

# Re-visiting the Concept of Mens Rea: Challenging the Common Approaches Employed under Islamic Jurisprudence and Statute Law

Fatemeh Ahadi<sup>1</sup>

<sup>1</sup> Assistant Professor, Department of Law, Maragheh Branch, Islamic Azad University, Maragheh, Iran

Correspondence: Fatemeh Ahadi, Department of Law, Maragheh Branch, Islamic Azad University, Maragheh, Iran. E-mail: fatemeh.ahadi1394@gmail.com

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## Abstract

In the present paper the traditional and customary perspectives on the concept of Mens Rea are challenged and a new definition of the same is put forward. The challenge is based on the idea that the concepts in criminal law need evolution in order to keep their function and practicality. Such an evolution demands such a condition wherein, while granting the characteristics of adaptability with the contextual conditions and principles of criminal law, the maintenance of the same is ensured. The mens rea is customarily defined as ‘culpable state of mind of the accused when committing an offence under criminal law and ‘rebellion intent’ under Islamic Jurisprudence. Both definitions of the concept have the capability to undergo evolution and, thus, a new definition of the same is envisaged herein as such that the mens rea constitutes ‘the culpable linkage of mind with the forbidden conduct’. Two changes are observable in the new definition compared with the existing one: first, the ‘state of mind’ is replaced with ‘linkage of mind’; second, the interpretation of the term ‘culpable’ as an independent constituent shall differ as per the common sense and the contextual conditions. The new definition grants dynamism to the concept and resolves the problems long associated with the definition of the mens rea under the criminal law.

**Keywords:** Mens rea, state of the mind, rebellion intent, linkage of mind

## 1. Introduction

Noting the function of the criminal law in preserving the public order, re-visiting the concepts therein seems inevitable over the time. A historical elaboration on criminal law shows that the thinkers have devised the concept ‘criminal faults’ in their search for a mindset in the cases where the accused, while being culpable, does not have the intent to commit an offence. Of course, the mentioned mindset seems to be in contradiction with the traditional definition of the concept of ‘mens rea’ in certain cases. This contradiction is to be accentuated noting the crisis arising from the definition of criminal fault in the offences occurring in the areas such as driving, industry, medical services and so on. On the other hand, philosophical and psychological problems do exist in the traditional definition of the mens rea which prevent the same constituting a base for criminal liability and responding to the demands of justice and provisions of the modern criminal law. So, a revision of the concept is needed in order to, while resolving the contradiction of the same with the concept of criminal fault, ensure the maintenance and survival of the concept. This is the coral motive of the present paper in providing a new definition of the mens rea. It is worth mentioning that the definition put forward herein is totally a new one for which no previous academic literature exists. The definition seems to have no contradiction with the nature and existential philosophy of the concept of mens rea and also be able to respond to all problems appertaining thereto. Of course, the presented definition shall not be an ultimate unchangeable one and might be subject to change in the course of time.

The present paper moves on addressing the ‘concept of mens rea under the criminal law and Islamic jurisprudence and the applicable criticisms’ and ‘a new definition of the mens rea and howness of responding the problems and doubts appertaining thereto’. The paper shall discuss the issue in the following order:

- 1) The definition of the mens rea under the Statute Law and thoughts of the thinkers: in this section the traditional and modern definition of the mens rea in the thoughts of the thinkers along with the same in the legislation process shall be studied;

- 2) The definition of the mens rea under the Islamic Jurisprudence: in this section the definition of the concept, its functions and its degrees shall be studied;
- 3) The reasons for revising the concept of mens rea: in this section the necessity of putting forward a new definition of the concept shall be stated noting the problems in proving the mens rea in the offences and also in the relationship between objective criterion and mens rea.
- 4) Finally, a new frame for the mental element shall be put forward in the conclusion part of the paper.

## **2. The Classical Definition of Mens Rea**

The concepts 'Actus Reus' and 'Mens Rea' have undergone so much change over the years that the preliminary interpretations of the same do not reflect the current provisions of the law. On the other hand, the problems associated with both the concepts denote that some attempts must be incorporated in order to place the foundation of the criminal liability on the concepts that truly reflect the nature of law (Willson, p. 107). These facts have turned the mens rea to a perpetual concern in the legal studies and thoughts. The classical definition of mens rea follows two approaches: a) Customary Approach: in which definition the mens rea is based on morality (the traditional definition); b) Modern Approach: in which the definition of the mens rea is devoid from moral justifications.

