery process. Lastly, in some

(29) Morrissey Joseph and Graves Jack, Op. Cit., p.102.

(30) Morrissey Joseph and Graves Jack, Op. Cit., p.104.

(31) Poudret Jean-Francois and Besson Sebastien, Comparative Law of International Arbitration (1st ed, 2007). p. 74

(32) Poudret Jean-Francois and Besson Sebastien, Op. Cit., p.74.

(33) Poudret Jean-Francois and Besson Sebastien, Op. Cit., p.78.

cases the international commercial arbitration can be an expensive process[34]. The parties have to pay the expenses and fees to the arbitrators. Administrative fees have to be paid to the arbitrator or the arbitral agencies. In addition to the administrative expenses, the parties may also have to pay the costs of hiring rooms for hearings and meetings instead of using facilities of the public.

2.5 Bahrain Arbitration Law

Bahrain Law No 9/2015 was promulgated the Arbitration Law in the year 2015. The Article 1 of the New Arbitration Law makes the provisions of the UNCITRAL 1985 Model Law with its 2006 amendments on international commercial arbitration to be applicable in any arbitration case if it takes place in Bahrain or abroad[35]. It will help to regulate international and local business and commercial disputes as Bahrain is the only GCC country to update its arbitration legislation in accordance with international standards.

The Article 253 and Section 7 on arbitration from the Civil and Commercial Procedures Act implemented by Decree No 12 of 1971 have been repealed[36]. The International Commercial Arbitration Law promulgated by Decree No 9 of 1994 has also been repealed[37]. This law is considered to be a major step towards unifying international arbitration rules and ensuring Bahrain is an attractive jurisdiction to settle commercial disputes. However, it is important to study the law and its impact on the legislation regarding commercial disputes and problems.

The law was implemented on 9th of August 2005 with the aim of have equal rights for the local and international investors whether the consent of partnership is happened in Bahrain or outside[38]. The law is a continuity of the Bahrain UNCITRAL 1985 Model Law which was earlier amended in 2006 to be aligned with the international commercial arbitration. As a result of the implementation of the updated law, promulgation of the New Arbitration Law, Section 7 on arbitration and Article 253 from the Civil and Commercial

(34) Poudret Jean-Francois and Besson Sebastien, Op. Cit., p.98.

(35) Redfern Alan (et al), Law and Practice of International Commercial Arbitration, Thomson/Sweet & Maxwell, London, (1st ed, 2004), p.56.

(36) Sanders Pieter, The Work of UNCITRAL on Arbitration and Conciliation, (2nd ed., 2016), p.21.

(37) Sanders Pieter, Op. Cit., p.22.

(38) Zu'bi & Partners, (2015), Bahrain's Arbitration and Foreign Judgements Laws. [online] Available at: http://zubipartners.com/arbitration-and-the-enforcement-of-foreign-judgments-in-the-kingdom-of-bahrain/ [Accessed 31 Mar. 2018].

Procedures Act promulgated by Decree No. 12 of 1971 were replaced[39].

Further, the International Arbitration Law promulgated by Decree No. 9 of 1994 will also be replaced. With the help of such enhancements, the international commercial disputes are likely to be solved in a better manner considering Bahrain as an attractive place with clear jurisdiction and proceedings.

Impact of Law 9/2015 on Bahrain's Arbitration Regime

The new arbitration law in Bahrain is expected to hail the investors interests in the country. The amendments are a step forward to the commercial settlement for the international investors. The law is expected to have a positive impact on the overall business community and international investors in the country. The previous law was somewhat less appealing international investors. The country has great potential in term of exceptional resources and strategic geographical positioning in the region. In such scenarios, the amendments seek to mitigate the risks by including arbitration clauses under the Bahrain law.

Considering the fact that the new law is the incorporation of the well-known and thoroughly executed UNCITRAL model Law, it is expected to provide much confidence to the local and international investors. According to the law, the Bahraini High Court is the court entrusted with considering and determining all arbitration related applications.

The legal representation of the parties need not be licensed or registered with the local authorities in Bahraini "international commercial arbitration". This adds on the benefits of the foreign investors as the signed contract can be made electronically as mentioned in the Article 7 of the UNICRAL law stating "The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy[40].

(39) Zu'bi & Partners, Op. Cit.

(40) Zu'bi & Partners, (2015), Bahrain's Arbitration and Foreign Judgements Laws. [online] Available at: http://zubipartners.com/arbitration-and-the-enforcement-of-foreign-judgments-in-the-kingdom-of-bahrain/ [Accessed 31 Mar. 2018].

