

**Intoxication & Self-defence: A Comparative Study of
Principles of English Law and *Shari'ah*.**

By

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**Submitted in accordance with the requirements for the degree of
Doctor of Philosophy**



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May 2004

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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In the name of Allah, the Beneficent, the Merciful.

Abstract

The study is based upon an analysis of the general principles of criminal liability in English law and *Shari'ah*. It is hoped that it may provide a valid basis for discussion of the future development of criminal law.

The relationship between law and society is an organic one and this relationship in *Shari'ah* is based on revelatory text of precepts, law, and admonitions. *Shari'ah* is an essential part of faith of every Muslim; a sound knowledge of its principles not only gives him a sense of inner fulfilment but enables him to order his life according to the dictates of his religion. On the other hand, in English law, religious beliefs and private morality might be viewed as not a matter for law. Religion is in that context generally conceived as a spiritual sphere of supra-human connotation distinct from law, which is basically a secular concern.

Both the systems of law under consideration are different in their sources and nature. English law, being a positive law, finds its source in legislation and other recognised sources. *Shari'ah* is a divine ordinance imposed upon people without having a freedom of choice and it has its roots in its primary sources, the Holy *Qur'an*, and the *Sunnah*.

However, the revelatory nature of *Shari'ah* does not render it entirely inflexible and immutable. The finality of authoritative legal texts is confined only to a limited number of injunctions in the primary sources. The secondary sources provide flexibility to meet the changing requirements of society. A legal system should strike a fair balance between flexibility and inflexibility of legal rules. A very flexible system of law may lead to inconsistencies, illogicalities and at the same time may be subject to abuse by judges while a rigid system, which leaves no room for judicial discretion is likely to lead to injustice in certain cases. It is submitted that the very flexible nature of English law has left it full of inconsistencies and illogicalities, despite the appropriate use of judicial discretion.

The research offers a general view of modern thinking about the theoretical foundations and methodology of *Shari'ah*. *Shari'ah* recognises a variety of sources and methods

from which a rule of law might be derived. Part-I of the thesis discusses the evolving principles of Islamic jurisprudence from their rudimentary sources. The specific relationship between socio-religious reality and the production of theoretical legal discourse is illustrated in Part-II and III while dealing with the problem of intoxication and private defence in society. It suggests that *Shari'ah* provides a framework in which the complex and sometimes competing needs of an individual and society can be fairly apportioned.

The research will demonstrate that there is a well developed system of criminal law in *Shari'ah* that can be compared with the most developed and civilised criminal law of the contemporary world, for example, English criminal law. In order to compare the compatibility of both the legal systems, the approaches of both towards the problems of intoxication and self-defence have been taken as a parameter. Though *Shari'ah* provisions seem to be predominantly prescriptive as compared to English criminal law, the comparison will show that it can provide practical solutions to problems faced by human society of any age. *Shari'ah* being a revealed law is proactive in its nature. It takes action to cause changes and not only react to a change when it happens. This particular feature can be felt while dealing with the problem of intoxication. English criminal law, on the other hand, being a positive law bears the characteristics of a reactive law. It reacts to events or changes rather than acting first to cause change or prevent something. Another major difference between the two legal systems might be that English criminal law has passed through many evolutionary phases and reached at the present stage through the efforts of the political power and the state; whereas, Muslim states and governments throughout the centuries neither had a hand in the development of Islamic jurisprudence nor in the training and certification of jurists or jurisconsults whose task it was to formulate the law.

History suggests that using the combined forces of religion, morality and law *Shari'ah* has effectively eradicated social evils and created a peaceful environment for human co-existence, where every one can enjoy his rights without a fear of infringement by the others. In cases of infringement of such rights, the offender shall be liable to severe punishments. The principles of criminal liability are on a par with the corresponding principles of the English criminal law. While protecting the rights of the victim of the crime, *Shari'ah* does not ignore the rights of the offender for fair trial, impartial justice

and liability for punishment proportional to the offence committed by him. At the same time it recognises excuse and justification defences under appropriate circumstances, as it will be evident while comparing the defences of intoxication and self-defence with the same in English criminal law.

The study reveals that there are similarities and differences between English law and *Shari'ah* when considering the issue of crime and criminal liability. However, this may be considered as normal phenomenon of comparing any two different legal systems. The differences can be attributed to their sources, origin, history and nature of the social values to be protected. Similarities can be ascribed to zeal for social justice and stability. The study of differences and similarities will provide an opportunity to illuminate our understanding of law and the process of its development. As both the systems have their own methodology to tackle legal issues, a different approach to the similar problem will provide a fresh insight leading to revitalised solutions. It will also be helpful to understand the methodology and the legal reasoning of both the systems leading towards a better understanding of law in general and at the same time providing efficient means for improvement.

Acknowledgements

All the praises be to Almighty Allah Who enabled me to complete this research work. This would have been, if not impossible, very difficult but for the sound foundation laid by very kind guidance of Professor C.P. Walker. I am very grateful to Professor Javaid Rehman and Mr. Ben Fitzpatrick whose all time assistance, supervision, keen interest, efficiency, patience, and a remarkable knowledge of criminal law kept me pursuing my goal, and helped me to formulate my ideas. The support extended and kindness with which they assisted me is beyond praise.

I owe a debt of gratitude to brother Sharifullah Khan for his generous assistance and support throughout my stay at Leeds. I am profoundly grateful to all those, including brother Safder Ali Shah and Hafiz Fetch Muhammad, Dr. Sahibzada Sharif Ahmed and Noor Ahmed, Muhammad Umar, and Khalid Mehmood who by one way or the other helped me at various stages of my research. Others whose assistance is gratefully acknowledged are Molvi Abdul Hamid, Syed Amjad Mehmood and many others. I would like to thank specially Major Shafqat Ullah Zafar, Dr. Iqbal Khan, Muhammad Ayub and Akram Khan for providing me moral encouragement.

I am indebted to the, meagre but, generous financial support of International Islamic University and co-operation of its administration, specially V.P (academics) Dr. Mehmood Ahmad Ghazi. I am profoundly grateful for the co-operation extended by my family during my stay at Leeds. My wife, my sons Waqas Javed, Adil Javed, Noaman Javed, my daughters Kainat and Alishbah who's love and memory kept me always busy in my work, and remained a source of inspiration for me. I am most grateful to my brother Muhammad Rafiq who looked after my home and my family in my absence. The acknowledgements would not be complete if I miss the prayers of my parents, my elder brother, my sisters and all other near and dear, for my health and my success.

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Key to Abbreviations

A.C.	Appeal Cases.
A.L.R.	American Law Reports.
All. ER.	All England Law Reports.
ALR	Australian Law Reports.
Am. J.C.L	American Journal of Comparative Law.
B.M.A.	British Medical Association.
B.M.J.	British Medical Journal.
C.L.J.	Cambridge Law Journal.
C.L.R.	Commonwealth Law Reports.
Can. Bar.Rev.	Canadian Bar Review.
Columb. LR.	Columbia Law Review.
Cr. App. R.	Criminal Appeal Reports.
Crim. LR.	Criminal Law Review.
C.L.R.C.	Criminal Law Revision Committee.
D.L.R.	Dominion Law Reports.
E.H.R.R.	European Human Rights Reports.
E.R.	English Reports.
H.R.A.	Human Rights Act.
Harv. LR.	Harvard Law Review.
Health Edu. J.	Health Education Journal.
I.I.I.T.	International Institute of Islamic Thought.
I.I.F.S.O.	International Islamic Federation of Student Organisations.
I.R.A.	Irish Republican Army.
I.B.S.	Islamic Book Service.
I.R.I.	Islamic Research Institute.
Int. J. Law and Psychiatry	International Journal of Law and Psychiatry.
I.T.S.	Islamic Text Society.
J.C.L.	Journal of Criminal Law.
J.L.H.	Journal of Legal History.
J.P.	Justice of Peace.
K.B.	King's Bench Division.
L.Q.R.	Law Quarterly Review.
L.S.	Legal Studies.
M.L.R.	Modern Law Review.
N.I.	Northern Ireland Law Reports.
N.I.L.Q.	Northern Ireland Legal Quarterly.
N.L.J.	New Law Journal.
N.Z.L.R.	New Zealand Law Reports.
O.J.L.S.	Oxford Journal of Legal Studies.
Q.B.	Queen's Bench Division.
Q.J.M.	Quarterly Journal of Medicine.
S.A.	South African Law Reports.
S.A.S.R.	South Australian State Reports.
S.C.R.	Canadian Law Reports (Supreme Court Canada)
V.A.T.	Value Added Tax.
V.R.	Victorian Reports.
W.L.R.	Weekly Law Reports.
Yale L.J.	Yale Law Journal.

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Introduction

The English legal system based upon the principles of Common law is the product of an evolutionary process spread over centuries.¹ A number of countries in the world, primarily from British Commonwealth, also follow the doctrines of Common law.² Though the U.S. has been independent for a long time, its laws are also influenced by common law and the same influence has been exported to Japan and the Philippines.³ It suggests that a considerable majority of people, throughout the world, is being governed under the principles of Common law.

On the other hand, Islam, being the religion of almost one quarter of the population of the world, practised in the private lives of Muslims is claimed to be the only other major legal system, beside civil law, affecting the lives of majority in one way or the other.⁴ This majority belongs to a variety of races and cultures scattered throughout the world but bound by a common faith and a sense of belonging to a single community, distinguishable by their adherence to the teachings of Islam.⁵ It means that Islam applies to order the lives and social conditions of many hundreds of millions of Muslims throughout the world. However, it is pertinent to mention that not all the Muslim population live under a political system which applies Islamic law to order the lives of its subjects.

A comparison of both these systems, particularly in the realm of criminal law, is the major aim of this study. The study will help to understand the law and legal reasoning of English law and *Shari'ah* along with development of various legal concepts. It will not only highlight the differences but also the similarities between the principles of the two legal systems. Study of similarities and contrasts is the best means to illuminate one's understanding of law and suggesting means of its improvement.

Comparative studies are important because every system has its own methodology to tackle the legal issues. A different approach to similar problem provides fresh insights

¹ Atiyah, P.S., *Law and Modern Society* (2nd ed., Oxford University Press, Oxford, 1995) p. 5.

² Roebuck, D., *The Background of the Common Law* (2nd ed., Oxford University Press, N. York, 1990) pp.1-2.

³ *Ibid.* p. 2.

⁴ Lippman, Matthew, *Islamic Criminal Law and Procedure* (Praeger, London, 1988) p.1.

leading to revitalised solutions. Comparative law is very useful for a better understanding of one's own national law and providing tools for its improvement.⁶ Comparative study may also be beneficial for the jurists; they may find the foreign legal thoughts more appropriate for the administration of justice in their own society. Comparative law is not only helpful in understanding foreign law but it also develops international understanding by providing an opportunity to study various legal systems through their culture and political system; hence leading to peaceful co-existence between the nations.⁷ Though practically it is impossible to produce a common law for the entire human kind, like the principles of natural sciences, to resolve social conflicts, yet a comparative study can provide a much wider range of solutions than a legal system devoted to a single nation.⁸

Unfortunately many people, both Muslims and non-Muslims, tend to reduce *Shari'ah* and its system of jurisprudence to its sub-system of penal laws, which seems very strict and harsh. Thus the idea of an Islamic state is essentially associated with its penal laws. This over simplification ignores the fact that penal law of Islam constitutes only a small portion of the whole *Shari'ah* system. There is a need for a better understanding of Islam not only for the non-Muslims but also for those Muslims who have certain misunderstandings regarding Islam as a system of life. It is impossible to understand Islam without understanding its law.⁹ This study is an attempt to make principles of Islamic law understandable to test their compatibility with the English law. However, it is not the totality of Islamic law which is being investigated here, but it is only one particular segment of it which is isolated in order to see how far it could provide a sufficient foundation for the understanding of the whole system of Islamic criminology and penology.

The basic problem in comparing both the systems is that Islamic law does not exist in any official codified form; rather it is there in the scattered opinions of Muslim jurists, whereas English law can be found either in the authoritative judgements of the

⁵ Nasir, Jamal J., *The Islamic Law of Personal Status* (3rd ed., Kluwer Law International, 2002) p. 2.

⁶ David, Rene & Brierley, John E.C., *Major Legal Systems in the World Today* (3rd ed., Stevens & Sons, London, 1985) p. 6.

⁷ *Ibid.* p. 8.

⁸ Zweigert, Konard & Kotz, Hein, *An Introduction to Comparative Law* (Translated by Weir, Tony) (3rd ed., Clarendon Press, Oxford, 1998) p.15.

