



The Manifestation of Recklessness: From *Mens Rea* to *Actus Reus*

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ABSTRACT

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Background

Recklessness involves an act conducted by a person who has the legal capacity and is aware of the substantial risk the act may give rise to. Such an act may assume these characteristics of Recklessness: a) recklessness is double-dimensional; b) the mental aspect of the Recklessness is prioritized.

Materials and Methods

This research has been done using library resources in a descriptive-analytical manner.

Ethical Considerations

Honesty and fidelity in writing the text have been observed.

Findings

Aiming to study the status of the Recklessness under English and Iranian Law, the present paper elaborates upon the Iranian and English Law and the Articles wherein Recklessness is at stake and, after comparing them in detail, it concludes that the difference between these two systems concerning Recklessness lies in their different interpretation and definition of this concept; denoting *actus reus* under Iranian and *mens rea* under English Law. Such a difference has led to adopting different criminal policies in dealing with the offences arising from Recklessness in Iran and England. Attention paid to mental aspects of the Recklessness in English law accentuates the mental element's dominance. On the contrary, emphasizing the Recklessness's physical element has led to extreme laxity under Iranian Law. Being an imported word under Iranian Law, *mens rea* has been wrongly translated as such that it accentuates only the physical aspect of an offence and fails to account for the mental aspect.

Conclusion

The present paper attempts at clarification of such a critical mistake under Iranian Law which has led to the criminalization of those behaviors which would have never been criminalized had it occurred in England owing to due considerations given to the mental aspect of the offence under discussion and finally suggests a revision concerning the treatment of this word which may lead to critical amendments of Iranian Law; the recommendation including that the same be rendered as such that it simultaneously denote 'subjective typical' criterion as well as 'objective typical' criterion.

Key words

Recklessness, Criminal Fault, Mens Rea, Actus Reus, English Law.

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INTRODUCTION

A. Preface

Although intention and criminal Fault are *mens rea* issues, the latter has always confronted challenges and changed different legal systems because of its particular nature i.e., double-dimensionality. Furthermore, the criminal Fault's core idea is 'foreseeing the possibility of a risk'. Foreseeing the possibility of risk leads to different degrees of culpability. Such difference in degree, which is based on the nature of the committed offence, leads to further complexity of interpreting the criminal faults in general and Recklessness, particularly to the extent of allowing different legal systems to treat them differently based on their interpretations. The present paper considers such a difference between Iranian and English Law regarding the Recklessness; the former firmly attaches the same to *actus reus* and the latter to *mens rea*. It aims to study different manifestations of Recklessness under Iranian and English Law and show how divergence from its original definition has caused Iranian legislators to attach it to *actus reus* instead of *mens rea*. Employing descriptive-analytic methodology, the present paper attempts to answer these questions: Do Recklessness manifestations under Iranian and English Law differ? Moreover, does such difference affect these countries' criminal policies?

It is hypothesized that there are differences in the manifestations and functions of the

Recklessness in these countries' legal systems. Furthermore, the present paper hypothesizes that such differences have led to adopting different criminal policies. Accentuating the importance of Recklessness and the offences arising thereby, the present paper attempts to show how attaching more aspects of *actus reus* than *mens rea* may pose challenges to the legal system country.

B. Definitions and Concepts

Under *Criminal Law*, it is put forward that Recklessness, as the highest degree of the criminal Fault, is based on two principles: "taking an unjustified risk and foreseeing the possibility of a risk". In its terminological sense, it involves an act a defendant pursues being aware of its danger and yet going ahead with the same. Some thinkers believe that "There are obvious connections between inflicting unjustifiable risk of damage to others and quasi-intentional acts under which fall issues such as willfulness, wantonness and recklessness. Noting these points, it could be stated that firstly, the concept of Recklessness involves *mens rea*. Secondly, it enjoys double-dimensional nature, i.e., *psychological* and *physical*, emphasizing the former as the main constituent and determinant of its functions and envisaging the latter to confirm *mens rea*'s existence. Such a nature facilitates applying a kind of '*amalgamated*' criterion for assessing an offence. Thirdly, this definition shows that the Recklessness differs from carelessness and the like.

Despite these differences, some writers suppose Recklessness as equal to carelessness, which involves an omission. Shambiati (2002) believes that: "Carelessness arises from the action or act while recklessness from negligence and includes abstaining from doing an act." Prevalence of these thoughts, which denote attaching Recklessness more to *actus reus* than *mens rea*, and the legislators' emphasis on this physical aspect constitute a conceptual divergence in the Iranian Law leading to wrong interpretation of criminal faults in general and Recklessness in particular.