2.6 strengths and weaknesses of Law 9/2015

The analysis of the law provides extensive benefits to the individuals and the amendments provide a more sophisticated system of dispute resolution. Among various benefits following are the most prominent one in accordance with the amendments of Law 9/2015.

- First of all, the confidence of the international community will be increased through the enactment of the arbitration law. It provides speed and informality in the processing for the international investors which is considered to be one of the main reasons investors adopts arbitration over litigation. Further, in many cases the attorney is not needed which causes the process to be lesser costly.
- Arbitrator is someone on who both parties have confidence and can be selected mutually. Both parties have a control on the arbitrator whereas the judge or jury selection is out of the hands of the two people(41). The new legislation also creates a new Bahrain Chamber for Dispute Resolution (BCDR), which is intended to become both a Bahraini national and a Middle Eastern regional arbitration center that will be run with the help of the American Arbitration Association (AAA). Another prominent examples of such arbitration bodies is the Bahrain Chamber for Dispute Resolution in partnership with the American Arbitration Association (the "BCDR-AAA ") that provides a settlement and clear legal processing between Bahrainis and United States Citizens. However, the statistics of the cases are not clear yet the load on the body estimates it to be a continuously growing caseload.
- The internationalization provided with the UNCITRAL law provides an opportunity for the parties to make the deal in any of the countries and the arbitral award will be recognized as binding and will be enforced by the court. Article 3of the New Arbitration law provides authority to the Bahraini High court to entrust with considering and determining all arbitration related application(42). This involves the applications to enforce or set aside arbitral awards. This is a great advancement towards commercial liberalization as earlier lesser trust was placed in arbitration because of rectifying
- Adoption of UNCITRAL Law in arbitration law brings a lot of uniformity and predictability to the judicial system of the Bahrain because of its

(41) Law 9/2015 Article 6: Non-Bahraini lawyers shall be authorized to represent the two parties to the dispute in case the international trade arbitration is held in the Kingdom of Bahrain.

(42) The High Civil Court shall perform the functions referred to in Article (6) of this attached law.

substantial body of interpretation. The law provides detail adequately the treatment of parties, Arbitrator challenges, Termination of arbitrator's mandate or of the arbitration, Presumption of reasoned award which strengthens the position of both parties regardless of the country of residence. According to the UNCITRAL Law Article 11, implemented in Bahrain, it is prohibited to preclude any person on the reasons of nationality to act as an arbitrator, unless otherwise agreed by the parties. This provides a great opportunity for the foreign parties to have their own representations in the international community. Further, it is assign to encourage investments by bringing increased confidence to Bahrain judicial system of arbitration.

- Before the domestic arbitration law amendment which adopts the UNCITRAL model, the Civil and commercial Procedures Law of 1971 found to had various issues. For example, Under Article 234 of the Civil and Commercial Procedures Law of 1971, the arbitrator must not be a minor, in incapacitated or deprived of his civil rights as a result of having been imprisoned or made bankrupt which are not included in the UNCIRTAL law and that's increases the scope of the selection of the Arbitrator(43).

2.7 Research Methods

The research methodology helps to play a critical role in identifying the techniques that will be used for acquiring information and data in this study. The methodology is described as the theoretical and systematic analysis of methods which will be used in any discipline(44). The methodology becomes an important part of the study since it will help to identify the proper methods and principles for the branch of knowledge. The goal of research seeks to assess existing assumptions or postulate new findings in the light of the research. A theoretical framework is essential for identifying the best method or practices that can be used in the specific case. The specific research goals and objectives will also be answered using the appropriate methodology.

Descriptive, analytical, physical, and exploratory are considered to be the various research methods available for the research process. The best method is that which is helpful in solving the problem or filling a knowledge gap or explaining the essence of the study(45). The Bahraini arbitration law has

(43) Article 11 of the UNCITRAL Model Law (1) There is no arbitration agreement between the parties; or (2) If one of the agreed arbitrators has abstained, withdrawn or has been dismissed.

(44) Taylor Steven J. and Robert Bogdan and Marjorie DeVault, Introduction to qualitative research methods: A guidebook and resource, John Wiley & Sons, USA, 2015, p. 67.