## **3. The Traditional Definition of the Mens Rea**

The traditional definition of the mens rea states that the mens rea is "the culpable state of the mind, which the prosecuting authority needs to prove, the accused had while committing an offence". Noting this definition, some lawyers prefer using "intentional element" instead of 'mens rea' for they believe that the mens rea amalgamates with the definition of criminal fault (Leturmy & Kolb, P. 18).

In this traditional approach the state of mind parallels to 'criminal mind' or 'guilty mind', and 'culpability' to 'mens rea'. The problem with this definition is that the mens rea is nothing more than a criterion for culpa. Not all those who do an act which entails a mens rea are culpable. The accused might inflict a harm willfully but have a plausible excuse and, therefore, not to be subject to culpa. Obviously, though the mens rea plays a significant role in evaluating the culpability, these two concepts differ in essence and that it is the culpa that constitutes the base and foundation of criminal liability. These lawyers believe that the process to violate the law is mental and those who commit have a culpable state of mind so-called the mens rea. It means that the existence of the mens rea denotes the accused's culpability (Elliott & Quinn, p.68).

The delicate point underlying this approach is that the culpability is rooted in the state of mind and the mens rea accounts to culpability rooted in the state of mind. This constitutes the difference of the new definition presented in this paper with the one already elaborated upon. The criticism is that in some cases, such as negligence, though there is no mens rea, the culpability can still be observed and in some cases, such as the ones where some plausible excuse exist, though there is mens rea, no culpability can be imagined (Ashworth, p. 162).

One of the Iranian lawyers defines mens rea as 'interactions of the mind' (Azmayesh, p.32). It seems that the interactions of the mind denote the accused's state of mind while committing an offence which is culpable. Noting the psychological data on the complex and different interactions of the accused's minds while committing an offence, it is better to limit the scope of such interaction in defining the mens rea. In other words, it is better to consider the interactions of the mind as far as the actus reus is concerned in order for the definition to be comprehensive.

## **4. The Modern Definition of the Mens Rea**

In its modern definition, the mental state refers to the state of mind, explicitly or implicitly, present in definition of the offence (Willson, p. 118). This definition is in fact an attempt to segregate the concept of morality from the law and also to reject the culpability as constituting the basis of mens rea. The pros of this approach believe that, over the history, law has turned its face from the concepts denoting moral content such as 'bad faith' to the ones denoting 'intention and awareness'. But it seems that in any era the culpability, being a moral judgement, shall still constitute one of the basic criteria for punishment. Exploring law cannot succeed free from the values (Fletcher, p.117). In other words, the basic ground for culpability and also its indicator is the mens rea. On the integration of the law and morality it is stated that: "lawyers end up investing "nominally descriptive terms with moral force". Thus terms like "intent", "state of mind" and "mental state" which appear to be descriptive are used "to refer to issues that require normative judgment". The problem, says Fletcher, is endemic in that the "confusion between normative and descriptive language is so pervasive in Anglo-American criminal law that it affects the entire language of discourse" (Norrie, p.23). Finally, it seems that the definition of the mens rea cannot be devoid from the moral judgements and culpability and that, in spite of these challenges, categorization

of the mens rea is still based on the culpability. It is as such that under England Law, intention bears very high culpability; subjective recklessness and objective recklessness are next in the hierarchy and, finally, comes the negligence bearing very low culpability. This shows that the existence of culpability and, thereby, moral judgement have not been denied. The judges as well as the interpreters simultaneously accentuate the common understanding of the mens rea. Their insistence is based on the point that the citizens shall conform better to the standards if they possess an understanding of the aforesaid concept. So, according to the classical approach, the mens rea constitutes a general culpable state of mind and not the one included in definition of the offence which might be non-culpable (Cliar, p.78).

It seems that in spite of the attempts made in separating the law from the moral values and also in wiping the moral judgement on culpability from the concept of mens rea, law and morality still remain inseparable. Therefore, it can be claimed that the concepts related to social behaviors, such as culpability, are changeable per the context; the point that grants dynamism to the law. It is worth mentioning that none of changes observed in the sphere of law possess the power to separate the morality from law.