Ahadi (2016) states that: "Recklessness is the culpable linkage of mind with the forbidden conduct" wherein "the defendant commits a risky act being aware of the unjustified risk of damage it may cause".

MATERIALS AND METHODS

This research is a theoretical type; the research method is a descriptive-analytical one.

DISCUSSION

A. Different Types of Recklessness

In this section different types of Recklessness referred to as the Common Law Concept of the Recklessness –Cunningham¹ Recklessness– and Caldwell

¹- The modern definition of recklessness has developed based in R. v. Cunningham wherein the definition envisaged for 'maliciously' pursuing the

Recklessness will be discussed. These concepts are categorized under subjective and objective Recklessness [1].

1- Subjective Recklessness

The Recklessness's Common Law concept is the first type to be discussed. It denotes an act wherein the defendant takes unjustified risk while foreseeing particular harm and yet going ahead. There are three main points in this definition. The first is that the defendant is aware of the risk subjectively. This coral point illustrates why it needs to be a *mens rea* issue. The second point is that the defendant is aware of a degree of risk of harm. The third point appertains to the unjustifiability and unreasonableness of the risk. Some lawyers believe that the latest point is determined only through the objective criterion, excluding Recklessness from mere categorization under *mens rea* [2].

Such a justification may denote double-dimensionality of the Recklessness under English Law even though it is envisaged as having *mens rea* characteristics *only* under

purposes of the Offences against the Person Act 1861 required a subjective rather than objective test when "a man released gas from the mains while attempting to steal money from the pay-meter. Because of his actions the gas leaked into the house next door, and partially asphyxiated the man's mother-in-law: In other words he was subjectively reckless about the risk involved". Available at <http://www.lawmentor.co.uk/glossary/R/recklessness/>, accessed on 03/12/2016

the same. The reason for using a mixed-method for assessing Recklessness is contingent upon the particular nature of all forms of Fault wherein, contrary to an intentional act, determining subjective linkage is not possible without taking into consideration the conditions under which action happens [3].

In a way to voice his criticism against the necessity of subjective awareness, Wilson (2011) states that: "First, awareness is not necessary for a person to be subjectively at Fault. It is necessary for the person concerned to fail to measure their carefulness or competence standards. Second, one can know of risks without thinking of them". Parker holds that human actions are not developed in such a 'mentalist'¹ fashion. The risk avoidance strategies one takes have their roots in their unconscious – a different 'mental world.' Human beings are unconsciously programmed to avoid dangerous sources when their part is at stake As Brady (1996) puts forward, "Our knowledge that fire burns, that water drowns, that electricity electrocutes, that cliffs collapse is enough to keep us out of danger without the need for elaborate mental activity on our part." White (1991) provides a good example: "If we substituted the telephone cradle for Parker's priceless vase and the public telephone for his dicky mobile phone, we can be pretty sure he would not have 'smashed the phone down upon it without thinking.' His mind

¹- See H. Gross, (1979) 22 – 5; White op. cit. 45.

would have 'miraculously' remained open" [4].

The leading authority for the subjective approach to Recklessness is Cunningham. As early as the 1970s, this was followed as the standard criminal damage approach. The Criminal Damage Act 1971 was based upon the Law Commission's recommendations², which adopted the subjective approach. The Law Commission in the Draft Criminal Law Bill 1993 endorsed such an approach.³ Clause 1 of the Bill is a clear restatement of the subjective position [5]:

... a person acts – (b) recklessly concerning (i) a circumstance, when he is aware of a risk that it exists or will exist, and (ii) a result when he is aware of a risk that it will occur, and it is, in the circumstances known to him, unreasonable to take the risk.

Cunningham Reckless [1957] denotes that the definition of 'maliciously' for the Offences Against the Persons Act [1861] requires a subjective test instead of an objective test. Cunningham was charged under s23 of the same act wherein it is provided that: "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person

²- Offences of Damage to Property (Law Com. No. 29) which itself reflected the view of the then leading commentator of the day, J.W.C. Turner, the editor of *Kenny's Outlines of Criminal Law* (1966), Cambridge: CUP.

³- Law Com. No. 218 (1993), London: HMSO.

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, shall be guilty of a felony ...". 'Malicious' was supposed to denote either (1) An actual intention to do the particular kind of harm that was done; or (2) 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) [6].