⁹ Schacht, Joseph, *An Introduction to Islamic law* (Clarendon Press, Oxford, 1964) p.1.

common law courts or codified in the statutory form. However, the problem can be solved by comparing the principles of Islamic law derived by the Muslim jurists from its sources and those followed by the English courts, while deciding practical issues before them. As far as the state practices in the modern Muslim world are concerned, these do not represent the true picture of Islamic law. Though a number of independent states have been officially declared as Islamic states and constitutionally *Shari'ah* is the principal source of their legislation, the question is of the extent to which they have applied the principles of *Shari'ah* in practice. An observation of the national codes of these states reveals that most of the governmental business, judicial system, commercial matters and all other major fields of life are being run by the secular laws. However, in the last quarter of the 20th century, in certain Muslim countries, some half hearted attempts have been made to base the legislation on the principles of *Shari'ah*.

For example, in Pakistan, *Hudood* Ordinance has been promulgated since 1979. The then government decided to Islamise the criminal law without meeting the prerequisites for such a step. A theft, in *Shari'ah*, will be liable for the amputation of hand only if committed in a society based on social justice fulfilling the needs of all its members.¹⁰ An accused driven by the force of circumstances, unable to earn his livelihood and at the same time deprived of the social security, shall not be liable to *Hadd* because the offence was committed due to the fault of the state.¹¹ *Hudood* punishments are to be implemented only in an Islamic society where *Shari'ah* is implemented in its complete form in all the spheres of life. Criminal law of Islam is not the whole system of Islam, rather it is a small part of the whole system. If these punishments are applied apart from the whole system, it will not be appropriate.

In general, the application of criminal law of Islam must be viewed within the whole system and not in isolation. The obligations of the individuals are to be enforced by the coercive force of the state, but before enforcing the obligations, it is to be ensured that rights and privileges of the subjects are secured. *Shari'ah* does not intend to amputate the hand of a hungry or needy thief, for in this case the blame of injustice is

¹⁰ Bassiouni, M. Cherif (ed) *The Islamic Criminal Justice System* (Oceana Publications, 1982) p. 5.

¹¹ Doi, Abdur Rahman I., *Shari'ah; The Islamic Law* (Reprint. Taha Publishers, London, 1997) p. 224.

attributed to the state and society.¹² The view is proved by the fact that the second rightly-guided caliph Umar ibn al-Khattab, suspended the application of fixed punishment for theft during the time of famine, when the state failed to discharge its functions to meet the needs of its subjects.¹³ The fact that the penal law of Islam can be applied only after a Muslim state has discharged its obligations towards society, ensuring social justice, equality and civil rights will reduce the instances in which they may be applied. In addition, the execution of the punishment is further restricted by imposing strict conditions and burden of proof beyond the slightest doubt or suspicion.

A government that does not fulfil the basic social and economic needs of its subjects has no right to implement only the punishments of *Shari'ah*. Moreover, well trained judicial machinery is needed for interpretation and enforcement of *Shari'ah* law. Enforcement of *Shari'ah's* principles by the judges trained in English law within the framework of secular judicial system is nothing more than putting the cart before the horse. Moreover, implementation of Islamic criminal law should be the last phase of Islamisation of laws. Only the infliction of *Shari'ah's* punishments, leaving aside all its other aspects has portrayed a totally different picture of *Shari'ah* to non-Muslims. The interest in preferring such a project is, basically, to unveil the relationship between the community created by Islam and the measures it took to protect that community from falling into error or disorder. Furthermore, to show that the measures adopted by *Shari'ah* are compatible with any advanced legal system. Like Pakistan, in many other countries enforcement of *Shari'ah* is on piecemeal basis, as elements of traditions rather than as manifestation of a governing principle.¹⁴

The research, based upon the principles of *Shari'ah*, as revealed in the Holy *Qur'an* and *Sunnah*, deduced by the Muslim jurists rather than the state practices of the contemporary Muslim states, will help to remove the misunderstanding. The whole study will be concentrated on the question whether the *Shari'ah* fulfils the conditions of positive law and can meet the requirements of modern ages. In order to remain within the limits of time and space, the research has been restricted to the study of the

¹² Bassiouni, M. Cherif, 1982, op. cit. p.196.

¹³ Al-Sanani, Abu-Bakar Abdul Razzaq bin Humam, *Al-Mussanaf* (Al-Maktab al-Islami, Beirut) Vol. X., p. 242.

¹⁴ Kerr, Malcolm H., *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (University of California Press, Berkeley, 1966) p. 2.

opinions of four major *Sunni* schools of thought, leaving aside the *Shiite* school. *Shiite* law possess certain distinctive characteristics in contrast to the principles of *Sunni* law as a whole.¹⁵ Their differences on some basic doctrines made them essentially different from *Sunni* schools.¹⁶ The *Shiite* school stands on its own and like its *Sunni* counterpart it demands an independent treatment. The opinions of the *Sunni* schools will be analysed and compared with the relevant provisions of the English law on the same point.

When dealing with Islamic law, we must bear in mind that the manner in which such law is presented in its formal sources is not necessarily conditioning the social life of Muslim society. There are factors of much greater importance which essentially overrule the principles and procedure of Islamic jurisprudence. These factors, like culture and traditions, are mistakenly considered to be the part and parcel of Islamic law and hence portraying a totally different picture of Islam. The research is an endeavour to show that such factors have nothing to do with *Shari'ah* and the principles of Islamic legal system as presented in the 7th and 8th century are compatible with the English law of the contemporary world, though the English law has passed through so many evolutionary stages to reach its present stage in the 21st century.

It should be kept in mind that the thesis is a comparison of a religious legal system, in some ways akin to a system of natural law, with a positive legal system, which is secular in its nature. The provisions of any other religious law, such as Biblical law, are for a variety of reasons, of a different nature from *Shari'ah*. Such laws are not dealt with in this thesis. We might note for example that the prophet of Islam successfully set up an Islamic state where the *Shari'ah* was practically implemented in its true spirit and later on his followers, the rightly guided caliphs, carried the tradition. However, in the case of Christianity, the head figure of the religion did not do this. Furthermore, *Shari'ah*, being a complete code of life, covers both spiritual and temporal aspects of human existence. It provides guidance in religious and secular, private and public, moral and legal, administrative and constitutional, social and commercial matters, leaving no aspect of human life unguided, whereas other religions focus principally on spiritual development.

¹⁵ Coulson, N. J., *A History of Islamic Law* (The University Press, Edinburgh, 1971) p. 105.

¹⁶ Schacht, Joseph, 1964, op. cit. p. 16.

A descriptive and comparative approach has been adopted to compare the established principles of English criminal law and the authentic opinions of the Muslim jurists. The study has been divided into three major parts. Part one deals with the nature, sources, characteristics of law, and the principles of criminal liability under both the systems. It seeks to provide a broader insight into the similarities and differences of both the systems. For a better understanding of the principles of criminal liability a brief account of defences available to an accused to a criminal charge has also been given. As we know there are a number of defences available to an accused under various legal systems. It is practically impossible to explore all the area of these defences. For the purpose of simplicity and comprehension only one defence has been selected both from excusatory defences and from justificatory ones.

Part two examines a very complex and controversial defence of intoxication in English criminal law. This part generally discusses the relevance of intoxication to mental disorder and the attitude of law towards defendants who seek to use the condition as a defence to a criminal charge. Consumption of alcohol, being an integral part of contemporary Western life style, has been discussed in its historical perspective. Taking into account the failure of various efforts to control the consumption of intoxicants in society, strategy of *Shari'ah* to totally control and prohibit intoxicants has been discussed in detail exploring its implications in the modern times. Part three of the study examines the right of private defence where the English criminal law is still in the state of flux; especially in the cases where the accused used more force than was necessary for the defence. As a matter of principle, both the systems recognise the right of every individual to defend his legally protected interests. The mechanism and limitation of the right, in both the systems, are pivotal point of this part. Key advantages for adopting an intermediate approach i.e. substitution of murder conviction with manslaughter in the cases of use of excessive force are identified. The proposals for the reformation of law have also been discussed at the end of the respective parts.

Part-I

Chapter-1 The Nature and Sources of English law

1.1 Introduction

The present English legal system comprehends the role of legislature and executive, judges and juries, barristers and solicitors;¹ the situation was not the same in the beginning and at its various developmental stages. What the law is now can only be discovered by examining the process of its development and the materials which comprises it. The basic issues to be dealt with in chapter are sources and various stages of development of English law. The peculiar characteristics which distinguish English legal system from other systems of the contemporary world will also be considered. In order to deal with these issues a brief account of historical development shall also be taken into account, for the knowledge of history is indispensable for understanding English Law.² The chapter will suggest that English law being a positive law in its nature reflects the aims and needs of the society it serves, without explicit reference to religious and moral values.

1.2 Sources of English Law

A source is an origin from which a rule of law derives its force.³ It may be termed as any fact which in accordance with the basic legal rules within a specific legal system determines the acceptance of any new rule within the system.⁴ The English legal system is a product of evolution over many centuries.⁵ The traditional unwritten law of England, common law, based on customs and judicial decisions began to develop over a thousand years ago.⁶ However, today the bulk of it has been enacted into statutes with modern variations.⁷ In its formative stages and development, it has been influenced by the Islamic law,⁸ Roman law, Canon law enforced by the church courts, charters and similar documents, official practices, assizes, and books of authority.⁹ The writings of

¹ Adam, J. N. & Brownsword, R., *Understanding Law* (3rd ed., Sweet & Maxwell, London, 2003) p.1.

² Atiyah, P. S., *Law and Modern Society* (2nd ed., Oxford University Press, Oxford, 1995) p.5.

David, Rene, *Major Legal System in the World Today* (3rd ed. Stevens & Sons, London, 1985) p.309.

³ Cross, R. & Harris, J.W., *Precedent in English Law* (4th ed. Clarendon Press, Oxford, 1991) p.167.

⁴ Fitzgerald, P. J., *Salmond on Jurisprudence* (12th ed., Sweet and Maxwell, London, 1966) p.110.

⁵ Walker, R. J. & Ward, R., *Walker & Walker's English Legal System* (7th ed., Butterworths, 1994) p.3.

⁶ Hudson, John, *The Formation of the English Common Law* (Longman, London, 1996)p.17

⁷ Ashworth, Andrew, *Principles of Criminal Law* (3rd ed., Oxford University Press, 1999) p.5.

⁸ Makdisi, G., *The Rise of Colleges* (Edinburgh university Press, Edinburgh, 1981) p.286.

Glenn, H. Patrick, *Legal Traditions of the World* (Oxford University Press, Oxford, 2000) p.236.

Khadduri, M. & Liebesny, H. J., *Law in the Middle East*(Middle East Institute, Washington, 1955)Vol. I, p.215.

For the influence of Islam on other institutions in Europe see, Watt, W. Montgomery, *The Influence of Islam on Medieval Europe* (Edinburgh University Press, Edinburgh, 1972).

⁹ Jenks, Edward, *A short History of English Law* (6th ed., Methuen & Co., London, 1949) pp.17-25.

the great English legal historians like Bracton, Glanvill, Littleton, Coke, Hale, and Blackstone can be considered as the historical sources of English law.¹⁰

Sources of law differ from system to system and even in one system in different periods of its development. In the modern age sources of English law are statutes, common law, books of authority, EC laws, European Convention on Human Rights, and international treaties.¹¹ However, it stemmed mainly from three major historical sources i.e. common law, equity and legislation.¹² As mentioned earlier, English law in its present form emerged from the principles of common law hence it is appropriate to have a look upon the origin and development of this most important source.

1.2.1 What is Meant by Common Law and What is it Composed of?

The common law prevailed in UK and countries colonised by it at some time. The name is derived from the medieval theory that the law administered by the royal courts represented the common custom of the realm, as opposed to the local customs applied by the manorial courts.¹³ It is designated common because it was the law common to all of England and Wales,¹⁴ administered by a central court, available to the majority of population,¹⁵ as distinguished from the customary law that varied from county to county, lordship to lordship, or manor to manor.¹⁶

The emergence of common law was the result of an attempt to bring uniformity in the law.¹⁷ Local customs were gradually replaced either by consolidation of local customary rules into rules of general application throughout the realm, or by their erosion,¹⁸ giving way to general customs nationally applied by the courts.¹⁹ It suggests that common law is the body of rules, enforced by the royal judges,²⁰ deriving their authority solely from usages and customs of immemorial antiquity. These rules were not dependent for their authority upon any express and positive declaration of the will of the legislature. In this

¹⁰ Cross, R. & Harris, J.W., 1991, op. cit. p.166.

Zander, Michael, *The Law-Making Process* (Butterworths, London, 1999) p.387.