The point to emphasize is that the term 'culpability', present in the definition of the 'mens rea', is an imported term and that the translated term has led to some ambiguities in Iran Law. Noting that determination of the culpability-based "blameworthiness" is done through a criterion called the mens rea, and that the same constitutes the most significant criterion of culpability and criminality, in some cases the mens rea is used parallel to criminality and culpability. In Persian language, on the other hand, the guilty person is called 'criminal' in common use. In this way, the 'criminality', which parallels to 'guilt', is rendered as mens rea. Such a translation does in no way at all consider the specific definition of guilty for, under the Civil and Criminal Law of Iran, the guilt has aspects appertaining to conduct. Furthermore, the guilt, in its specific legal definition, has no relationship with culpability and mens rea. Such a gap requires due attentions in order not to render mens rea as criminal delinquency (Note 1) since the specific definition of the guilt constitutes those forms of behavior which, in some cases, entail criminal sanction. In spite of the point that the criminal law must not employ the terms capable of conveying different meanings and moral values simultaneously, the ambiguity in translation has penetrated into legislation process as well. Such an ambiguity is even more tangible in New Islamic Penal Code of Iran. In sum, the change in the meaning of mens rea shows that the relationship between mens rea and culpability is moving from "absolute universality and particularity" to "universality and particularity in some respects" and that some logical and reasonable resistance confronts such movement. The present paper attempts at modifying such a social demand by accentuating the changeability of the concept of culpability and holds that the relationship between culpability and mens rea is still of 'absolute universality and particularity' nature. This view takes for granted the issue that, over the history, different interpretations might come into existence as far as the concepts such as the mens rea and its variables are concerned.

### **5. The Forms or Degrees of the Mens Rea**

The legislation in the Middle Ages and even before French Revolution considered the human beings, animals and even the inanimate as having responsibilities under the law. These principles were based on the provisions of strict liability which dominated the legislation prior to French Revolution. It is worth mentioning that the Islamic Jurisprudence from the beginning and the European Legislation from the ending years of the 15th century have distinguished different kinds of murder and other physical harms according to the intention of the accused in committing them (Sadeghi, p. 79). Among different forms or degrees of the mens rea, "intention" is the most obvious one for liability. It is of no meaning under Criminal Law System to punish only those who intended to inflict harm. Like the other terms appertaining to mens rea, the term 'intention' justifies the willful act and can reveal the degree of criminality. Though under the England Law there is emphasis on the terms such as intentionality, recklessness and awareness, a review of the body of law reveals other terms such as bad faith and willful (Ashworth, p. 169).

The existence of different degrees of criminality is justified based on the difference in degrees of "probability" and "certainty" in the criminal acts (Brady, 35). Under England Law and the traditional categorization, negligence constitutes a degree of mens rea. But, noting the change of perspectives in the recent years that have led to admitting the point that the subjective criminality must be proven to suppose an act as criminal, there is a tendency to exclude the negligence offences from the same (Smith & Hogan, p.169).

The above perspective led to the controversies over the issue of the offences arising from negligence. Differentiating the normative claims on obligatory legal principles and the facts of law seems quite necessary but, under England law, there still are some offences connected with negligence in which the existence of the mens rea is considered to be quite necessary (Ashworth, p.158). On the other hand, there are no claims about the point