There are two significant points embedded in this definition. The first concerns the prosecution and the necessity for proving that there was subjective awareness of the risk either to the result or the circumstances [7]. The second denotes limitation in the liability's scope from the objective element. The prosecution must prove that the risk a defendant had taken was unjustified and unreasonable no matter what circumstances they were in. Unlike intention, of course, the 'unreasonableness' requirement makes it possible for some value judgments to penetrate prosecutorial decisions and prove guilt. It allows, for example, decisions to be taken not to prosecute doctors who conduct high-risk operations and, less satisfactorily, corporate enterprises that take cost-related risks with the public's safety [8].¹

2- Objective Recklessness

¹- Due to the impact of the requirement that the risk taken be 'unreasonable' in the circumstances; see A. Norrie, *Crime, Reason and History* (1993), 81.

This type of Recklessness is known as Caldwell Recklessness. The drunken defendant sets fire in a hotel. He does so because of the quarrels he has with the owner. He was indicted on two arson counts contrary to s 1 (1) and (2), Criminal Damage Act 1971 [9]. He admitted to being guilty of the first but refused to admit that he had inflicted damage on property 'to endanger life or be reckless whether life was endangered.' He claimed that being drunk, he never thought his action might bring about dangerous results, but this just was rejected both on the first instance and appeal based on the point that the drunkenness constitutes no defense to Recklessness's crime. Following this case, the House of the Lords explained that Recklessness does not require prior awareness of the result so long as the risk is obvious. It further proposed a way to prove that the defendant's prior awareness was unnecessary for testing the Recklessness [10]. Some believe this demonstrates a kind of formal recognition that there might be no regard to particular risk while choosing to go ahead with a potentially dangerous act. Here Recklessness involves all subjective states, including thinking or abstaining from thinking about the result of an action and deciding to ignore it.

Caldwell's case imposed important changes in the Recklessness's fault elements from (subjective) Recklessness to (objective) negligence. The emphasis was not on

whether or not the risk was foreseen but that it was apparent, needing foresight [11].

The reasoning for justification of objective includes: 1- There is no such clear-cut distinction between awareness and non-awareness; 2- In daily use, Recklessness covers more meaning sphere than only having awareness about a risk; 3- A person who neglects to foresee an obvious risk is punishable no less than a person who goes ahead with action while being aware of its possible results. This means failing to foresee the risk is itself proof of Recklessness.

Finally, section 1(1) of the Criminal Damage Act 1971, concerning Recklessness, stated that's the defendant should (a) intend to destroy or damage any property or be reckless as to [the same] and (b) intend by the destruction or damage to endanger the life of another or be reckless as to whether the life of another would be thereby endangered [12].

Objective Recklessness demands that: a) a defendant is aware of a risk of harm yet goes ahead with the same. It seems that this is a subjective test because the jury has to be satisfied that the defendant was aware of it. Meaning sphere of 'aware' is more extensive than 'intend,' 'know,' 'want,' etc., but it requires that the defendant is conscious that harm may occur. This definition of 'reckless' is not controversial; b), a defendant who commits an act that people would regard as involving an obvious risk of harm is reckless

even though they are not aware of that fact or opinion. This is an objective test because it involves the standards of other people. It is concerned with the quality of the defendant's conduct, not with what the defendant was thinking or was aware of.

The second part constitutes the coral discussion of the present paper. Objectivity is related to 'non-awareness' and the physical form of action. This is the point mistaken under Iranian legislation. The present paper holds that this part, which has provided the ground for criticizing Caldwell Recklessness, is mostly related to those criminal faults which target an individual's safety. Noting the function of the recent security-based Modern Criminal Law, the point that a 'person had to be aware' equals to 'a person's subjective awareness' and, thus, is culpable to the same degree as the second, does not seem unjust. The House of the Lords criticized the term 'objective' attached to the second part in 1995 in Reed's Case. It is related to a defendant's state of mind in that he/she never thought about the risk [13].

In this paper's categorization later in this paper, the mentioned criterion is entitled as 'subjective typical', which seems not to contradict the nature of mens rea, particularly when considering the point that the Caldwell Recklessness has the capacity for applying a kind of *amalgamated* criterion. Noting the point that the prosecution can never be aware of what went on the mind of a defendant at the time

of doing an action, it must be supposed that only having the competence to understand an unjustified risk suffices for determining the awareness on the condition that he/she does not nullify his/her competence before an action. The *amalgamated* criterion, denoting subjective typical and objective typical simultaneously, differs from objective criterion; a distinction not paid due attention to under the Iranian Law [14]. The *amalgamated* criterion is not isolated from a defendant's state of mind even if the criterion for judgment is a reasonable man or another man the same type as the defendant himself/herself.