¹¹ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* (7th ed., Sweet & Maxwell, 2001) p.19.

¹² Walker, R.J. & Ward, R., 1994, op. cit. p.5.

¹³ Baker, J.H., *An Introduction to English Legal History* (3rd ed., Butterworths, 1990) p.15.

S.H.Bailey & D.C. Ormerod, *Modern English Legal System* (4th ed., Sweet & Maxwell, 2002) p.2.

¹⁴ Kiralfy, A.K.R., *The English Legal System* (8th ed. Sweet & Maxwell, London, 1990) p.1.

¹⁵ Hudson, John, 1996, op. cit. p.16.

¹⁶ Walker, R.J. & Ward, R., 1994, op. cit. p.5

¹⁷ Stychin, Carl F., *Legal Method: Text and Material* (Sweet & Maxwell, London, 1999) p. 94.

¹⁸ Walker, R.J. & Ward, R., 1994, op. cit. p.5.

¹⁹ Denham, Paul, *A Modern Introduction to Law* (Edward Arnold, London, 1983) p. 6.

²⁰ Hogue, A. R., *Origins of the Common Law* (Indiana University Press, London, 1966) p.11.

sense it represents the unwritten law whether legal or equitable in its origin²¹ as opposed to the statutory law.²² Let's have a brief introduction to custom and precedent, the two important elements that played a vital role in its formation.

1.2.1.1 Custom

A custom may be termed as a common practice among the people, varying with the country, culture, time and religion. A local custom may develop from a folkway or the traditional behaviour of a certain group of people.²³ It originates either from the repetition of certain acts till they become habitual or from the decision of an authority in a case brought before it.²⁴ If the majority of people in an area behave in a specific manner for a reasonable time, the established behaviour may be termed as a custom.²⁵ In its broad sense a custom includes all the social rules that are approved and observed by the majority of the members of society.²⁶ These rules acquire the binding power and force of law by a long use and admissibility by the masses.²⁷ It is the existence of society that gives rise to a custom, binding on all its members;²⁸ however its process of growth is slow and gradual.²⁹ Beside locality, a custom may be restricted to a specific class of persons within a particular locality.³⁰

Ancient customs, embodied in the judicial decisions, are the basic element of the common law.³¹ In order that a custom should be considered as a source of law it must not be repugnant to any fundamental principle of justice or law, because no custom can take away the force of any law.³² It must have a reasonable commencement, must be certain and regarded by the persons concerned as binding, not as a matter of individual choice. Its practice must be continuous not disputed, must not be against the law of God³³ and must be reasonable.³⁴ To determine whether it is reasonable is the sole

²¹ Jowitt, Earl, *Jowitt's Dictionary of English Law* (2nd ed., Sweet & Maxwell, London, 1977) Vol. I, p.391.

²² Pollock, Frederick, Sir, & Maitland, Frederic William, *The History of English Law* (2nd ed. The University Press, Cambridge, 1898) Vol. I, p.177.

²³ Denham, Paul, 1983, op. cit. p.6.

²⁴ Sadler, Gilbert T., *The Relation of Custom to Law* (Sweet & Maxwell, London, 1919) p.27.

²⁵ Denham, Paul, *Law: A Modern Introduction* (4th ed., Hodder & Stoughton, 1999) p.43.

²⁶ *Ibid.* p.2.

²⁷ Hale, Matthew, Sir, *The History of the Common Law of England* (ed. Gray, Charles M) (The University of Chicago Press, Chicago, London, 1971) p.17.

Thorne, Samuel, *Bracton on the Laws and Customs of England* (Seldon Society, 1968) Vol. II, p.22.

²⁸ Allen, Carleton Kemp, Sir, *Law in the Making* (7th ed., Clarendon Press, Oxford, 1964) p.67.

²⁹ Dias, R.W. M., *Jurisprudence* (5th ed., Butterworths, London, 1985) p.187.

³⁰ Walker, R. J. & Ward, R., 1994, op. cit. p.9.

³¹ Luke, H.K., "The Common Law: Judicial Impartiality & Judge Made Law"98 (1982) *LQR* 29 at p.33.

³² Fitzgerald, P. J., 1966, op. cit. p.200.

³³ Sadler, Gilbert T., 1919, op. cit. p.61.

Denham, Paul, 1983, op. cit. p.6.

discretion of the court that may disregard a custom if it does not fulfil any of the conditions mentioned.³⁵ A custom is void if it is unreasonable such as to make a person judge of his own cause.³⁶ Similarly, it must be consistent with the other customs of the area.³⁷ Another condition might be that it must have been enjoyed peaceably without the opposition of the other members of the community.³⁸ Customs continued to be the chief regulator of private rights of the people even long after the birth of law.³⁹ However, their importance diminished with the development of the legal system.⁴⁰

1.2.1.2 Precedent

The common law is not a product of merely customary rules; judicial decisions have also played a vital role in its growth⁴¹ and a great deal of its development is attributed to the decided cases.⁴² It may rightly be designated as judge-made law in the sense that it is a by-product of litigation in the courts.⁴³ In the 12th and 13th centuries, the king's judges succeeded in weaving a single garment of common law, which served to clothe the entire nation.⁴⁴ Up to the Norman period there is no trace of reported cases. By the end of 13th century the very words of judges and pleaders were being reduced into writing,⁴⁵ and before the end of the century the year books were available for citing earlier cases.⁴⁶ A decided case forms a precedent that might be used in the cases of similar nature in future. Judicial record of the court's decision is very important because a court is not bound to follow the previous decisions unless its attention is drawn to it.

Judicial precedents derive their force from the doctrine of *stare decisis* i.e. the previous decisions of the higher court in a jurisdiction are binding on all the lower courts in that jurisdiction.⁴⁷ A judge must always look how the previous judges have dealt with the

³⁴ Brown, W.J., *The Austinian Theory of Law* (John Murray, London, 1906, Reprint, 1931) p.315.

Cross, R. & Harris, J.W., 1991, op. cit. p.168.

³⁵ Paton, G. W., *A Textbook of Jurisprudence* (4th ed., Clarendon Press, Oxford, 1972) p.195.

³⁶ Sadler, Gilbert T., 1919, op. cit. p.67.

³⁷ Dias, R. W. M., 1985, op. cit. p.189.

³⁸ Zander, Michael, 1999, op. cit. p.393.

³⁹ Geer, F. A., "Custom in the Common Law" 9 (1893) *LQR* 153 at 163.

⁴⁰ Fitzgerald, P. J., 1966, op. cit. p.188.

⁴¹ Allen, Carleton Kemp, Sir, 1964, op. cit. p.71.

⁴² Fitzgerald, P. J., 1966, op. cit. p.141.

⁴³ Luke, H.K., 1982, op. cit. p. 33

Denham, Paul, 1983, op. cit. p.9.

⁴⁴ Jenks, Edward, *The Book of English Law* (6th ed., John Murray, London, 1967) p.24.

⁴⁵ Lewis, Ellis T., "The History of Judicial Precedent" 46 (1930) *LQR* 207 at 207.

⁴⁶ Baker, J.H., 1990, op. cit. p.225.

Jenks, Edward, 1949, op. cit. p.79.

⁴⁷ S.H.Bailey & D.C. Ormerod, 2002, op. cit. p.486.

Cassell and Co. Ltd. v. Broome [1972] AC 1027 at 1054.

similar cases.⁴⁸ Technically it is not the court's judgement or decision that is important rather it is the *ratio decidendi* of the case which forms a precedent.⁴⁹ Where a *ratio decidendi* is considered relevant to a subsequent case and is applied by the court to decide it, the court is said to follow the precedent.

Precedent may serve another very important purpose of guiding judges.⁵⁰ It prevents new judges from unwittingly leaving the right course settled by their wise predecessors.⁵¹ In this way the doctrine of *stare decisis* not only affects the parties but everyone else by leaving its impact on the future decisions of courts.⁵² The doctrine implies the stability of the legal system along the stream of time and suggests that the contents of the legal system are more or less settled and that the social, economic and political changes have not affected the society and its need for a changed rule of law.⁵³ This implies that a legal system based on precedents is inclined to rigidity or continuity because it is confined only to declaring law instead of making it.⁵⁴ However, it has never been claimed, even in the most rigidly codified systems, that a judge should shut his mind to the reasoning of others in like circumstances.⁵⁵ Even today the decisions of Court of Appeal and House of Lords can be very important in law making because they may adjudicate the issues which have never arisen in quite the same way before.⁵⁶

By following a precedent, a judge is seeking authoritative basis for his decision.⁵⁷ A departure from the precedent may cause injustice to those who have shaped their conduct in the light of the decision of the court.⁵⁸ The primary requisites of law are that it should be certain and applicable to all so that they may know it and feel its impartiality.⁵⁹ The public interest requires that the principle according to which the law

Manchester, C., & Salter, D., *Exploring the Law* (2nd ed., Sweet & Maxwell, 2000) p.13.

⁴⁸ Darbyshire, P., 2001, op.cit.p.36.

⁴⁹ Manchester, C., & Salter, D., 2000, op. cit. p.4.

S.H.Bailey & D.C. Ormerod, 2002, op. cit. p.480.

⁵⁰ Allen, Carleton Kemp, Sir, 1964, op. cit. p.162.

⁵¹ Baker, J.H., 1990, op. cit. p.225.

⁵² Zander, Michael, 1999, op. cit. p.195.

⁵³ Stone, Julius, "The Ratio of the Ratio Decidendi" 22 (1959) *MLR* 597 at 598.

⁵⁴ Jenks, Edward, 1967, op. cit. p.27.

⁵⁵ Allen, Carleton Kemp, Sir, 1964, op. cit. p.161.

⁵⁶ Atiyah, P.S., 1995, op. cit. p.19.

⁵⁷ Allen, Carleton Kemp, Sir, 1964, op. cit. p.162.

⁵⁸ Paton, G. W., 1972, op. cit. p.224.

Ingman, Terence, *The English Legal Process* (9th ed. Oxford University Press, 2002) p.431.

⁵⁹ Fifoot, C.H.S., *English Law and its Background* (C. Bell & Sons Ltd, London, 1932) p.5.

was administered should be made known to the people.⁶⁰ Precedents are a means to make the law known to them, unless a judge does as his predecessor has done no one would know with certainty what the law was.⁶¹ However, a too rigid adherence to precedent may lead to injustice in certain cases and also unduly restrict the proper development of law.⁶² This may be the reason that the doctrine is not recognised within most civil law jurisdictions, for it restricts the right of judges to interpret law.⁶³ Nonetheless, in order to maintain uniformity the concept of *jurisprudence constante* is applied to ensure that the judges shall adjudicate in a predictable manner.

The quality of judge-made law and the authority of a precedent depend upon judicial impartiality, capacity of the judge, power of his imagination and his commitment to the ideals of justice.⁶⁴ However, its value can be undermined on the ground that throughout the common law world there are judges who will, consciously or not, decide the cases, the way political authority wants them to, rather than according to law.⁶⁵ A court could be bound by a precedent only if it was unimpeachable and its authority was established.⁶⁶ Since judges, as human beings, sometimes make mistakes, the precedent may be wrong and it could be corrected by the court of appeal. If a judge believes a previous decision to be wrong, he is not bound to follow it because a strict adherence to precedent can increase uncertainty, for it encourages over-subtle distinctions between cases essentially similar.⁶⁷ The convenience of following precedents should not be allowed to degenerate into a mere mechanical exercise performed without thought.⁶⁸

1.2.2 Origin and Development of Common Law

Primitive man knew nothing of laws except customs, the body of unwritten rules, evolved with the evolution of society.⁶⁹ The primitive laws obtained their force from custom of a certain territory which was declared as its law by those who were familiar with it.⁷⁰ Customs were not deliberately designed; they originated inadvertently having their roots far off in the history. Though the needs of society were diverse yet

⁶⁰ Manchester, A.H., *A Modern Legal History of England and Wales 1750-1950* (Butterworths, 1980) p.24.

⁶¹ Lewis, Ellis T., 1930, op. cit. p.221.

⁶² Scarman, Leslie, *Law Report: The New Pattern* (Routledge & Kegan Paul, London, 1968) p.23.

⁶³ *Stare decisis* (http://www.fact-index.com/c/co/common_law.html) p.1.

⁶⁴ Luke, H.K., 1982, op. cit. p.29.

⁶⁵ Roebuck, Derek, *The Background of the Common Law* (2nd ed., Oxford University Press, N.York, 1990) p.3.

⁶⁶ Baker, J.H., 1990, op. cit. p.229.

⁶⁷ *Ibid.* p.228.

⁶⁸ Ingman, Terence, 2002, op. cit. p.430.