that the criminal negligence is to be considered as an offence of absolute liability. Such a perspective arises from the point that the existence of the mens rea is necessary in criminal negligence; though the evaluation criterion of the same is an amalgamation of typical and subjective criteria (Note 2). Under Iran Law the intention or the criminal fault are considered as forms or degrees of mens rea. The criminal fault includes carelessness, recklessness, lack of skill, noncompliance with the regulations and, in some cases, negligence. In spite of the existence of different perspectives towards the criteria for such breakdown, there is agreement on its necessity. Such a necessity must also be paid due attentions under Criminal Law of Iran as far as the parallels of criminal faults are concerned for, under Iran Law, different degrees of mens rea are envisaged only for intentional offences and criminal faults. After all, in spite of the existence of different culpability degrees between recklessness and carelessness for example, different instances of criminal faults do not bear different degrees and are considered as parallel. In such a categorization, the 'intentional' is more culpable than the 'fault'. It is worth mentioning that such a moral judgment may well be subject to doubts in today's world. This doubt necessitates revision in the traditional categorization of the mens rea according to culpability, common sense, criminal law practices and social requirements. Further, such a revision does not necessarily require fundamental changes and can be performed by just changing the evaluation criteria and adjusting the subjective criterion and the punishment extent. The policy followed in England Law manifests such a revision. In some cases, not paying attentions to the safety of the others parallels to intention in causing harm to their safety. A driver who is aware of their car having problems in its breaking system and still drives speedily in congested areas may be held culpable as the one who willfully performs such an act. Distinguishing the intentional and reckless acts is justifiable noting the point that the probability of inflicting harm in the former is higher. If the punishment is decided in order to prevent harm, then the degree of danger attached to it must be proportionate to its significance. It seems that recklessness in a serious harm is more culpable than the intent in a trivial harm.

Such a point, which constitutes an instance of evolution in the definition of culpability per the contextual conditions and justice demands, must be paid due attentions in the criminal fault offences. Today's law demands the people to lead such a kind of life wherein the rights and safety of the others are prioritized. Such a priority differs as per the values violated. In such a social demand, intent or recklessness are not considered as the only variables in violating such values and that, in some cases, such a hierarchy may even revert as far as their significance is concerned. The present paper holds that if the basis for determining the degrees of the mens rea and criminal fault is culpability, then each one of the factors in inflicting harm, such as intent or recklessness, might constitute a determinant of the culpability. Such an amalgamated approach can be more conformable to the social demands and the modern criminal law. Some believe that, since the intent and awareness does not require non-justifiability, comparing different degrees of the mens rea in a direct way is wrong. According to such thinkers, a precise and necessary approach to follow is to precisely determine different kinds of negligence and mens rea as such that the hierarchy of the mens rea does directly include only those degrees which are obviously observable. So, the comprehensive definition of the negligence must be determined in such a hierarchy in which a certain degree is allotted to the negligence. Whenever the cognitive negligence is at stake, the hierarchy of recklessness, awareness and intention is suitable but, when the conduct negligence is at stake, the hierarchy must be based on inexcusability of the conduct and not on the beliefs or the intent of the perpetrator (Glanvil, p. 45).

Noting such a reasoning, another kind of hierarchy including belief (awareness, subjective recklessness and cognitive negligence), tendency (intention and criminal indifferent recklessness) and conduct (regular negligence and serious negligence) is proposed in that, comparing negligence with more important forms such as recklessness, awareness and intention is not permissible for it is like comparing the apple and orange. (Note 3) Some of the writers believe that the approach employed in the draft of Legal Commission (1989) considers intentionality, awareness and recklessness as the constituents of the mens rea unless the parliament states something else (Ashworth, p.198).

This is actually an attempt to reduce the number of the words which can be used in explaining the mens rea under Statute Law. The view that the terms employed criminal law must be clear, understandable and reliable so that lesser time is spent on dealing with the same, constitutes the basis for such an attempt (Elliot and Queen, p.216). In spite of the challenges which led to doubts in recognizing the negligence as a degree of the mens rea, the introduction of the cognitive aspect for the same has still preserved it as a degree of the mens rea is the legal procedure. It, of course, needs mentioning that in the offences such as manslaughter (unintentional homicide) the gross negligence must be proved while in other offences ordinary negligence might do.

## **6. Mens Rea under Islamic Jurisprudence**

The Islamic Law, though implicitly and through different concepts, has accentuated the necessity of the existence of the mens rea or criminal liability long before the European Law. Though the legislators consider committing

bad deeds as the basis for criminal liability under the Islamic Law, they suppose existence of two factors namely perception and option as the bases for coming to existence of the religious liability. Since existence of the criminal liability under jurisprudence is contingent upon existence of rebellion, it is so obvious that the degree of liability shall conform to the degree of rebellion.