(45) Taylor Steven J. and Robert Bogdan and Marjorie DeVault, Op. Cit., p. 67.

recently been passed which means that is efficacy and reliability is still vague. Consequently, an exploratory research method is utilized for this study because it helps to study the problem of analyzing the arbitration law which has not been studied properly. Furthermore, exploratory research plays a critical role in establishing priorities and developing operational designs.

2.8 Research Strategy

Data collection can be done through primary and secondary methods. Primary data collection involves the researcher undertaking research in the field while collecting the data through methods like interviews, questionnaires, surveys, and others. These methods help to fill the knowledge gap. Such a method will be used by the objectivist that seeks to develop objective answers. The realistic point of view helps to guide the objectivist towards answering the objectives and goals(46). A second method for collecting data is secondary research which uses existing studies in order to answer the specific questions. The studies undertaken in law can be constructive in nature also. The current research on arbitration law is constructive in nature as it is not limited by time while it will help to answer the questions in a manner that entails different factors or subjective reality of the situation.

2.9 Data Collection Methods

Qualitative approach was identified as being suitable methodology for collection data. The case study approach helps to enhance the qualitative methodology. Bahrain as a case study has been used in order to review the legal framework on arbitration. The goal is to identify the efficacy and potential weaknesses of the new arbitration law. The study focuses on a legal issue while it also conducts a review of the current law. The need for quantitative data from respondents is not needed in this study. Consequently, the secondary research approach was utilized for the objectives and questions of this study(47).

The number of secondary sources on the topic would be extensive which means that only those studies that are relevant and recent have been selected. Books, journal articles, law articles, and other relevant secondary sources that review the arbitration law as well as the international mechanisms on arbitration have been used as part of the study. Secondary research has been

(46) Flick Uwe, Introducing research methodology: A beginner's guide to doing a research project. Sage, 2015, p. 76.

(47) Flick, Uwe, Op. Cit., p.76.

suitable for this study because it has many advantages. The primary benefit is the extensive studies that are published on any given topic. The researcher will be able to access materials in an easy manner about the topic. The relevant parts from the data can be filtered by the researcher due to the secondary research process(48).

Secondary research is beneficial in the sense that it helps to improve the interpretation and understanding of the research problem. The disadvantages of secondary research have been the fact that secondary data might be irrelevant and outdated. Specifically, the researcher has no means to check the veracity of the findings. There is no way to test the biases of the researchers in the research study when secondary research is utilized(49). Secondary research can pose difficulties for researchers as they have to go through volumes of data sources in order to find the appropriate and relevant material.

However, secondary research is appropriate for this study since it is concerned with analyzing the arbitration framework in Bahrain which has introduced a new law in the year 2015. Secondary research can help to identify the rationale behind arbitration as a tool under commercial law while helping to analyze the international legislation that is being used as a model for the current Bahraini law on arbitration.

2.9.1 Justification For Current Methodology

An exploratory qualitative data analytical methodology has been selected for this study. Secondary qualitative data has been used because it has been found in different sources. The sources on arbitration, international laws on arbitration, and Bahrain's new law have been selected for the purpose of this study. The exploratory qualitative data analysis is beneficial since it can be used for exploring the knowledge on the current subject. It provides the researcher with the ability to understand the topic from a broad and critical perspective(50). It helps in understanding the ground rules and developing the understanding of reality that is close to the reality. Moreover, the researcher will be able to successfully provide foundation on the broad research project which can in turn help to answer the questions in an objective manner.

Another advantage is that the data collection method is flexible while being

(48) Flick, Op. Cit., p.77.
(49) Flick, Op.Cit., p.78.
(50) Flick, Uwe, Op.Cit., p.79.

time and space friendly for the researcher. Online repository has been used for identifying literature references together with specific laws in order to improve understanding about the project. The philosophical approach is constructivist in nature because it will help in understanding the context of the new arbitration law and the analysis of its key strengths and weaknesses(51). The analysis of the current Bahraini law on arbitration can be done only when it is done through the critical analysis of the existing literature on international arbitration

2.10 Findings and Analysis

Law No. 9/2015 is the most recent legislation in Bahrain which is associated with the process of arbitration in commercial disputes. The analysis shows that the law is applicable for locally seated arbitrations as well as foreign seated ones depending on agreement by all parties. The law allows Bahraini High Court to consider and identify arbitration related applications. It has the power to give arbitral awards depending on the outcomes of each individual case. This will be beneficial as foreign investors are protected as they can refer to the law by hiring legal representatives that do not have license or registration to operate in Bahrain for international commercial arbitrations(52).