⁶⁹ Sadler, Gilbert T., 1919, op. cit. p.1

⁷⁰ Hogue, A. R., 1966, op. cit. p.9.

unchanging, hence met by the customary obligations.⁷¹ The customary law, approved by use, carried the greatest authority⁷² and provided foundation for the origin of common law. Different phases of common law's development can be summarised as under.

1.2.2.1 Law and Administration of Justice before Norman Conquest

In the Anglo Saxon times, there was no uniform law for the whole of England.⁷³ The laws were mostly oral varying with the variation of local custom.⁷⁴ The diversity of customs can be highlighted by the fact that even for centuries after the accomplishment of common law there was no common language or common dress in the kingdom.⁷⁵ Most important men of the society had judicial powers and were responsible for law and administration.⁷⁶ Administration of justice was a profitable business⁷⁷ and a privilege shared by the powerful; the king laid down the rules of his peace, so did the lord and the bishop.⁷⁸ Breach of peace had two-fold penalty, one to the victim and the other to the king, lord or bishop.⁷⁹ Everyone who had some authority had his own court and hence could do justice.⁸⁰ There were no police and no justice separate from administration until the end of the middle ages in England.⁸¹ In early 13th century a preliminary form of police system was introduced in each county to keep peace.⁸²

A number of judicial tribunals were exercising parallel jurisdiction in the disputes amongst the subjects, like the courts of shires, hundreds and boroughs, the courts of lords, and the king.⁸³ It was a network of competing courts of conflicting jurisdictions,⁸⁴ yet it played its role in the growth of common law and by the end of 13th century the common law absorbed much of it.⁸⁵ By the end of 15th century common law courts established their superiority over all local courts, and the new courts such as council

⁷¹ Milsom, S.F.C., *Historical Foundations of the Common Law* (2nd ed., Butterworths, 1981) p.13.

⁷² Hogue, A. R., 1966, op. cit. p.10.

⁷³ Slapper, G. & Kelly, D., *The English Legal System* (5th ed., Cavendish Publishing, London, 2001) p.3.

⁷⁴ Denham, Paul, 1983, op. cit. p.5.

⁷⁵ Warmington, L. Crispin (Editor-in-chief) *Stephen's Commentaries on the Law of England* (Butterworth's & Co., London, 1950) Vol. 1, p.12.

⁷⁶ Kiralfy, A.K.R., 1990, op. cit. p.2.

⁷⁷ Baker, J.H., 1990, op. cit. p.17.

⁷⁸ Roebuck, Derek, 1990, op. cit. p.30.

⁷⁹ *Ibid.* p.13.

⁸⁰ Caenegem, R. C. Van, *The Birth of English Common Law* (The University Press, Cambridge, 1973) p.14.

⁸¹ Roebuck, Derek, 1990, op. cit. p.11.

⁸² Baker, J.H., 1990, op. cit. p.29.

⁸³ *Ibid.* p.15.

⁸⁴ Holdsworth, W.S., *A History of English Law* (6th ed., Methuen & Co., London, 1938) Vol. 1, p.4.

⁸⁵ Hogue, A. R., 1966, op. cit. p.5.

court, Star Chamber and court of chancery were all centralised.⁸⁶ Traces of the borough and city courts could be found until 1971, when the Courts Act 1971 abolished them.⁸⁷

The royal administration depended upon the lord's administration. If a man had no lord he could be proclaimed an outlaw; being outside the law's protection against anyone doing him harm.⁸⁸ The lord was responsible to produce him in the court if required.⁸⁹ Dependence on a lord was a check on the individual freedom of a freeborn man.⁹⁰ The administration of justice was discriminatory taking into account the rank or the status of the person. There was nothing called law, rather groups of people were enforcing local customs in an arbitrary manner. The distinction between civil and criminal liability was not recognised.⁹¹ However, it began to rise in the late 12th century under the influence of Roman and canon law.⁹² There was no difference between public and private law, substantive law and procedure; and even the most obvious distinction between ecclesiastical and secular affairs was absent.⁹³

There was no central state authority, the essential element of contemporary civilised life.⁹⁴ It was a typical localised society that remained divided into classes of noble, knights, esquires, gentleman, plebeians, clergy, and many others up to the first quarter of 17th century.⁹⁵ The state of legal affairs was hap-hazard.⁹⁶ Pre-conquest legal process of England was used by the powerful to their own advantages.⁹⁷ The Norman Conquest brought uniformity and eliminated the hap-hazard state of affairs.

1.2.2.2 *Norman Conquest and After*

The Norman Conquest is an event of great importance in English legal history.⁹⁸ At the time of the conquest, in 1066, there was very little that could be called common law.⁹⁹

There was no central court administering justice to neither the whole country nor any

⁸⁶ Holdsworth, W.S., 1938, op. cit. Vol. I, p.187.

⁸⁷ The Courts Act 1971(c.23) ss. 42-43.

⁸⁸ Roebuck, Derek, 1990, op. cit. p.13.

⁸⁹ Holdsworth, W.S., 1938, op. cit. Vol. I, p.23.

⁹⁰ Pollock, & Maitland, 1898, op. cit. Vol. I, p.31.

⁹¹ *Ibid.* (Reissue, 1968) Vol. II., p.499.

⁹² Hudson, John, 1996, op. cit. p.56.

⁹³ Jenks, Edward, 1967, op. cit. p.13.

⁹⁴ Jenks, Edward, 1949, op. cit. p.7.

⁹⁵ O' Sullivan, Richard, *The Inheritance of the Common Law* (Stevens & Sons, London, 1950) p.26.

Pollock, & Maitland, 1898, op. cit. Vol. I., pp.32-34.

⁹⁶ Jenks, Edward, 1949, op. cit. p.17.

⁹⁷ Harding, Alan, *The Law Courts of Medieval England* (George Allen &Unwin, London, 1973) p.30.

⁹⁸ David, Rene, 1985, op. cit. p.311.

⁹⁹ Roebuck, Derek, 1990, op. cit. pp.17-18.

developed form of judicature or legislative¹⁰⁰ and there existed no concept of separation of powers.¹⁰¹ The conquest resulted in the introduction of precise and orderly methods into government and law.¹⁰² The Norman kings and their successors made a great effort and assumed the responsibility of administration of justice themselves.¹⁰³

The conquest brought a strong ruler with the power and will to make his influence felt throughout the country by establishing a central royal court and centralised administrative organisation.¹⁰⁴ Soon after the conquest the royal justices travelled all over the country to hear civil and criminal pleas of the crown and brought justice to the doors of their subjects.¹⁰⁵ Normans rapidly set up an elaborate system of courts not only to enforce pleas of the Crown but also common pleas.¹⁰⁶ The court of common pleas contributed to the development of common law more than any other court.¹⁰⁷ The Normans were successful in putting together the basic ingredients of common law; nonetheless it took two centuries to establish a centralised judicial system.¹⁰⁸

The centralised judicial system gradually rendered the local courts insignificant and substituted one common law for the confused mess of local customs.¹⁰⁹ In the 13th century, litigation was allowed only through the limited number of standard forms of writs available from chancery on the payment of prescribed fee.¹¹⁰ Originally there were only three writs, writ of right to land, writ of debt and detinue, and the writ of trespass.¹¹¹ New forms of writs were introduced from time to time to meet the requirements of changing circumstances.¹¹² The rapid growth of common law during this period is mainly attributed to the writ system.¹¹³ A writ issued once becomes a precedent for the future.¹¹⁴ However, in the 19th century, in order to bring uniformity in

¹⁰⁰ Holdsworth, W.S., 1938, op. cit. Vol. I, p.3.

¹⁰¹ Milsom, S.F.C., 1981, op. cit. p.13.

¹⁰² Plucknett, Theodore F. T., *A Concise History of the Common Law* (5th ed., Butterworth, 1956) p.11.

¹⁰³ Roebuck, Derek, 1990, op. cit. p.20.

¹⁰⁴ Holdsworth, W.S., 1938, op. cit. Vol. I, p.4.

David, Rene, 1985, op. cit. p.311.

¹⁰⁵ Holdsworth, W.S., 1938, op. cit. Vol. I, p.49.

¹⁰⁶ Jenks, Edward, 1967, op. cit. p.14.

¹⁰⁷ Baker, J.H., 1990, op. cit. p.46.

¹⁰⁸ Warmington, L. Crispin, 1950, op. cit. Vol. I, p.12.

¹⁰⁹ Holdsworth, W.S., 1938, op. cit. Vol. I, p.5.

¹¹⁰ Brand, Paul, *The Making of the Common Law* (The Hambledon Press, London, 1992) p.96.

¹¹¹ Geer, F. A., 1893, op. cit. p.158.

¹¹² Jenks, Edward, 1967, op. cit. p.31.

¹¹³ Jenks, Edward, 1949, op. cit. p.45.

¹¹⁴ Baker, J.H., 1990, op. cit. p.65.

the system most of the forms of actions were abolished and thereafter any litigation could commence by the same form of writ and also different causes of action could be joined in it.¹¹⁵

1.2.3 Equity

Early common law was somewhat inflexible; it would not adjudicate a case that did not fall precisely under the purview of a particular writ and had an unwieldy set of procedural rules.¹¹⁶ It means that an aggrieved party was not entitled to relief if no remedy was provided under the law. Except for a few types of lawsuits in which the object was to recover real or personal property, the only remedy provided was damages; the body of legal principles known as equity evolved partly to overcome these deficiencies.¹¹⁷ Equity served as an appendix to the common law by filling up its defects, preventing abuse of its process, and hence setting up itself as a rival to the common law courts.¹¹⁸

The common law courts, bound by precedent, were unable to administer justice in certain cases, and the plaintiffs started petitioning the sovereign seeking justice, hence the origin of the court of equity.¹¹⁹ Equity dates from the 15th century in the form of the Court of Chancery.¹²⁰ Rules of equity, unlike the rules of common law, were altered, improved, and refined from time to time for securing the better administration of justice.¹²¹ Court of equity exercised exclusive, concurrent, and auxiliary jurisdiction in the cases where common law provided no relief or was insufficient or to remove procedural deficiencies respectively.¹²² Unlike common law, equity established the rule that where there is a wrong there is a remedy.¹²³

Until recent times there was a sharp division between common law and equity. Obviously, the exercise of common law and equity jurisdiction by different courts raised the risk of rivalry between the two and their amalgamation was considered

¹¹⁵ Glenn, H. Patrick, 2000, op. cit. p.223.

Baker, J.H., 1990, op. cit. p.80.

¹¹⁶ Allen, Carleton Kemp, Sir, 1964, op. cit. p.401.

S.H.Bailey & D.C. Ormerod, 2002, op. cit. p.4.

¹¹⁷ Glenn, H. Patrick, 2000, op. cit. p.237.

¹¹⁸ Jenks, Edward, 1967, op. cit. p.33.

S.H.Bailey & D.C. Ormerod, 2002, op. cit. p.5.

¹¹⁹ Denham, Paul, 1983, op. cit. p.11.

¹²⁰ *Ibid.*

¹²¹ Fitzgerald, P. J., 1966, op. cit. p.145.

¹²² Denham, Paul, 1983, op. cit. p.11.

appropriate.¹²⁴ In the 19th century the rivalry between both the courts had become intense¹²⁵ and ultimately both the courts were amalgamated by an Act of parliament.¹²⁶ Thenceforth, actions at law and suits in equity are to be administered in the same courts and under the same procedure.¹²⁷

1.2.4 Legislation

A legal system based on the-judge-made law could keep pace with the needs of society if the conditions remained fairly static.¹²⁸ In the modern age dramatic changes are taking place in the social, economic, and political structure of society. Judge-made law cannot cope with such changes. Legislation is the rapid and efficient means to meet the needs of society. Though the legislation as a regular practice started in the 13th century by the establishment of the parliament,¹²⁹ however the changing political and socio-economic conditions led to the dominance of legislation over common law from the late 19th century.¹³⁰ Rules of law developed by the courts can be modified or reversed by the legislature and it can legislate on any subject.¹³¹ Nonetheless, it is desired that legislation should be avoided in the areas where the basic principles are still in the process of evolution and a legal dispute is likely to arise unexpectedly.¹³²

A law is ought to be simple, straightforward, readily accessible and its provisions to be easily and immediately ascertainable.¹³³ An enacted law, indeed, have all these characteristics and is easily intelligible.¹³⁴ Moreover, Legislation removes the uncertainties, illogicalities, and inconsistencies of law.¹³⁵ Though the bulk of English criminal law is now found in the statutes yet some offences, like murder, manslaughter, assault and conspiracy to defraud, are governed under the principles of common law; likewise some basic principles of criminal liability, like intention and recklessness and defences like duress, intoxication, and insanity are still firmly embedded in the common

¹²³ Denham, Paul, 1999, op. cit. p.65.