Under Islamic Law, rebellion intent is present in intentional offences. Rebellion intent includes the intention to perpetrate an illegal act or refrain from doing an obligatory act while being aware of their prohibition or obligation respectively. So, according to the criminal liability provisions, there is difference between the offender who intentionally commits an offence and the offender whose offence arises due to their negligence. The intensification of the liability in the case of a perpetrator is due to the reason that he/she volitionally has the rebellion intent in their heart and, therefore, their offence is completely to blame. The lessening of the liability of the offender is that, though a kind of rebellion occurs due to his/her act, in their hearts there is no rebellion intent. Though in the corpus on Islamic Jurisprudence the mens rea is manifested in the concept of rebellion intent, an elaboration on the concept of fault among the jurists can prove the claim that the concept parallels to one of the degrees of the mens rea under Islamic Jurisprudence for which much lesser culpability might be envisaged compared to the same allotted to the rebellion intent. According to a Sunni jurist, since the person who commits manslaughter does not have the intention to kill, he/she is actually guiltless for he/she never wanted to kill a person (Abi Ashagh, p.178). Another definition of the manslaughter puts forward that: the criteria for determining the mere fault is that the committer does not have the intent to commit an act or expect a consequence; the immature or the insane are included in the definition as well, i.e., the manslaughter by them is considered as involuntary and, therefore, account to pure fault (Mosavi Khoiyi, p. 348). The fault is the one in which there is no intention to cause harm or to commit manslaughter but it happens unwantedly (Najafi, p.267). Pure fault is the one in which there is no intention to cause harm or to commit manslaughter such as the case where a person shoots to hunt an animal but another person gets killed unwantedly (Eslami, p.351). The general principle in Islam is that the criminal liability applies to those acts which are committed intentionally. The differing perspectives on the issue among the Sunnis and Shiites often yield no specific result for both essentially believe that, except manslaughter and battery happening by fault, all other acts happening by fault are included under the *Le hadith d'annulation* (Marashi Shoostari, p.117). So, it can be concluded that under Islamic Jurisprudence the intention to rebel is punishable. It needs mentioning that the determinant of the criminal liability is the commission of an offence and the liability of the offender differs as per degrees of the offence. Furthermore, in cases where the perpetrator commits an offence intentionally, severe punishment may be envisaged, and in those where an offence such as quasi-intentional manslaughter is committed involuntarily, lesser punishment may be determined. Thus, the intention, which is called criminal intent under Statute Law, plays the most significant role in determining the punishment. Noting such explanations, the criminal intent or rebellion intent constitutes an offence which is committed intentionally with the purpose of inflicting harm i.e., the committer commits an illegal act or refrains from doing an obligatory act while being aware of their prohibition or obligation by the legislator. The criminal intent is applicable in offences of intentional nature only and is not present in the involuntary offences (Odeh, p.148).

It can be deduced from discussions and definitions provided here that the mentality is present in the faults as well but, it is different from the legal definition of the criminal fault. It seems that under Islamic jurisprudence the term involuntary is used as an antonym for intentional and includes quasi-intentional and pure fault. Noting the point that the sphere of the fault, being by nature contrary to the rebellion intent, is quite extensive including quasi-intentional to pure faults, it can be stated that the concept is inclusive of the criminal fault denoted by its specific definition. So, under Islamic jurisprudence, the rebellion intent is the only culpable form of the mens rea. Finally, though the fault itself is a kind of the state of mind, it might be inculpable. This is why the punishment envisaged for the same is mulct which bears lesser criminal characteristics. By distinguishing the culpable from inculpable faults and determining different punishments through systematic procedures, some assistance can be offered in the way of maintaining the dynamism of the Islamic jurisprudence. To put forward a comparison of the concept of fault under Islamic jurisprudence with the concept of criminal fault under Statute Law, it seems necessary to state that in unintentional offences under Statute Law the present mens rea is the criminal fault. The mens rea of unintentional offences is the criminal fault arising from carelessness, recklessness, lack of skill and noncompliance with the regulations (Ardebili, p. 50). In these offences the intent to do an act is present but the intent for a consequence is absent, meaning that the general bad faith (*general mala fide*) is there but the specific one is not. This definition exactly parallels the definition of quasi-intentional under Islamic jurisprudence in which a fault is caused by a voluntary act. The only difference of the same with the Islamic approach is that the intent to inflict harm to a definite person does not exist therein and, therefore, the criminal fault offences are closer to pure fault. The intent to inflict harm may be interpreted as the intent to do an act in violation of the

social standards and values which finally leads to violation of the obligations envisaged by the legislation; the point which is present in all involuntary offences. Of course, the willfulness of an act under criminal law is taken-for-granted to such a degree that the bad faith is considered to be the only mens rea in intentional offences.