Consequently, the benefits are that preferred legal counsel of foreign investors can participate in such proceedings. In case of any dispute, the party can approach the mediator for proceeding under the support of the BCDR-AAA through a simple request by way of e-mail, regular mail, or fax. The party mediating a dispute at the same time should initiate an informatory letter to the other party for better coordination and alliance.

Another benefit of the new law is that arbitrators will be immune from liability which happens due to actions and decisions taken during the arbitral proceedings(53). There is an exception when gross mistakes or bad faith might influence the arbitral proceedings. The New Arbitration law ensures that Bahrain will use option 1 in Article 7 of the UNCITRAL Law for defining arbitration agreement and its form. The successful process of arbitration will be possible only when it meets the criteria outlined in the provisions of Article

(51) Flick, Uwe, Op.Cit., p.80.

(52) Sheta Ahmed, The Arbitration: An Explanatory and Comparative Study of Judiciary Provisions and Arab and International Arbitration institutions, (1st ed, 2009), p.82.

(53) Moses, Margaret L., The principles and practice of international commercial arbitration, Cambridge University Press, 2017, p.73.

7 of the UNCITRAL Law. The benefits of the new Bahraini law are that "arbitration agreements" are defined as process in which parties have submitted to arbitration process as a result of the defined legal relationship(54).

This relationship can be either contractual or non contractual. The arbitration agreement can be present in the form of an arbitration clause in a contract or it can be a separate agreement. The agreement for arbitration must be present in written form. Furthermore, Bahraini law defines arbitration agreement as being in a written form when it has been recorded in any form. It does not matter if the arbitration agreement has been in oral form or other means. The Bahraini law's advantage is that it will recognize electronic communication for recognizing arbitration agreement if the information can be accessible for subsequent references(55).

Furthermore, the electronic communication is defined in terms of parties being able to exchange and use data messages for communication. The concept of data message is information generated or stored by electronic or similar means. The previous laws of arbitration with regard to recognizing and enforcing foreign arbitral awards were inadequate to meet the modern international arbitration process(56). Furthermore, the previous law in Bahrain did not understand the nature of typical arbitral proceedings. The New Arbitration Law will play a critical role in addressing this problem.

The analysis of the arbitration law in Bahrain suggests that it provides a neutral process in terms of choice of law and arbitrators. This helps to make arbitration an advantageous process. However, there are concerns related to complete neutrality(57). There are no provisions concerning matters such as fraud, arbitrator bias, or misconduct. Private arbitrators might have financial, personal, or professional relations with one of the parties. The arbitrators might be biased which can question the integrity of the arbitral awards(58).

(54) Radhi, Hassan Ali, International Arbitration and Enforcement of Arbitration Awards in Bahrain, BCDR International Arbitration Review 1, no. 1, (2014), 29-47.

(55) Almutawa, A. M., & Maniruzzaman, A. F. M., (2015), Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC arbitration law: an empirical study, p.98.

(56) McClure, M., and C. Shepherd, Arbitration in the Middle East: Expectations and Challenges for the Future, Transnational Dispute Management (TDM) 12, no. 2, (2015), p.98.

(57) Alqudah, Mutasim Ahmad, The Impact of Sharia on the Acceptance of International Commercial Arbitration in the Countries of The Gulf Cooperation Council, Journal of Legal, Ethical and Regulatory Issues 20, no. 1 (2017), p.104.

(58) Seyadi, Reyadh, Challenges in implementing the 1958 New York Convention: A case study of the

Another problem with the new Bahraini law is that it would be difficult to construct an effective arbitration agreement and regime in multi party contracts. The need for careful considerations of arbitration clauses is important. The parties have to bear the costs of arbitrator and venue which can be a major problem for many groups. There are no express provisions in the law regarding the costs of arbitral proceedings. The parties are given discretion to agree on the costs or in the absence of an agreement for the tribunal to decide(59). Another problem with the law is that foreign arbitral awards have to be enforced subject to the New York Convention. The arbitral awards are recognized as binding – irrespective of the country in which they were made. However, Bahraini courts recognize foreign awards based on various conditions. The reality is that differences between legal system of the country and other jurisdictions will lead to case being effectively retried on its merits by the Bahraini courts(60).

The analysis of the new arbitration law suggests that it will play a leading role in solving commercial disputes. This is because commercial disputes refer to discords that occur between the organization and its partners over particular aspects of the business contract. Such disputes can be catastrophic for organizations in many ways(61). They can create negative perception and value about the organization.