¹²⁴ Jenks, Edward, 1967, op. cit. p.36.

¹²⁵ Denham, Paul, 1983, op. cit. p.12.

¹²⁶ The Judicature Act 1873, s. 24.

¹²⁷ Walker, R. J. & Ward, R., 1994, op. cit. p.7.

¹²⁸ Kiralfy, A.K.R., 1990, op. cit. p.98.

¹²⁹ Jenks, Edward, 1967, op.cit.p.37.

¹³⁰ Denham, Paul, 1999, op. cit. p.43.

¹³¹ Kiralfy, A.K.R., 1990, op. cit. p.98.

¹³² *Ibid.* p.101.

¹³³ Samuels, Alec, "Is it in force or Isn't it?" 35 (1979) *The Magistrate* 173 at 174.

¹³⁴ Luke, H.K., 1982, op. cit p. 31.

¹³⁵ Hahlo, H. R., "Here Lies the Common Law: Rest in Peace" 30 (1967) *MLR* 241 at 246.

law.¹³⁶ In addition, the law relating to movable property, prerogative of crown and constitutional law can only be understood by the study of common law.¹³⁷

1.2.5 Other Sources of English Law

Although common law, legislation and equity are the major sources of English law,¹³⁸ however, after joining the European Community and signing the Treaty of European Union, the legislation and judicial decisions of European Court of Justice have become its important and additional source.¹³⁹ The international conventions are meant to harmonise the laws of all the contracting states on the particular subject and this cannot be achieved unless their interpretation is same to the possible extent in all the contracting states.¹⁴⁰ Normally an international treaty does not impinge on the sovereignty of the parliaments of the member states, rather a failure to comply with its provisions results in the breach of international law.¹⁴¹ However, the EC treaty has its own legal system which the courts of the member states are bound to apply.¹⁴²

The treaty demanded that the courts of the member states should set aside any national law which prevent them from granting any relief which, otherwise, is available under the Community laws.¹⁴³ UK's parliament gave effect to the community law under statutory provisions. Section 2, of the European Communities Act 1972, states that both past and future Acts of the parliament should be effective subject to the Community law.¹⁴⁴ In the light of this rule UK courts are now Community law courts, bound to give effect to that law where it is operative.¹⁴⁵ They are not allowed to set entirely different rules to undermine the convention.¹⁴⁶ It suggests that English courts cannot disregard any provision of the convention.¹⁴⁷ The decisions of the European Court of Justice are binding on all the courts of member countries including English courts.¹⁴⁸ It is an interesting phenomenon that English courts are bound to follow the decisions of

¹³⁶ Ashworth, Andrew, 1999, op. cit. p.5.

Allen, Carleton Kemp, Sir, 1964, op. cit. p.76.

¹³⁷ Jenks, Edward, 1967, op. cit. p.29.

¹³⁸ Zander, Michael, 1999, op. cit. p.374.

¹³⁹ Manchester, C., & Salter, D., 2000, op. cit. p.3.

¹⁴⁰ Dicey, A.V., *Dicey and Morris on the Conflict of Laws* (12th ed., Sweet & Maxwell, 1993) Vol. I, p.9.

¹⁴¹ Atiyah, P.S., 1995, op. cit. p.93.

¹⁴² Zander, Michael, 1999, op. cit. p.382.

¹⁴³ *R. v. Secretary of State for Transport, Ex p. Factortame Ltd.* [1990] 3 WLR 818 at 852.

¹⁴⁴ Wade, H. W. R., "What Has Happened to the Sovereignty of Parliament?" 107 [1991] *LQR* 1.

S.H.Bailey & D.C. Ormerod, 2002, op. cit. p.354.

¹⁴⁵ Slapper, G. & Kelly, D., 2001, op. cit. p.569.

¹⁴⁶ *Sidhu and Others v. British Airways* [1997] A.C. 430 at 454.

¹⁴⁷ Darbyshire, P., 2001, op. cit. p.45.

¹⁴⁸ *Ibid.* p.37.

European Court of Justice but the European Court itself is not bound by its own decisions.¹⁴⁹ Nevertheless, for the purpose of legal certainty and uniformity the ECJ generally follows its own previous decisions.¹⁵⁰

It implies that the interpretation of the national laws by the European Court will take precedence over all the laws prevailing in the country including statutes if they appear contrary to such interpretation.¹⁵¹ In the context of the Community law, the parliament is no longer sovereign¹⁵² rather subordinate to the European Community law.¹⁵³ The membership of the Community requires every member to undertake that its domestic law shall give way to the Community law in case of a conflict. It means that in case of a conflict the Community law will prevail over the UK's laws and hence the parliament will be bound to annul, amend, or change the national law contrary to the Community laws. The House of Lords confirmed the supremacy of the Community law and declared that an Act of parliament contrary to the Community law is unenforceable.¹⁵⁴ However, the supremacy of Community law has been tempered by the fact that the EC legislation must be in accordance with the principles of international laws.¹⁵⁵

Similarly, the parties to the European Convention on Human Rights, within their jurisdiction, are required to protect the rights safeguarded in the convention and to provide a remedy for their breach.¹⁵⁶ Initially, the UK government did not enact to incorporate the convention into its domestic laws for the assumption that the rights and freedoms set out in the convention are already protected under the domestic laws.¹⁵⁷ However, later on the convention was incorporated into UK laws as Human Rights Act 1998.¹⁵⁸ Under the provisions of the Act all the primary and subordinate legislation shall be given effect in a way which is compatible with the convention rights.¹⁵⁹ The

¹⁴⁹ Baker, J.H., 1990, op. cit. p.230.

¹⁵⁰ Manchester, C., & Salter, D., 2000, op. cit. p.7.

¹⁵¹ Zander, Michael, 1999, op. cit. p.381.

Slapper, G. & Kelly, D., 2001, op. cit. p.567.

¹⁵² Wade, H.W.R., 1991, op. cit. p.2.

¹⁵³ Atiyah, P.S., 1995, op. cit. p.93.

¹⁵⁴ *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others* (No.1) [1990] 2 AC 85 & (No.2) [1991] 1 AC 603 at 659.

¹⁵⁵ Weatherill, Stephen & Beaumont, Paul, *E U Law* (3rd ed., Penguin Books, London, 1999) p.437.

¹⁵⁶ Manchester, C., & Salter, D., 2000, op. cit. p.131.

¹⁵⁷ *Ibid.* p.132.

¹⁵⁸ *Ibid.*

¹⁵⁹ Zander, Michael, 1999, op. cit. p.167.

fundamental rights guaranteed under Article 5 and 6 have become the parameters for the statutes and case law of the English courts.¹⁶⁰

1.3 *Distinctive Features of English Law*

One of the distinctive features of English law is that it is based upon judicial decisions, leaving a scope for a discretionary, *ad hoc*, and pragmatic approach to the particular problem before the court. The grounds for deciding cases are found in precedents; whereas civil law system based upon codified laws controls the exercise of judicial discretion.¹⁶¹ Though the idea of codification is finding its place in English legal system but still certain important areas are being governed by the principles of unwritten common law. The different roles of case law in civil and common law traditions creates differences in the way the courts render their decisions. Common law courts generally explain in detail the rationale behind their decisions with numerous citations to previous decisions and other authority. By contrast, decisions in the courts of most civil law jurisdictions are generally very short, referring only to the statute applied.¹⁶²

The jury trial is a common law process by which the jury are responsible for hearing the dispute, evaluating the evidence presented and deciding on the facts,¹⁶³ in accordance with the rule of law as directed by the judge. Trial by jury is considered to be the heart of the Anglo-Saxon process of criminal trial.¹⁶⁴ The jury is the final arbiter of the question of fact; however it has no part to play in fixing the punishment.¹⁶⁵ A jury is a body of responsible persons of neighbourhood helping the judge to resolve a conflict.¹⁶⁶ The jury trial has its peculiar feature of division of responsibility between the judge and the jury, the judge explains the law and directs the jury on the rule of law and the actual judgement is made by the jury. Though to some extent the trial by jury is better than the ordeals and battle yet its simplicity and rationality are doubtful.

The jury trial has attracted more praise and less theoretical analysis¹⁶⁷ because the Contempt of Court Act 1981 made it an offence to publish or solicit for publication any

¹⁶⁰ Darbyshire, P., 2001, op. cit. p.174.

¹⁶¹ Slapper, G. & Kelly, D., 2001, op. cit. p.3.

¹⁶² Common Law (http://www.fact-index.com/c/co/common_law.html) p.3

¹⁶³ Holdsworth, W.S., 1938, op. cit. Vol. I, p.298.

¹⁶⁴ Findlay, Mark, & Duff, Peter, (ed) *The Jury Under Attack* (Butterworths, London, 1988) p.140.

¹⁶⁵ Darbyshire, P., 2001, op. cit. p.313.

¹⁶⁶ Jenks, Edward, 1949, op. cit. p.48.

¹⁶⁷ Darbyshire, P., "The Lamp that Shows that Freedom Lives-Is it Worth the Candle?"[1991] Crim. LR. 740

detail of what happens in the jury room.¹⁶⁸ However, this mode of trial is not free from defects. A jury is comprised of a group which eliminates the concept of individual responsibility. It gives no reason for its verdict nor the verdict is subject to any appeal, experience shows that the verdict can be influenced by intimidation,¹⁶⁹ as it has been apprehended in *Tony Martin's* case.¹⁷⁰ Corruption and misconduct by jurors was an undeniable obstacle to justice.¹⁷¹ A jury may be composed of persons having no desire or capacity to grasp complex question, whether of fact or law, to weigh evidence or to reach a conclusion upon facts in issue.¹⁷²

In the middle ages juries were ignorant and not very intelligent to perform their functions properly, the questions in dispute were to be much narrowed down so that they could be answered simply by guilty or non guilty.¹⁷³ Until 1930, there was an extensive use of jury in civil actions¹⁷⁴ but now most civil and criminal cases are not tried before a jury.¹⁷⁵ At the moment, only 3% criminal cases are tried in the Crown Court and most of the offenders plead guilty and merely appear before the judge for sentence.¹⁷⁶ The courts themselves admit that in certain cases the trial by a judge should be the usual mode.¹⁷⁷ It is also alleged that the chances of acquittal of the accused in a jury trial are very high.¹⁷⁸ It can be claimed without any fear of contradiction that judges are more competent in deciding question of fact relying upon their experience of weighing evidence, so a trial by a judge is more rationale and preferable.

Statutes codifying English common law are understood to always be interpreted in the light of the common law tradition, and so may leave a number of things unexplained because they are already understood from pre-existing precedents and customs. Codification restate the common law position in a single document rather than creating new offences, so the common law remains relevant to their interpretation.¹⁷⁹ By contrast

¹⁶⁸ The Contempt of Court Act 1981, Section 8.

¹⁶⁹ Holdsworth, W.S., 1938, op. cit. Vol. I, p.347.

¹⁷⁰ *The Times*, April 20, 2000.

¹⁷¹ Baker, J.H., 1990, op. cit. p.156.

¹⁷² Holdsworth, W.S., 1938, op. cit. Vol. I, p.347.

¹⁷³ Jenks, Edward, 1967, op. cit. p.34.

¹⁷⁴ Atiyah, P.S., 1995, op. cit. p.30

¹⁷⁵ Home Office, *Juries in Serious Fraud Trials: A Consultation Document* (<http://www.homeoffice.gov.uk>). 2003, Chapter-2.

¹⁷⁶ Darbyshire, P., 2001, op. cit. p.313.

¹⁷⁷ *Ward v. James* [1966] 1 QB 273 at p.303.

¹⁷⁸ Atiyah, P.S., 1995, op. cit. p.33.

¹⁷⁹ Common Law (http://www.fact-index.com/c/co/common_law.html) p.3.

to the codifications of common law, in other jurisdictions some laws are purely statutory, and may create new causes of action and offences beyond the common law.