In some cases it seems that the willfulness of the act is contingent upon the bad faith. This applies to the cases such as assault and battery resulting in death where the act is illegal by nature (called inherent under Islamic jurisprudence). Of course, it needs mentioning that in some cases the unintentional offences arising from the willful acts do not fall under general bad faith category. For example, the willful act of driving does not fall under general bad faith category. Since driving by nature is a mobah act and a social activity, the bad faith can be claimed to be present therein only when it is done carelessly or recklessly. It might seem that such a perspective of the Islamic jurisprudence towards the 'rebellion intent' cannot be parallelized with the new definition provided in the present paper but, noting the point that the meaning envisaged for the intent under Islamic Jurisprudence is wanting in its basic meaning and not a definite state of mind and, referring to the point that the criminal fault means a wrong recognition, the rebellion intent and the fault can be easily parallelized with the new interpretation of the mens rea. Though in some of the faults envisaged under the Islamic jurisprudence the culpability is not present, it can be put forward that some of the inculpable linkage of mind constitute civil faults and the mulct as compensation may be determined for them. This does not have any contradiction with the new thought and the principles of the criminal law for, as far as the mulct is concerned, no perspective denies the necessity of compensation. The present paper holds that the reason for such integration is that under Islamic jurisprudence there is no clear cut between the criminal and compensation aspects of the mulct. It parallels the modern perspectives under the criminal law which doubt there being a clear cut between Restorative Justice and Criminal Justice.

### **7. The Necessity for Re-visiting the Classical Concept of Mens Rea**

In spite of the inevitable necessity to duly and appropriately recognize the mens rea of the offences under the modern criminal law, there have always been some problems in the way of proving the same. The reason for reminding the existence of such problems lies in the attempt to place re-emphasis on the necessity of the dominance of objective criterion and also non-compliance of the criminal law with some psychological and philosophical issues and, therefore, presentation of new perspectives on the concept of mens rea. While confirming the provided definition of the mens rea, the present study justifies categorizing the negligence as mens rea. It seems that the attempts under criminal law to determine the existence of the mens rea can be righteously related to the justice and conduct which are at the core of the criminal law. In such a process, there is no necessity at all to observe the philosophical teachings on the freedom of will, behavioral determinism and mental processes in the human activities; a point reflecting the independence of the criminal law. The criminal law always seeks the help from other disciplines in order to fortify its academic bases. It, of course, needs mentioning that making use of the findings of other disciplines are only in cases where there is ambiguity and not the cases such as freedom of will which everyone enjoys because of being a human being. Determining the 'intent and will' is possible through comparing the behavior of a person with the others (dominance of the objective criterion). This is a well-accepted issue which necessitates referral to the psychological teachings. Paying due attention to the mens rea can help in dissolving the aforementioned problems. A revision of the traditional definition of the mens rea and also the subjective criterion seems necessary noting the challenges which confront the classical concept of the mens rea. Some of these challenges are as follows:

One of the criticisms is that the "subjective liability doctrine" depends on the hypothesis that there is something as the "state of mind" which is also determinable but, is it possible to question a person on their mentality at the time of the commission of an offence which may date back to the past months or even years? It is so obvious that there are no academic criteria for determining the degree of the intent of a person (Berly, Alexandr & Ferzan, p. 17). Furthermore, it is impossible to determine the state of mind the accused had while committing an offence. It is in no way at all possible to claim that what has been done was intended. Some thinkers believe that, though the criminal law supposes the person to be liable for their acts in general, there are two related issues about the natural consequences of the acts: 1. there is difference between what the person thinks with what he/she actually does; 2- the freedom of will is no more than a tale. The other criticism is that the negligence as a kind of carelessness or recklessness cannot be considered as a kind of the state of mind. Therefore, noting such a classical definition of the mens rea wherein the criteria for decision is purely based on the mentality, the negligence cannot be a degree of the mens rea. Another criticism is that belief in mens rea is based on the demoded psychological and philosophical practices. Since those disciplines have rejected such a concept, the law, in its own turn, must also adopt the proper definitions and concepts and must not ignore the challenges confronting the issue of freedom of will (Kayitana, p.18). Noting above discussions, it seems that the

non-compliance characteristics of the criminal law plus independence of the principles and concepts under it seems necessary for maintaining its dynamism and preserving its function. Existence of such independence and noting the philosophy behind the necessity to prove the existence of the mens rea justify presentation of the new definition of the latter in this paper.