The present paper holds that the imminence of a risk, which is supposed to be a condition in the Caldwell Recklessness, duly accentuates a competent individual's awareness.

The challenges posed regarding the meaning of Recklessness led to the isolation of the objective Recklessness because the mental element needs to be strictly adhered to in Recklessness. The main reason for rejection of the Caldwell Recklessness was the 'existence of legal vacuum' inside it. Some believed that there was a legal loophole as such that a defendant who checked for potential risk but decided that there was no risk could not be held reckless however if a defendant thought about the risk and decided by mistake or due to *culpa lata*, i.e., *gross negligence* he/she was held reckless according to Caldwell Recklessness.

Of course, it seems that Caldwell Recklessness, though theoretically rejected, will still be influential in judgments in that it has its roots in the social demands of modern life.

B. The Change History and the Future of Recklessness

A historical overview of the English Criminal Justice System shows noticeable changes in the Recklessness's underlying meaning. The assumption of the mental element in Recklessness has shed light on such movement that it has paved the way for the dominance of the subjective Recklessness in the same system.

This section attempts at first, accentuating the point that the nature of the Modern Criminal Law and the appertaining circumstances mandate changes and review of the concepts employed therein for which Iranian Criminal Law is not an exception and the second, showing that the changes and evolutions of the culpability criteria of the Recklessness necessitate having mental function rather the physical function since the latter, by nature, is not possible to undergo changes or evolutions. This is the missing link in the Iranian Criminal Law on which the present paper's emphasis is laid [15].

Concerning the meaning sphere of the Recklessness and other forms of the criminal Fault under Iranian Law, not only that no change or evolution has ever been observed, but also the very negligible doubts over

attaching physical aspects to the same have given their place to a firm determination under the New Islamic Penal Code¹ wherein the Recklessness is envisaged as a mere *actus reus* issue [15].

A historical look at the same trend in England shows something different. In the 1950s, the courts in England started applying a different meaning of the Recklessness named Common Law Recklessness in which determining a defendant's awareness was assumed mandatory. Later on, this was modified in *R v Parker* (Daryl) [1977] 1 WLR 600 'where the defendant, in a fit of temper, had broken a telephone by smashing the handset violently down on to the telephone unit and had been convicted under section 1(1) of the 1971 Act'. Extending the time element to not discharge the '*bad guys*' constituted the base for such modification [16]. This was a positive change in the meaning sphere of the Recklessness in response to the social demands, confirming that the legal concepts need evolution to preserve their functionality over time.

Subsequently, during the 1980s, another view held sway, following the House of

Lords' decision in *Metropolitan Police Commissioner vs. Caldwell* [1981] 1 All ER 961. In *MCP vs. Caldwell* [1982] AC 341, it was established that: "A person is reckless in the new wider sense when he performs and acts which creates an obvious risk, and, when performing the act, he has either given no thought to the possibility of such a risk arising or he recognized that some risk existed, but went on to take it.". It was put forward that the risk must be obvious to the reasonably prudent person; it need not be evident to the defendant. Criticism includes providing two meanings of the Recklessness, not making a clear-cut distinction between a person who takes a risk knowingly with a person who does not know about such a risk paved the way for further changes.

Elaborations on *Reginavs G and Another*, which held that subjective appreciation of a risk to the health or property of another on the side of a defendant and yet going ahead with the same must be proven to let them be held criminally culpable, caused This 'objective recklessness' upheld in *Caldwell* Recklessness to be abolished. It was determined that: "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 concerning - (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him,

¹- *The New Islamic Penal Code* is a revised version of the Islamic Penal Code (1991). Islamic Consultative Assembly ratified the same on 19 December 2009. It was subsequently approved by the Council of Guardians on 18 January 2012. Its English version was published online by 'The Iran Human Rights Documentation Center' (IHRDC) on April 8, 2014.

unreasonable to take the risk [17].¹ In *Mark and another, R v* [2004] CA, it was decided that the foresight of risk was not essential to an offence of gross negligence manslaughter. In paragraph 23 of his judgment, Buxton LJ refers to *Adomako* and the passage on page 809 of the *Attorney-General's Reference*², and paragraph 24, he states that:

"The law is, therefore, quite clear. If the accused is subjectively reckless, the jury may be taken into account as a strong factor demonstrating that his negligence was criminal. However, negligence will still be criminal in the absence of any recklessness if on an objective basis the defendant demonstrated what, for instance, Lord Mackay quoted the Court of Appeal in *Adomako* as described as: 'failure to advert to a serious risk going beyond mere inadvertence in respect of an obvious and important matter which the defendant's duty demanded that he should address. That is a test in objective terms.