The English law has sufficient flexibility to take account of the changing needs of a continually changing society.¹⁸⁰ Being secular in its nature it has absorbed all types of changes that occurred in society. English law is mainly based upon the local customs as recognised and embodied in legal framework by the courts.¹⁸¹ If a case is raised to a common law court and no statute or a precedent appears to deal with the question in issue, the judge may decide the case on the principle of analogy¹⁸² because no intelligent legal system would refute the indispensable instrument of analogy and parity of reasoning.¹⁸³ In this sense the judge undoubtedly makes and declares law in a limited sense and this practice gives the law flexibility which is one of its features but it does not allow a departure from recognised principles¹⁸⁴ because too much flexibility will lead to intolerable uncertainty. Flexibility of English law may be attributed to the principles of equity which abated the rigours of the fixed common law.¹⁸⁵

Conclusion

Common law, being a human effort, is the product of time and places, economic and class interests, struggle for power between political factions, and the trial of cases by the judges and lawyers of great skill.¹⁸⁶ Customs, precedents, legal writings, legislation, human reason and international treaties played their part to take it to the stage where it stands today. It is the basic characteristic of human effort that there is always room for improvement. Though the English law has passed through many stages of its development yet it is not free from defects. Statutory reform of common law is an inevitable fact of the 20th century.¹⁸⁷ The Law Commission admitted that a great deal is to be done before it can be justifiably said that the English legal system is harmonious with the social and economic requirements of the modern society.¹⁸⁸ According to them the English law is not certain, nor readily accessible or easily understandable. In 1968, expressing their dissatisfaction over the criminal law the commissioners stated that it is

¹⁸⁰ Per Lord Justice Donaldson in *Parker v. British Airways Board* [1982] 2 WLR 503 at p.513.

¹⁸¹ Keeton, G., *English Law: The Judicial Contribution* (David & Charles, Newton Abbot, 1974) p.10.

¹⁸² Waldron, Jeremy, *The Law* (Routledge, London, N. York, 1990) p. 6.

¹⁸³ Allen, Carleton Kemp, Sir, 1964, op. cit. p.67.

¹⁸⁴ Jenks, Edward, 1967, op. cit. p.28.

¹⁸⁵ Lobban, M., *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press, Oxford, 1991) p.1.

¹⁸⁶ Roebuck, Derek, 1990, op. cit. p.2.

¹⁸⁷ Luke, H. K., 1982, op. cit. p. 29.

complex, obscure, its terminology confusing, and its provisions often out of accord with the modern conditions.¹⁸⁹ Simply, the common law has been declared defective and unattractive. The law making process in the UK has also been declared unsatisfactory and obscure as compared to many other jurisdictions.¹⁹⁰

In the next chapter we'll deal with the nature and sources of Islamic law and it will be made clear how the two systems are alike or differ from each other.

¹⁸⁸ The Law Commission, *First Programme of the Law Commission, Note by the Commissioners* (Law Com. No. 1, 1965).

¹⁸⁹ The Law Commission, *Codification of the Criminal Law* (Law Com. No. 14, 1968) Item No. XVIII.

¹⁹⁰ Dale, William, Sir, *Legislative Drafting: A New Approach* (Butterworths, London, 1977) pp.331-33.

Chapter-2 Islamic Law its Nature and Sources

2.1 Introduction

The Islamic legal system is one of the major non-western legal systems of the world¹ and Islam itself is the second largest religion in Europe.² The word 'Islam' literally means peace, commitment, submission, and obedience.³ In its religious sense it denotes submission to the will of God and in its secular sense the establishment of peace.⁴ As a religion it stands for a belief in Allah and all His prophets and demands an unconditional submission to the Divine will revealed to mankind through Prophets.⁵

The study of law and theology cannot be differentiated; no distinction can be made between rules of law and that of religion.⁶ This joint body of learning is termed as *Fiqh*, or understanding of the word of God and man's duties under it.⁷ The life of a Muslim has always been dominated by the two; theology, prescribing the beliefs, and the law, declaring the permissible and prohibited.⁸ The discipline of law rather than theology played the primary part in the development of this understanding, for the law became the central discipline of Islam.⁹ Islamic law is essentially religious as opposed to English concept of law and hence enormously wider in its scope than any secular law.¹⁰

The term *Fiqh* thus came to have exclusively legal undertone. Later the word *Shari'ah* or the path¹¹ became the accepted expression for describing this discipline. Islamic law, having its expression in the *Qur'an* and the *Sunnah*, is technically known as *Shari'ah*.¹² It is the expression of divine limits over the freedom of human in his individual and collective life. *Shari'ah* is the divine path along with it is incumbent on mankind to walk.¹³ It enunciates the rules and regulations, derived from the *Qur'an* and *Sunnah*,

¹ Edge, Ian, *Islamic Law and Legal theory* (Aldershot, Dartmouth, 1996) p. xiii

² Ahmad, Khurshid, *Islam: Its Meaning and Message* (Islamic Council of Europe, London, 1976) Foreword.

³ Ibn Manzur, *Lisaan Al-Arab* (Dar Sader, Beirut, 1955) Vol. XII, p.293.

Mulla, D. F. Sir, *Principles of Mohammadan Law* (18th ed. Mansoor Book House, Lahore, 1988) p. xiv.

Gibb, H.A.R., *Mohammedanism: An Historical Survey* (Oxford University Press, 1949) p.1.

⁴ Mulla, D. F. Sir, 1988, op. cit. p. xv.

⁵ Ahmad, Khurshid, 1976, op. cit. p.28.

⁶ Hassan, Ahmad, 1982, op. cit. p.30.

⁷ *Ibid.*

⁸ Anderson, J.N.D., *Islamic law in the Modern World* (Stevens & Sons, London, 1959) p.19.

⁹ *Ibid.*

¹⁰ *Ibid.* p.4.

¹¹ Ibn Manzur, 1955, op. cit. Vol. VIII, p.176.

¹² Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed. I.R.I., Islamabad, Pakistan, 1993) p.1.

¹³ Doi, Abdur Rehman I., *Shari'ah: The Islamic Law* (Ta'ha Publishers, London, 1997) p.2.

governing rights and liabilities of Muslims.¹⁴ Both the sources are textual in character and technically called *Nusus* (sing. *Nass*) in Arabic. *Shari'ah* covers both, law, in the English sense, and also moral rules not enforceable by the law courts.¹⁵ It reaches much deeper into the thought, life and conduct of human beings than a secular law.¹⁶

This chapter will deal with the sources and nature of *Shari'ah* and its distinction from the English law. It will demonstrate that the revelatory nature of *Shari'ah* restrict the scope of law making by man. The restrictions are based on divine commandments, however these restrictions do not render it inflexible and the secondary sources of *Shari'ah* are capable of developing legal rules to cope with the requirements of modern times. A brief description of four major *Sunni* schools of thought has also been included to facilitate the understanding of development of *Shari'ah*. The similarities and dissimilarities of both the systems will be highlighted elaborating the characteristics which distinguish Islamic legal system from the English one.

2.2 Sources of Islamic Law

Sources of Islamic law fall into two main categories; the primary and the secondary or dependent sources,¹⁷ some time these sources are designated as agreed upon and disputed sources as well.¹⁸ In the classical view of Islamic jurisprudence the Holy *Qur'an*, *Sunnah*, *Ijma* together with *Qiyas* comprise the primary sources.¹⁹ These sources are more authoritative than any man-made statute having unchanged authority in all the times and the circumstances.²⁰ It is unanimously accepted that the Holy *Qur'an* and the *Sunnah* are the primary sources of *Shari'ah* and the custodian of Islamic thought and knowledge. *Qiyas* and *Ijma* are, in fact, instruments for legislation on new problems for whose solution a direct guidance from the *Qur'an* or the *Sunnah* is not available.²¹ An enormous proportion of *Shari'ah*, indeed, rests on these two sources.

¹⁴ Bosworth, C. E. & Donzel, E. Van, *Encyclopaedia of Islam* (New ed. E.J. Brill, Leiden, 1997) Vol. IX, p.321.

¹⁵ Gerber, Haim, *Islamic Law and Culture 1600-1840* (Brill, Leiden, 1999) p.128.

¹⁶ Weeramantry, C. G., *Islamic Jurisprudence: An International Perspective* (Macmillan, 1988) p.1.

¹⁷ Hassan, Ahmad, 1982, op. cit. p.31.

¹⁸ Hassan, H. Hamid, *An Introduction to the Study of Islamic Law* (Shari'ah Academy, 1997) p.124.

¹⁹ Hassan, Ahmad, "The Sources of Islamic Law" *Islamic Studies* 7 (1968) 165 at 170.

Anderson, J.N.D., 1959, op. cit. p.13.

Ali, Shaheen Sardar, *Gender and Human Rights in Islam* (Kluwer Law International, 2000) p.19.

²⁰ Weeramantry, C. G., 1988, op. cit. p.42.

Bassiouni, M. Cherif, (ed) *The Islamic Criminal Justice System* (Oceana Publications, 1982) p.9

²¹ Weeramantry, C. G., 1988, op. cit. p.42.

The secondary or the subsidiary sources are, *Istihsan* (public interest), *Masalih Mursalah* or public good, *Istishab* (presumption of continuity), religious laws before Islam, *Madhab al-sahabi*, acts of *Ahl-e-Madina*, *Fatwa* of a companion (legal opinion), *Sadd al-Darah'i* (blocking the means) and customs.²² These sources mainly serve as means to discover law and in themselves are not independent.²³

The primary sources shall be taken in the order mentioned above because it is not permissible to refer to the subsequent source except when no rule is found in the preceding one on the point under consideration.²⁴ However, it is necessary to keep in mind that the *Sunnah* is to be consulted concurrently for the explanation and exposition of the meaning of the *Qur'an* to resolve any ambiguity. The secondary sources need not any specific order for their application in deducing a rule of law.²⁵

2.2.1 The *Qur'an*

The *Qur'an*, the Holy book of Islam, is the bed rock of Islamic jurisprudence.²⁶ It is the primary source of *Shari'ah* and all other sources are subordinate to it.²⁷ It is a part of every Muslim's belief that it has been authentically revealed to the Prophet and has been preserved down the ages without any alteration having been effected in its text.²⁸ The *Qur'an* was not revealed all at once,²⁹ the revelation came in fragments from time to time and the Holy Prophet used to communicate it to his followers and asked them not only to learn it by heart but to write it down as well.³⁰ He also indicated the precise place of the new revelation in the text.³¹

The *Qur'an* was revealed according to happenings, incidents and in response to the questions raised by the companions, which are called the causes of revelation.³² This piecemeal revelation served several purposes; it facilitated the preservation of revelation by reducing into writing and memorising, it led to the gradual legislation, as it will be

²² Hassan, H. Hamid, 1997, op. cit. p.124.

Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (I. T. S., Cambridge, 1991)pp.168-310.

²³ Weiss, Bernard, "Interpretation in Islamic Law: The Theory of *Ijtihad*" 26 (1978) *Am. JCL.* 199 at 202.

²⁴ Hassan, H. Hamid, 1997, op. cit. p.132.

²⁵ *Ibid.*

²⁶ Hassan, Ahmad, 1982, op. cit. p.34.

²⁷ Hassan, H. Hamid, 1997, op. cit. p.143.

Ali, Shaheen Sardar, 2000, op. cit. p.19.

²⁸ Ahmad, Khurshid, 1976, op. cit. p.82

²⁹ Hassan, H. Hamid, 1997, op. cit. p.144.

³⁰ Hamidullah, Muhammad Dr., *An Introduction to Islam* (I. I. F. S. O., 1970) p.20.

³¹ Hassan, H. Hamid, 1997, op. cit. pp.146-47

³² *Ibid.* p.144.

seen in the case of prohibition of alcohol drinking (see 9.7), it made the implementation of *Shari'ah* easy over those who had recently left tribal system. The knowledge of incidents and questions helped the commentators to explain the meaning of the verses revealed on a particular time.³³ The revelation continued during the whole missionary life of the Holy Prophet for a period of 22 years 2 months and 22 days.³⁴

The laws given by the *Qur'an* are eternal, immutable and binding on Muslims of all the countries and ages.³⁵ Since the *Qur'an* has no earthly source, it is obvious that nothing of it can be altered by any human agency or institution.³⁶ As a matter of fact, leaving certain specific offences, the Holy *Qur'an* describes the objectives of law and general principles of legislation in civil and criminal, political and economic, constitutional and international affairs leaving the rest for the scholars of every age to legislate in the light of these principles according to their social needs and interests of the people.³⁷ In the realm of criminal law, society is allowed to legislate in the light of a broad principle that the punishment of an evil should be an evil like it.³⁸

The scholars throughout the centuries attempted to derive a fresh message, a new thought from the *Qur'an* that was more suitable to the realities of their times and the requirement of the community.³⁹ It contains directions for the conduct of the ruler and the ruled, the rich and the poor, for peace as well for war, for spiritual as well as material well-being of man.⁴⁰ A careful study of the Book would show beyond any doubt that there is not a single word in it which could ever become time-barred.

The *Qur'an* calls itself a book of guidance⁴¹ and not a code of law. Out of 6235 verses⁴² at the most only 500 deal with the legal matters, both secular and ecclesiastical, including family, civil and criminal matters.⁴³ According to a more careful opinion there are about 228 such versus out of which 70 deal with the family law, 70 with civil law,

³³ Doi, Abdur Rehman I., 1997, op. cit. p.22.