### 8. Conclusion and Presentation of a New Definition

The study of the 'mens rea', as far as its degrees and the problems associated with it are concerned, was based on the hypothesis that the mens rea be defined as the 'state of mind or the mental or psychological state' of the accused while committing an offence. As per the traditional and classic perspectives towards the issue, such a 'state of mind' was a criterion for determining culpability and, subsequently, the criminal liability. The modern perspectives, of course, pay lesser attention to the issue of culpability.

The present paper holds that the reason for the challenges and doubts on the definition of the mens rea is the variable 'state of the mind', being the most necessary and perpetual factor, present therein and not the issue of culpability. It further holds that the denial of certain principles of the criminal law not only shall not help it in functioning well, but also shall lead to violations of the basic human rights. The necessity for existence of the mens rea in the offences constitutes one of such principles. The lawyers have employed cautions in addressing the Absolute Liability Offences (the offences wherein there is no need to prove existence of the mens rea). The modern perspectives are inclined to considering such offences as negligence; meaning that a valid defense may be envisaged if the accused proves that they have employed all their efforts in preventing the consequence. Noting the necessity for maintaining dynamism of the criminal law, such a cautious change of perspectives towards absolute liability offences seems crucial and inevitable or else, the criminal law will be accused of injustice and, thus, be isolated and rejected. Noting the philosophy behind existence of the mens rea and in accordance to the principles of the criminal law and to respond the social demands, the criminal law shall not be devoid of the new thoughts in order to assign a new frame for the mens rea considering the defined function for it. This paper has presented such a new frame by modifying the variables present in its definition and, thus, has modified the 'state of mind', to the 'linkage of mind'. Obviously, such a replacement is a modification and not a change since the 'linkage of mind' is inclusive of the 'state of mind' and enjoys much more social and customary characteristics compared to psychological or philosophical ones. On other variable of the mens rea so-called 'culpability', the present paper holds that the definition, scope and judgement on the same shall be different contingent upon the era, place, social demands and the human rights concepts. The new definition of the mens rea is: "the culpable linkage of mind of the accused with the forbidden behavior". The behavior includes committing a forbidden act or refraining from doing an obligatory act. Obviously, such a relationship shall be determined by the common sense for, the linkage of mind is of lesser psychological or philosophical attributes. Such a characteristics lets it be evaluated based on a collection of typical-subjective criteria and obviates the problems associated with its evaluation based merely on subjective criteria. Finally, this definition:

- 1- Is dynamic and conforms to the principles of the criminal law;
- 2- Is devoid from the complex psychological and philosophical discussions;
- 3- Paves the way for negligence to be considered as a degree of the mens rea for 'not paying attention to the danger' is a kind of the culpable linkage of mind;
- 4- Considers the typical criteria as the bases for evaluation. This is not only not problematic, but also a requisite because in the presented definition both the culpability and the linkage of mind build relationships with the common sense and in both of them there is emphasis on the everyday experiences which, in their own turn, are supposed to be the basis for typical evaluation.

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## Notes

Note 1. The author prefers to use the term ‘shortcoming’ instead of ‘fault’ or ‘guilt’ noting the difference of these two terms in the Law of Iran.

Note 2. It is necessary to explain that under England Law due attentions are paid both to the dangerous act and to the mentality of the perpetrator in determining criminal negligence. This constitutes an amalgamated criterion for evaluation called typical-subjective. But under Criminal Law of Iran, not only in criminal negligence but also in none of the criminal faults attentions are paid to the mentality of the accused..

Note 3. The author does not accept such reasoning. Comparing the apple and orange is not problematic as both are fruits and that their difference does not allow for them not to be considered as fruits. As such, difference between cognitive negligence and recklessness does deny its status as a degree of the mens rea.

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