The guilty were refused to appeal against conviction owing to the point that the judge in the instant case had applied those

principles to the latter⁴ explanation and since the court decided that no revision was needed in the law appertaining to that, heedless of the change of approach to Recklessness in *Regina v. G and Another* case by House of the Lords.

One of the main criticisms against Caldwell Recklessness was that it could not be a mental element since it did not refer to the state of mind. Glanville (1983) elaborates on the point that the minimum for culpability is that a defendant, at the least, thinks about the harmful results. However, it is evident that 'failure to do' is itself a 'state of mind.' A person who fails to foresee the results has a passive subjective state. If such a subjective state does not fall under *mens rea* then, abstaining from an action must not be an *actus reus* [18]. The other criticism against the objective Recklessness is about 'obvious risk.' Caldwell Recklessness embeds 'obviousness of risk' at its core. Lord Dipock believes that:

"In my opinion, a person charged with an offence under section 1(1) was 'reckless as to whether ... property would be destroyed or damaged' if (i) he does an act which creates an obvious risk that property will be destroyed or damaged and (ii) when he does that 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

¹- Based on clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report "A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill" (Law Com No 177, April 1989))

²- See *Attorney-General's Reference* (No 2 of 1999) (2000) CA

involved and has nonetheless gone on to do it".¹

Supporting Lord Diplock's statements, the present paper holds that it is not logical to put forward that the concept of Recklessness means awareness on the side of a defendant before acting; instead, the capability to have such awareness is illustrative of the Recklessness. Such capability is contingent upon competence, which is part of the *amalgamated* criterion. Put another way; it could be stated that having competence suffices for holding a person criminally liable.

C. The Meaning and Function of the Recklessness under Iranian Criminal Law

The manifestations of Recklessness in any criminal justice system denote the forms, degrees, the assessment criteria of the Recklessness, and the criminal policy adopted by that system.

The legal bodies can be analyzed through studying the legal thoughts and ideas employed therein. This denotes the close relationship between the doctrines and the legislative approaches. Of course, some thoughts have so much been taken for granted in some rare cases that the lack of legal and judicial reasoning and justification for which is never noticed or

even are somehow 'turned a blind eye' to. Sometimes there are some legal principles and some regulations for which no academic background or support exists, leaving doctrines academically unsupported and leading to the formation of, sometimes, critical defects in the criminal policies adopted by the criminal justice system of a given country such as *Iran*.

The Iranian legislation system follows quite a different approach to the well-established principle that the *mens rea* in unintentional offences involves Recklessness and other forms of criminal faults. It can firmly be claimed that what is referred to as forms of criminal Fault under the doctrine is attached to the *actus reus* by the Iranian legislators; a critical mistake which leaves no ground for further discussions on culpability and its degrees as well as the assessment of a defendant's subjective awareness. The justification for this claim is that in the denotative meaning of the articles regarding Recklessness, it does not cover the behavior and that there is necessity to prove the physical relationship between Recklessness and the result. The denotative meaning of the only Noteto the Article 145² of the Iranian Islamic Penal Code stating that

¹- R v. Caldwell [1982] AC 341 at 354

²- This article states that: "Accomplishment of unintentional offenses is subject to establishing the fault of the offender. In cases of unintentional offenses against body and life, including quasi-intentional offenses or absolute negligence, the provisions of Books *Qisas* and *Diyat* shall be applied".

"Fault includes both negligence and Recklessness. Indulgence, inattention, lack of skill and disregard of governmental regulations and so on, shall be considered as either negligence or Recklessness, whichever is applicable" along with Article 529 stating that "In cases where the fault is considered to have civil or criminal liability, the court must prove the relationship between the result and the defendant's fault" refers to the physical aspect, i.e., *actus reus* of the Recklessness. This is true with Article 616 of the Iranian *Discretionary Punishment Statute*¹ stating that "In cases where the manslaughter is committed due to carelessness or recklessness or an act for which a person does not have the skill or disregard of governmental regulations, the perpetrator shall be sentenced to 1 to 3 years imprisonment and payment of *diya* to the *avenger of blood* in case the latter demands for on the condition that it is not *purely unintentional*" as well as the article 714 stating that "In cases where carelessness or recklessness or disregard of governmental regulations or lack of driving skill (including land, water or air vehicles) or operating skill of a motor vehicle results in manslaughter, the perpetrator shall be sentenced to six months to three years imprisonment along with payment of *diya* to the *avenger of blood* in case the latter demands for".