³⁴ Hamidullah, Muhammad Dr., 1970, op. cit. p.21.

³⁵ Walliullah, Mir, *Muslim Jurisprudence and the Qur'anic Law of Crimes* (I.B. S. Lahore, 1982) p.5.

³⁶ Mulla, D. F. Sir, 1988, op. cit. p. xvi.

Rahman, Fazlur, *Islam* (Holt, Rinehart & Winston, New York, 1966) p.32.

³⁷ Kamali, Mohammad Hashim, 1991, op. cit. p.30.

³⁸ *Al-Qur'an* 42:40.

³⁹ Kamali, Mohammad Hashim, 1991, op. cit. p.32.

⁴⁰ Hamidullah, Muhammad Dr., 1970, op. cit. p.26.

⁴¹ *Al-Qur'an* 2: 3.

⁴² Kamali, Mohammad Hashim, 1991, op. cit. p.14.

30 with criminal law, 13 with procedure and jurisdiction, 10 with constitutional law, 25 with international relationships, and 10 with economic and financial matters.⁴⁴ Such an enumeration, however, can only be approximate. The legal bearing of some injunctions is disputable, whereas some others simultaneously apply to more than one sphere of law.⁴⁵ If we leave out of account those verses which concern the state as such, there are about 80 verses more or less, which deal with the law of personal status.⁴⁶ In addition, these verses are scattered around and not in any particular order.

Apart from the controversy over the number of legal verses, it is clear that the *Qur'an* is an amalgam of law, ethics, and moral guidance; the legal verses were revealed in the form of moral exhortations, exhorting people to the obedience of God and occasionally installing a keen sense of fear of God in their minds.⁴⁷ The divine law joins ethical and legal matters together, thereby encouraging the harmonisation of conscience and the law.⁴⁸ Its primary purpose is to regulate the relationship of man with man and with his Creator.⁴⁹ The law of inheritance, principles of marriage and divorce, rules for commercial transactions, prohibition of usury, provisions for war and peace, directives for international relations, punishments for crimes, are all meant for regulating human relationships in society.⁵⁰ It can, therefore, be said that Coulson is not justified in saying that the primary purpose of the *Qur'an* is to regulate the relationship of man with his Creator and not with his fellows.⁵¹

2.2.2 The Sunnah

The *Sunnah* is the second major source of *Shari'ah* after the *Qur'an*.⁵² It explains and elaborates the *Qur'an* and at the same time constitutes an independent source as well.⁵³ It explains the precise rules of the *Qur'an* or qualifies its absolute injunctions or

⁴³ Al-Qardavi, Yousaf, *Madkhal-Li-Dirasat Al-Shari'ah Al-Islamia* (Maktaba Al-Wahba, Cairo, 1997) p.10

⁴⁴ Khallaf, Abdul Wahab, *Ilm Usul al-Fiqh* (8th ed., Dar Al-Ilm, Kuwait) p.22-23.

Lippman, Matthew, *Islamic Criminal Law and Procedure* (Praeger, London, New York, 1988)p.29

Kamali, Mohammad Hashim, 1991, op. cit. pp. 245-46.

⁴⁵ Ramadan Said, *Islamic Law: Its Scope and Equity* (2nd ed. Dr. Said Ramadan, 1970) p.43.

⁴⁶ Mulla, D. F. Sir, 1988, op. cit. p. xv.

Coulson, N. J., *A History of Islamic Law* (Reprint) (Edinburgh University Press, 1971) p.12.

⁴⁷ Weeramantry, C. G., 1988, op. cit. p.44.

⁴⁸ Waines, David, *An Introduction to Islam* (Cambridge University Press, 1995) p.76.

⁴⁹ Weeramantry, C. G., 1988, op. cit. p.43.

⁵⁰ Waines, David, 1995, op. cit. p.31.

⁵¹ Coulson, N. J., 1971, op. cit. p.12.

⁵² Lippman, Matthew, 1988, op. cit. p.30.

Ali, Shaheen Sardar, 2000, op. cit. p.20.

⁵³ Weeramantry, C. G., 1988, op. cit. p.42.

Kamali, Mohammad Hashim, 1991, op. cit. p.62.

specifies its general statements.⁵⁴ The Prophet was, in fact, sent primarily to exemplify the teaching of the *Qur'an* hence its understanding is dependent upon *Sunnah*.⁵⁵ If on a given matter the *Qur'an* is silent, the guidance is sought from the teaching and example of the Holy Prophet. Detailed accounts of the life of the Prophet and his teachings are available in their original and pure form.⁵⁶

The word *Sunnah* literally means manner of acting, a rule of conduct, or a mode of life.⁵⁷ It will, therefore, include any rule deduced from the saying or the conduct of the Holy prophet.⁵⁸ Such conduct may be in the form of a specific utterance of the Holy Prophet, an action or practice, or the approval by him of the action of someone else.⁵⁹ The approval implies the permissibility of the conduct in question. It shows that the *Sunnah* may be divided into three kind i.e. verbal, practical and tacit constituting the model behaviour of the Holy Prophet for Muslims.⁶⁰

To follow the command and the example of the Holy Prophet is obligatory upon every Muslim. It has been ordained in the Holy *Qur'an*, "Whatsoever the Messenger gives you take it and whatsoever he forbids, abstain from it."⁶¹ It was the *Qur'anic* command to obey the Prophet that sanctioned the second source of authority for *Shari'ah*.⁶² The Prophet neither errs nor does he commit mistakes in what emanates from him because of infallibility and divine guidance. He speaks nothing of his own but that what has been revealed to him.⁶³ Thus whatever the Holy Prophet commanded is considered to be the will of Allah⁶⁴ hence the authority of the traditions of the Holy Prophet collectively known as the *Sunnah* in *Shari'ah*.

The importance of *Sunnah* is increased due to the fact that the Holy Prophet not only taught, but took the opportunity of putting his teachings into practice in all the important affairs of life. He lived for 23 years after Prophet-hood and endowed his community

⁵⁴ Hassan, H. Hamid, 1997, op. cit. p.149.

⁵⁵ Kamali, Mohammad Hashim, 1991, op. cit. p.60.

⁵⁶ Ahmad, Khurshid, 1976, op. cit. p.43.

⁵⁷ Ibn Manzur, 1955, op. cit. Vol. XIII, p.225.

⁵⁸ Hassan, Ahmad, 1982, op. cit. p.34.

⁵⁹ *Ibid.*

⁶⁰ Kamali, Mohammad Hashim, 1991, op. cit. p.50.

Hassan, H. Hamid, 1997, op. cit. p.151.

⁶¹ *Al-Qur'an* 59:7

⁶² Calverley, E. E., *Islam: An Introduction* (The American University at Cairo, Cairo, 1958) p.69.

⁶³ *Al-Qur'an* 53:3-4.

with a practical religion, founded a state which he administered, maintained internal peace and order, led the armies for external defence, judged and settled the disputes of his subjects, punished the criminals, and legislated in all other walks of life.⁶⁵

2.2.3 *Ijma* (consensus)

Ijma or consensus of opinion is the third source of *Shari'ah*. Whether *Ijma* means the *Ijma* of the whole community, the companions, the jurists as a class, or just those of a particular locality is a debatable question,⁶⁶ yet in classical theory it is the agreement of the qualified jurists.⁶⁷ The successors of the Holy Prophet retained both spiritual and secular authority over the community; while deciding any case they had to consult the *Qur'an* and the *Sunnah* to seek a divine ruling about a certain issue. In case of failure, they had to seek the advice of the pious and learned members of the community and apply their unanimous opinion. It suggests that recourse to *Ijma* will be allowed only in the cases where the point of law, under consideration, is not covered by the first two basic sources.⁶⁸ Though *Ijma* has been defined differently by various jurists yet the most appropriate definition is the unanimous agreement of the Muslim jurists in a certain period of time, after the death of the Prophet, on a rule of *Shari'ah*.⁶⁹

Ijma serves as a source of authority to unite the Muslim community under a common body of doctrine and law.⁷⁰ Doctrine of *Ijma* derives its authority both from the Holy *Qur'an*⁷¹ and the saying of the Holy Prophet that his community shall never unite on error.⁷² In a sense the doctrine represents a secular proposition that the voice of the people is the voice of God.⁷³ It serves as a means to acclimatise the provisions of *Shari'ah* to the ever changing needs of society at different places and times.⁷⁴ The Holy

⁶⁴ Hamidullah, Muhammad Dr., 1970, op. cit. p.27.

⁶⁵ *Ibid.* p.28.

⁶⁶ Waines, David, 1995, op. cit. p.82.

Weeramantry, C. G., 1988, op. cit. p.40.

⁶⁷ Coulson, N. J., 1971, op. cit. p.77.

⁶⁸ Walliullah, Mir, 1982, op. cit. p.30.

⁶⁹ Kamali, Mohammad Hashim, 1991, op. cit. p.37.

Walliullah, Mir, 1982, op. cit. p.32.

Hassan, H. Hamid, 1997, op. cit. p.166

⁷⁰ Waines, David, 1995, op. cit. p.82.

⁷¹ *Al-Qur'an* 4: 115 (Shafi, Mufti Muhammad, *Muarif al-Qur'an* (Idara al-Muarif, Karachi, 1986) Vol. II, p.547.

⁷² Ibn Majah, *Sunan ibn Majah*, (2nd ed., Cagri Yayinlari, Turkey, 1413 A.H.) Vol. II, p.1303.

⁷³ Kerr, Malcolm H., *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (University of California Press, Berkeley, 1966) p.79.

⁷⁴ Von Grunebaum, Gustave E., *Medieval Islam* (The University of Chicago Press, Chicago, 1953) p.149.

Prophet is reported to have said that whatever is agreed upon by the Muslims attains the status of binding rule unless it declares an unlawful as permissible and vice versa.⁷⁵

Doctrine of *Ijma* is agreed upon by all the four *Sunni* schools of thought.⁷⁶ Though the rules deduced on the basis of *Ijma* vary in degree of sanctity in different schools, however, there is unanimity of opinion that *Ijma* once established cannot be abrogated.⁷⁷ The Muslim jurists unanimously admit the principle that all that the Muslims consider good, is good in the eyes of Allah,⁷⁸ hence doctrine of *Ijma* implies that the rules deduced by *Ijma* entail divine approval.⁷⁹ It will be binding on the Muslims to act on a principle that has been established by *Ijma* of qualified legal scholars of any generation.⁸⁰

Unlike the *Qur'an* and the *Sunnah*, *Ijma* is not a divine source. Its importance as a source of *Shari'ah* demands that only an absolute and universal consensus, though difficult to obtain, should qualify.⁸¹ The concept will lead to the political unity of the Muslim community, combined with the democratic notion of political consensus it is the most authoritative basis for the legislative development of *Shari'ah*.⁸² However, this particular feature renders it too slow a process for legislation to keep pace with the changing needs of community in modern times. Moreover, geopolitical differences and the diversity of culture and traditions throughout the Muslim world render the occurrence of classical *Ijma* more difficult. The only plausible solution to overcome the difficulty is that the courts should not be barred from giving *ad hoc* judgements pending the occurrence of *Ijma*.⁸³

2.2.4 *Qiyas* (Analogical Reasoning)

Literally *Qiyas* stands for measuring the length, weight or quality of something or its comparison with a similar one.⁸⁴ It suggests an equality or close similarity between the

⁷⁵ Al-Tirmidhi, *Al-Jameh al-Sahih* (2nd ed., Cagri Yayinlari, Turkey, 1413 A.H.) Vol. III, p.626.

⁷⁶ Ali, Shaheen Sardar, *The Conceptual Foundation of Human Rights: A Comparative Perspective* 3 (1997) *European Public Law* 261 at 268.

⁷⁷ Mulla, D. F. Sir, 1988, op. cit. p. xix.

⁷⁸ Al-Ghazali, Abu Hamid Muhammad bin Hamid, *Al-Mustasfa min Uloom ud Din* (Al-Moassat al-Rissala, Beirut, 1997) Vol. I, p.411.

Ibn Nujaym, Zain ud din, *Al-Ashbah Wa Al-Nazair* (Mo, assasa al-Halbi, Cairo, 1968) p.93.

⁷⁹ Hamidullah, Muhammad Dr., 1970, op. cit. p.131.

⁸⁰ Mulla, D. F. Sir, 1988, op. cit. p. xviii.

⁸¹ Kamali, Mohammad Hashim, 1991, op. cit. p.168.

⁸² Bassiouni, M. Cherif, 1982, op. cit. p. xvi.