Furthermore, the organization has diminished productivity and output . This can impact the performance of the organization with respect to its key stakeholders. The new arbitration law helps to provide a framework for resolving commercial disputes through the use of arbitration in Bahrain with updated rules that are according to the international standards(62). Disputes are resolved through several formal and informal mechanisms. Firstly, the parties will attempt to negotiate with each other and raise concerns about their respective interests. An initial meeting usually leads to discussion about creating the procedure for negotiations.

In addition, the nature and cause of the discord is addressed while the

Arab Gulf States, PhD diss., University of Sheffield, 2016, p.83.

(59) Drahozal Christopher R., Empirical Findings on International Arbitration: An Overview, (2016), p.34.

(60) Kidane Won., The Culture of International Arbitration, Oxford University Press, 2017, p.98.

(61) Caron David D. and Lee M. Caplan, The UNCITRAL arbitration rules: a commentary, Oxford University Press, 2013, p.98.

(62) Croft Clyde and Christopher Kee and Jeff Waincymer, A guide to the UNCITRAL arbitration rules, Cambridge University Press, 2013, p.102.

representatives of each side are chosen as a means of ensuring high levels of efficiency and effectiveness. Alternative options are decided through mutual consultation and compromise. Sometimes disputes can fail as both parties are unwilling to pursue dynamic strategies. This means that they can refer the cases to external parties which can use arbitration and mediation as a means of resolving such industrial disputes(63). Arbitration involves a third party whose decision will be final in the entire process. Agreed terms of reference are created for ensuring fairness and impartiality. The final decision cannot be enforced legally on the parties.

wArbitration is successful when there are adequate measures. Sound planning and preparation are critical for achieving success in a collaborative environment. Industry disputes can be settled if both sides are successful in establishing communication channel(64). This helps to remove ambiguities in the process. In addition, the parties must have high levels of awareness and perception regarding the success of the process.

3. Conclusion and Recommendations

The signature of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1988 was a major decision by Bahrain to upgrade its arbitration regime so that it could be effectively used in encouraging the use of arbitration as an alternative to the expensive and time consuming process of litigation. The new law 9/2015 is a major step towards upgrading the law as it will be able to provide high levels of success for Bahrain in encouraging foreign investment in the region.

The promulgation of the arbitration regime will help to ensure transparency and accountability in the entire region. It will help to create an integrated strategy through which long term goals can be attained as number of parties opting for Bahrain as the appropriate jurisdiction for their international commercial arbitrations. There are no provisions concerning matters such as fraud, arbitrator bias, or misconduct. Private arbitrators might have financial, personal, or professional relations with one of the parties. The arbitrators might be biased which can question the integrity of the arbitral awards.

Another problem with the new Bahraini law is that it would be difficult to

(63) Tang Zheng Sophia, Jurisdiction and arbitration agreements in international commercial law, Routledge, 2014, p. 29.

(64) Tang Zheng Sophia, Op.Cit., p.3.

construct an effective arbitration agreement and regime in multi party contracts. The need for careful considerations of arbitration clauses is important. The parties have to bear the costs of arbitrator and venue which can be a major problem for many groups. There are no express provisions in the law regarding the costs of arbitral proceedings. The parties are given discretion to agree on the costs or in the absence of an agreement for the tribunal to decide.

Another problem with the law is that foreign arbitral awards have to be enforced subject to the New York Convention. The arbitral awards are recognized as binding – irrespective of the country in which they were made. Most propounding result of this amendment is the creation of the Bahrain "Free Arbitration Zone" that provides to arbitrate before the BCDR. At the same time, Bahraini courts recognize foreign awards based on various conditions. The reality is that differences between legal system of the country and other jurisdictions will lead to case being effectively retried on its merits by the Bahraini courts. All of these problems related to the new arbitration regime need to be enhanced through the presence of clear and precise goals. Furthermore, there is the need for an integrated strategy that would lead to sound outcomes.

In conclusion it can be stated that at the time of confusion and criticism in the global world for investors and different parties to initiate an investment, Bahrain stands tall through its proactive response based on the lost faith of the people on arbitration conciliation and mediation specifically in the Middle East countries. After going through an evolutionary period of depending only on Civil and Commercial Procedure Laws of 1971, signatory to the New York Convention of 1958 and finally adopting international commercial arbitration based on the UNCITRAL Model is a positive sign for the regional stability and investors interests.

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Table of Contents

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

Dr. *Khalid Saleh Al-Shamari**

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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