¹. *Discretionary Punishment Statute* was ratified on 26 May 1996 by the Islamic Consultative Assembly.

Noting the necessity of the contingency of the result to the Fault, it can be inferred that in all of these Articles, the Fault is attached to *actus reus* (Factual Causality). Article 537 of the Iranian Islamic Penal Code² covers the faults' intention and mental state. This contradicts the Fault's specific meaning under the Iranian Civil Code and is illustrative of the bewilderment on the legislators' side in attaching *actus reus* to some Articles and *mens rea* to some others in both *Iranian Islamic Penal Code*. In the *Pre-revolutionary Public Criminal Law*³, Article 174 states that: "Whenever a person unintentionally causes injury or does physically strike to another or causes the same to happen, he/she shall be sentenced to eight days to one month of punitive imprisonment along with six to thirty *Tomans* towards indemnity or only one of them on the condition that the injury or strike does not happen due to carelessness or disregard of governmental regulations in which case the perpetrator shall be sentenced to both" along with Article 177 providing that: "In cases where the

²- This Article puts forward that: "In all above-mentioned cases in this chapter, whenever a crime is attributed to the intention or fault on the side of the victim there shall be no liability for the perpetrator. In cases where the crime is originally attributed to the perpetrator's intention or fault but that its effect is due to the victim's own intention or fault, the perpetrators shall not be held liable to the same".

³- The Law was ratified on 27 January 1926 by Iranian National Consultative Assembly.

manslaughter happens because of Recklessness or carelessness or lack of skill or disregard of governmental regulations, the perpetrator shall be sentenced to one to three years of punitive imprisonment. He/she may also be sentenced fifty to five hundred *Tomans* towards indemnity" plus Article 8 of the *Punishment of Saboteurs in Iran's Oil Industry Act of 1959* stating that: "If a person unintentionally commits any of the actions referred to in Articles 1&2 as such that it leads to manslaughter, he/she shall be sentenced to one to three years of punitive imprisonment and if it causes damage to or temporary cessation in the operation centers of the industry, he/she shall be sentenced to six months to two years of punitive imprisonment.

Furthermore, if a person causes damage to the facilities belonging to the Oil Industry Company recklessly or negligently, he/she shall be sentenced to one to six months of punitive imprisonment along with due re-compensation; Note- Recklessness means committing an act which the perpetrator must not have done and, negligence means abstaining from doing an act which had to be done regardless of the causes such as non-awareness, lack of skill or experience, in observance of law and disregard of the regulations or orders or common sense or practice" are illustrative of the double-dimensionality of the Recklessness, i.e., the existence of *psychological* as well as *physical* aspect in Recklessness.

The denotative meaning of these Articles does not relate the resulted damage directly to the Recklessness but to an act committed recklessly, demonstrating factual causality between the act and the result and legal causality between the result and the Recklessness.

Articles 174 and 177 are denotative of the point that the mental element's existence is necessary for intentional offences and that the unintentional ones are punishable if a criminal fault happens thereby, accentuating the *mens rea* of an offence. As far as the injury and strike are concerned, the faults include Recklessness or disregard of governmental regulations. In manslaughter, the faults include Recklessness or carelessness or lack of skill or disregard of governmental regulations. Article 177 is illustrative of legal causality between the result and the Recklessness.

Surprisingly, Article 616 of the Iranian Islamic Penal Code states that: "If manslaughter happens because of carelessness or recklessness or lack of skill in a given activity or disregard of governmental regulations, the perpetrator shall be sentenced to one to three years imprisonment and payment of *diya* if the blood avenger demands for on the condition that it is not *purely unintentional*; Note – This article does not cover manslaughter happening because of driving accidents" still repeats the mistake of taking a physical

approach towards such faults disregarding Articles such as 174.

Another Article illustrative of contradiction in the Iranian Law regarding Recklessness is Article 6 of the *Punishment of Offences in the Railway Act of 1932* which states that: "If a person commits any of the actions referred to in Articles 1&2 recklessly or negligently, he/she shall be sentenced to one to three years imprisonment plus two hundred to ten thousand *Rials* for the offences for which execution or imprisonment with hard labor must have been considered had they been intentional; and to three months to two years of imprisonment plus one hundred to one thousand *Rials* for the offences for which solitary imprisonment must have been considered had they been intentional" wherein mental approach has been taken toward criminal faults.

The absolute *actus reus* approach to the criminal faults is also observable in Article 295, Note 3 of IIPC, which puts forward that: "If a person murders another believing that he/she is doing retaliation (*Qisas*) or that the latter is an outlaw and later on it is proved that none was applicable, the act is quasi-intentional murder. In the case, the perpetrator proves his/her claim about the victim being an outlaw, retaliation, and *Diya* shall not be applicable as punishment to him/her" and the only Note to Article 336, which has of course been eliminated in recently published IIPC, stating that: "Fault

is comprised of carelessness or Recklessness or lack of skill or disregard of governmental regulations. The former denoting that 'had the regulations been duly observed the *result* would not have taken place' employs obvious *actus reus* approach wherein the forms of Fault and Recklessness are linked physically to the result".

D. The Meaning and Function of the Recklessness under English Criminal Law

Under English Law, though, Fault is always considered a criminal Fault degree. Criminal Fault itself is considered as having a degree of *mens rea*. The English Criminal Law and the Judicial Procedure have consensus over such understanding and absolute consistency with the adopted doctrine. For example, the mental element involves Recklessness in driving under the Road Traffic Act 1972 [19].

The Article 1 (Part 1) of the Road Traffic Act 1972 stating that: "A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence" along with Article 2 of the same Act stating that: "If a

person drives a motor vehicle on a road carelessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of the traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be guilty of an offence" denote the point that the 'legal causality' between Recklessness and a behavior resulting in death plus the 'factual legality' between the act of driving and the resultant death must be proven [20].

Article 1 of the Criminal Damage Act 1971 states that "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" the Recklessness is associated with a behavior.

According to Kenneth, degrees of culpability include intention, awareness, and Recklessness under the Law Commission Draft Criminal Code 1989 unless the parliament determines something else [21].

E. Assessing Recklessness according to the Nature of Offences

The criminal faults' particular nature makes them acquire different forms necessitating any to be assessed differently according to

the committed. Under Iranian Law, contrarily, no attention is paid to the nature of the offences and all the faults are assessed employing the *same* criteria. This applies to the *actus reus* approach taken towards criminal faults such as Recklessness under the Iranian Criminal Law. Under English Law, though, Recklessness is approached as a *mens rea* issue [22]. Furthermore, in gross negligence manslaughter, the objective and subjective Recklessness must be determined. For the offences associated with destroying or damaging property, the subjective criterion is applied but, in order to preserve the mental function of the Recklessness in the offences such as driving, which constitutes noting the necessity of due attention to the nature of driving offences and driving skill of the defendant which demand objective assessment. Here, due attention is paid to the defendant's state of mind and his/her behavior in determining the 'dangerousness' [23].

CONCLUSION

It seems that the security-based criminal policies are so much amalgamated with modern criminal law that, targeting *security* as the highest right of human beings, they will have the potential to overshadow some prevalent supportive concepts of the latter. Noting the point that the security-based criminal policies, which the papers hold to equal to human rights-based policies, has succeeded in replacing the 'Presumption of Innocence' with 'Guilty Until Proven Guilty' or 'Guilty Until Proven Innocent' in the

terrorist realm, it seems that it will lead to change or evolution in the meaning attached to the concept of *mens rea* and assessment criteria.

The criminal law's evolution shows that the thinkers and legislators have reached the concept of 'criminal fault' in their search for a mindset for the cases where a defendant's unintentional act is culpable – Recklessness, as an example. Thus, such faults as Recklessness are considered a degree of the *mens rea*.

The English Criminal Law and the doctrine it follows confirm such an approach towards the criminal Fault but, under Iranian Law, the search for the function of the criminal Fault in general and Recklessness, in particular, leads a researcher to the *actus reus* sphere of the unintentional offences. In other words, Recklessness is considered as abstaining from doing an act equal to other forms of carelessness and lack of skill for which lesser degrees of culpability is considered. The term 'recklessness' was first referred to through Articles 177 and 174 of the Iran Public Criminal Law and later through various Acts such as Punishment of Saboteurs in Iran's Oil Industry Act and Punishment of Offences in the Railway Act. The Article 295, Note 3 of the Iranian Islamic Penal Law along with the only Note to the Article 336 and also Articles 616 and 714 of the Iranian Discretionary Punishment Statute, as well as the Note to the Article 145 of the New Islamic Penal Code and some others, have all taken *actus reus*

approach toward the criminal Fault as such that evolution even has led to further emphasis on such understanding in the later Articles.

Such an *actus reus* approach has led to noticeable digression from the existing philosophy of the 'criminal fault' and the Recklessness's terminological meaning. Noting the importance and ascending order of the offences arising from reckless in the industry, construction, production, and medicine sectors, revitalization of the meaning and function of the Recklessness and adoption of an appropriate criminal policy seems inevitable in Iran. As the very first step, such a revitalization demands digestion of the idea that the criminal law and its components – such as Recklessness– need evolution and dynamism in order to preserve their functionality. Such dynamism needs not a denial of the raised issues but challenging the prevalent understandings. For example, if the classic understanding of the issue of the *mens rea* does not duly cover the needs and functions of the Modern Criminal Law or if the concept of the 'criminal fault' – owing to its particular nature– is in contradiction with it, the solution shall not involve the denial of the *mens rea* function of the criminal Fault for the unintentional offences cannot be void of *mens rea*. The justifications such as the criminal faults having particular nature or assessing Recklessness according to the offence nature of the necessity of sticking to the classic definition of *mens rea* do in no way at all

provide a logical ground for sacrificing *mens rea* aspect of the offence at the cost of the objective assessment. Accordingly, the present paper holds that 'recklessness as a form of criminal fault denotes a person's culpable linkage of mind with the committed unjustified risky behavior foreseeing the possibility of such risk before the act.' It further concludes that:

1- Equal to other forms of the criminal Fault, Recklessness means abstaining from acting according to the Iranian Criminal Law's legislative and judicial approach. This *actus reus* approach towards Recklessness has caused it not to differ from other forms of the criminal Fault as far as their culpability is concerned. Even under NIPC – Note to Article 145 as an example– indulgence, inattention, lack of skill and disregard of governmental regulations and so on fall under Recklessness. Such an *actus reus* approach towards Recklessness has led to adopting such criminal policy wherein the judges are bestowed with the authority to mistake even the minor cases of the carelessness as forms of the Recklessness and consider the same degree of culpability for them.

2- Following such an approach, the criminal policy adopted against such offences does not consider the issue of culpability. This *Recklessness* committed by the Iranian legislators is likely to create anomie about applying the criminal policy and hinder the crime prevention attempts.

3- Such an *actus reus* approach followed by Iranian legislators seems to be aloof from the common consensus that the Recklessness is a *mens rea* issue. Furthermore, the terminological meaning of the Recklessness itself is illustrative of the priority given to mental elements on the one hand and the dominance of a mixed typical individualized criterion or even subjective criterion on the other hand. Terminologically, Recklessness denotes an act which a competent person, foreseeing a potential risk, goes ahead with.

4- The distance between the meaning and adopted doctrine with the legislative and judicial approach taken towards Recklessness illustrates a kind of bewilderment on the Iranian legislators' side.

5- Under English Law, Recklessness constitutes the highest degree of criminal Fault and is considered a *mens rea* issue. Thereby, the doctrine adopted and legislative and judicial approaches taken towards it are in such a consistency that Caldwell's recklessness is now sidelined. The Iranian and English Law differ concerning Recklessness; the former considers it an *actus reus* issue and the latter a *mens rea*. It seems that the *actus reus* approach towards Recklessness undermines the necessity for the existence of the mental element in unintentional offences.

Considering the points mentioned above: a) a fundamental revision on the interpretation

and reconsideration of the Recklessness status under the Iranian Criminal System seems inevitable. Such a revision requires separating it from other Fault types and applying a different criminal policy to the offences arising from Recklessness. This means that the Iranian legislators must eliminate the different words which denote the same thing in the sphere of the criminal Fault from their legislation system and move towards application of the different degrees of the culpability about the criminal faults and the terms applied therein; b) Such a fundamental revision requires a change in the denotative meaning of the Articles on Recklessness in order to bestow *mens rea* aspect to the same aiming to show that a defendant's reckless behavior, according to the factual causality, is connected with the result. Such a revision will allow the legal causality between the recklessness and the behavior leading to a result that exists about *mens rea*, to come to existence. In response to the social demands and justice requirements, such a revision could constitute a turning point in Iran's criminal Fault's revolution. The concluding remark is that: "the human beings must always practice cautions in their acts failing to do shall lead them to be held culpable to the highest degree."

ETHICAL CONSIDERATION

Authenticity of the texts, honesty and fidelity has been observed.

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CONFLICT OF INTEREST

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