⁸³ Kerr, Malcolm H., 1966, op. cit. p.11.

⁸⁴ Ibn Manzur, 1955, op. cit. Vol. VI, pp.187-88.

two things, where one serves as criterion to evaluate the other.⁸⁵ In *Shari'ah Qiyas* means the deduction of legal prescriptions from the *Qur'an* and the *Sunnah* by reasoning and analogy.⁸⁶ When a judge exercised his discretion to extend the principle in one case to another by virtue of a common cause (*Illah*) shared by the two, the process was termed as analogical deduction or *Qiyas*.⁸⁷ The deduction may be regarded as reasoning from the general to the particular or from the particular to the particular. *Qiyas* may be described as the method of interpretation in which legal reasoning on the basis of *Qur'an* and *Sunnah* is generally accepted as fully legitimate.⁸⁸

The whole concept of *Qiyas* is based upon the effort to find out an essential common cause between the similar cases and to apply the rule of one to the other.⁸⁹ The main role of human reason is the identification of the common cause.⁹⁰ Once it is identified it becomes necessary to apply the rule without any change or interference.⁹¹ The extension of an existing rule of *Shari'ah* to a similar case is invalid without identification of the common cause.⁹² Hence, reasoning and example both are essential elements of *Qiyas*.

Qiyas is merely the extension of the existing law to the new cases, hence it does not amount to an independent source of law rather it is a tool to develop the existing one.⁹³ Doctrine of *Qiyas* is a means to restrict and discipline the discretion of the judges.⁹⁴ It involves the investigation of the motive of law or *ratio legis* and application of the reasoning in one case to the other on the basis of analogy.⁹⁵ It is permissible for the jurists to exercise *Ijtihad* to determine the common cause, the essential requirement of analogy, in the cases where it was not evident.

⁸⁵ Kamali, Mohammad Hashim, 1991, op. cit. p.197.

⁸⁶ Walliullah, Mir, 1982, op. cit. p.32.

⁸⁷ Waines, David, 1995, op. cit. p.65.

⁸⁸ Kerr, Malcolm H., 1966, op. cit. p.66.

⁸⁹ Kamali, Mohammad Hashim, 1991, op. cit. p.197.

Weeramantry, C. G., 1988, op. cit. p.43.

⁹⁰ Hassan, H. Hamid, 1997, op. cit. p.173

⁹¹ Kamali, Mohammad Hashim, 1991, op. cit. p.198.

⁹² *Ibid.* p.37.

⁹³ *Ibid.* p.198.

⁹⁴ Von Grunebaum, Gustave E., 1953, op. cit. p.148.

⁹⁵ Kamali, Mohammad Hashim, 1991, op. cit. p.251.

Weeramantry, C. G., 1988, op. cit. pp. 40-41.

Walliullah, Mir, 1982, op. cit. p.32.

For the application of doctrine of *Qiyas* it is a prerequisite condition that the original ruling was based upon either of the two material sources of *Shari'ah* and the solution of the current case cannot be found in them or in a definite *Ijma*.⁹⁶ It means that a rule of law already exists in the primary sources leading to a particular conclusion given all the circumstances of the case in hand.⁹⁷ Hence doctrine of *Qiyas* ensures consistency of revealed law and reason in the development of *Shari'ah*.⁹⁸ Though there is disagreement among the Muslim jurists on the application of *Qiyas* in criminal cases, however the most appropriate view is not to apply the doctrine in cases of penalties because in the realm of criminal law each case has its peculiar facts distinguishing it from the other.⁹⁹ Generally in the civil cases the doctrine can be applied.

English law also recognises the principle of analogy as a tool to deal with the new issues of law. If a new case comes before a court and it is analogous with some other already dealt with, it should be decided on the same principle because if like matters arise let them be decided by the like one,¹⁰⁰ since the occasion is good one for proceeding *Similibus ad similia*.¹⁰¹ The common cause (*Illah*) required by *Shari'ah* is analogous to the *ratio decidendi* to be followed in the cases of binding precedents. Majority of the Muslim jurists hold the view that the four sources i.e. the *Qur'an*, the *Sunnah*, *Ijma* and *Qiyas* are valid and provide adequate means for the decisions of all new problems forming the basis for the fundamental structure of Islamic jurisprudence.¹⁰²

2.3 Secondary Sources of Islamic Law

Divine origin of *Shari'ah* does not render it rigid. The secondary sources give it the flexibility required to absorb the changing conditions of human society. The political power of the time enjoys a degree of legislative competence derived from the divine law. Justice, doing of good and wisdom are the fundamental guiding principles for such legislation. A study of *Shari'ah* makes it clear that there are certain subjects whose rules have been specified in a definite way, while there are others left to the discretion of the community to determine appropriate rules for them, provided that they do not contradict

⁹⁶ Kamali, Mohammad Hashim, 1991, op. cit. p.197.

Ali, Shaheen Sardar, 2000, op. cit. p.23.

⁹⁷ Hassan, H. Hamid, 1997, op. cit. p.173

⁹⁸ Kamali, Mohammad Hashim, 1991, op. cit. p.198.

⁹⁹ *Ibid.* p.223.

¹⁰⁰ S.H.Bailey & D.C. Ormerod, *Modern English Legal System* (4th ed., Sweet & Maxwell, 2002) p.477.

¹⁰¹ Thorne, Samuel, *Bracton on the Laws and Customs of England* (Seldon Society, 1968) Vol. II, p.21.

¹⁰² Calverley, E. E., 1958, op. cit. p.73.

the principles laid down in the primary sources. Some of the secondary sources are unanimously acknowledged by all the *Sunni* schools, whereas some others are acknowledged by some and refuted by the others. Some of the important secondary sources have been precisely discussed below.

2.3.1 *Istihsan*

Istihsan is an important method of *Ijtihad* that plays a significant role in the adaptation of *Shari'ah* to the changing needs of a society. The word is derived from *Hasan*, which means being good or beautiful.¹⁰³ It literally means to approve, or to deem some thing preferable.¹⁰⁴ In juristic sense, it stands for exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing rules.¹⁰⁵ *Istihsan* does not mean to derive a rule by an arbitrary opinion or desire.¹⁰⁶ It means to set aside the requirement of a proof as an exception, and to make concession for a stronger proof, in case of the conflict of proofs.¹⁰⁷ It is another way to interpret the sources by preferring one of the two analogies.

Istihsan authorises departure from the set principle of analogy, when its strict enforcement leads to unfair results,¹⁰⁸ for what would be more convenient for the people in a particular case.¹⁰⁹ If the analogy is general and conflicts with consensus, public interest, custom, or the principle of eliminating harm, the analogy will be set aside.¹¹⁰ This suggests that a decision arrived at by the use of reasoning by analogy may be rejected in favour of one based on equity.¹¹¹ *Istihsan* does not seek to constitute an authority beyond the *Shari'ah*. It is an integral part of the *Shari'ah* and does not recognise superiority of any other law to the divine law.¹¹²

Doctrine of *Istihsan* helps admitting new rules into *Corpus Juris* of *Shari'ah*; it restricts or extends the interpretation of pre-existing rules on the basis of social needs.¹¹³ It

¹⁰³ Ibn Manzur, 1955, op. cit. Vol. XIII, p. 114.

¹⁰⁴ Kamali, Mohammad Hashim, 1991, op. cit. p.246.

¹⁰⁵ *Ibid.*

¹⁰⁶ Hassan, H. Hamid, 1997, op. cit. p.180.

¹⁰⁷ *Ibid.*

¹⁰⁸ Waines, David, 1995, op. cit. p.66.

¹⁰⁹ Von Grunebaum, Gustave E., 1953, op. cit. p.149.

¹¹⁰ Hassan, H. Hamid, 1997, op. cit. p.180.

¹¹¹ Makdisi, John, "Legal Logic and Equity in Islamic Law" 33 (1985) *Am. JCL.* 63 at 67.

¹¹² Kamali, Mohammad Hashim, 1991, op. cit. pp.245-46.

¹¹³ Makdisi, John, 1985, op. cit. p.68.

equips *Shari'ah* with the necessary means encouraging flexibility and growth.¹¹⁴ This essential flexibility of the doctrine led the *Shafite* to apprehend that it may escort to the suspension of *Shari'ah's* injunctions and may be used as a means to circumvent its general principles and hence they rejected the doctrine.¹¹⁵ However, this opinion is questionable because it is neither an independent source of law nor it is the arbitrary exercise of personal opinion, rather a form of *Qiyas* having firm roots in *Shari'ah*.

Use of the doctrine by *Malkite* and *Hanfite* is widely known, the only disagreement between them is on its nomenclature.¹¹⁶ *Malkite* named it as *Istislah*.¹¹⁷ An example of *Istihsan* is imposition of liability on artisans for destruction or damage of an article handed over to them for certain work, on payment of charges. The general rule requires that there should be no responsibility because they are trustees and a trustee is not liable for the damage or loss of deposit, unless attributed to his personal fault or negligence. However, the imposition of liability under the doctrine is for the public interest.¹¹⁸ This will ensure the protection of the property of the people because craftsman will be more cautious to safeguard it. The doctrine of *Istihsan* states that the overall welfare of the community overshadows any particular legal consideration and a general right or duty is more important than the particular one.¹¹⁹ It consists of determining man's best interests and promoting them in accordance with the spirit of *Shari'ah*.

Istihsan is an equivalent of equity in secular law.¹²⁰ Both are inspired by the principle of fairness and conscience, authorising a departure from the rule of law when its enforcement leads to injustice.¹²¹ Despite their similarity they are not exactly identical, equity relies on the concept of natural law whereas *Istihsan* on the underlying values and principles of *Shari'ah*.¹²² Natural law shares a lot of features of divine law but it differs in its assumption that right and wrong are inherent in nature.¹²³ *Shari'ah* admits that these values are determined by the divine will. Equity is the law of nature, above all

¹¹⁴ Kamali, Mohammad Hashim, 1991, op. cit. p.246.

¹¹⁵ Al-Ghazali, Abu Hamid Muhammad bin Hamid, 1997, op. cit. Vol. I, p.409.

¹¹⁶ Hassan, H. Hamid, 1997, op. cit. p.179.

¹¹⁷ Schacht, Joseph, *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964) p.61.

Von Grunebaum, Gustave E., 1953, op. cit. p.149.

¹¹⁸ Kamali, Mohammad Hashim, 1991, op. cit. p.257.

¹¹⁹ Kerr, Malcolm H., 1966, op. cit. p.22.

¹²⁰ Walliullah, Mir, 1982, op. cit. p.36.

¹²¹ Kamali, Mohammad Hashim, 1991, op. cit.p.245.

¹²² *Ibid.*

¹²³ Kerr, Malcolm H., 1966, op. cit. p.57.

the legal rules written or otherwise but *Istihsan* does not recognise superiority of any law over *Shari'ah*.¹²⁴ Equity in itself is considered as a superior law but *Istihsan* is not an independent authority beyond *Shari'ah*.¹²⁵ *Istihsan* can be called Islamic equity since justice is the most basic value emphasised in *Shari'ah*.¹²⁶

2.3.2 Religious Laws Revealed before Islam

Another source of Islamic law is the divine revelation received by the former Prophets.¹²⁷ Islam is preceded by other revealed religions that have been mentioned in the Holy *Qur'an* and the *Sunnah*, like the laws of Abraham, Moses and Jesus.¹²⁸ All revealed laws emanate from one and the same source and convey the same message.¹²⁹ The revealed religions may be considered as different manifestations of unity. Since these laws were addressed to different nations at different times so each of them has its distinguishing features in the fields of permissible, prohibited and religious rituals.¹³⁰

The essential unity of revealed laws in belief, moral values, and essence of guidance to regulate human conduct has been affirmed a number of times in the *Qur'an*.¹³¹ Islam has retained many of these laws and at the same time abrogated or amended many others. These laws are binding on Muslims if they are not amended or repealed.¹³² However, now the basis of their being binding is not the old revelation but the text of the *Qur'an* and the *Sunnah* commanding the Muslims to adhere to them. For example, the law of *Qisas* was actually revealed for the Jews in the *Torah* but as it has been maintained in the holy *Qur'an* so now it is an Islamic law.¹³³ Similar is the case with the punishment of stoning to death for adultery.¹³⁴

2.3.3 Custom (*Urf*)

A custom may be defined as a conduct that is common among the people and to which they have become habituated.¹³⁵ *Shari'ah* did not impose such laws on the people as

¹²⁴ Kamali, Mohammad Hashim, 1991, op. cit. p.245.

¹²⁵ Makdisi, John, 1985, op. cit. p. 90.

¹²⁶ Gerber, Haim, 1999, op. cit. p.93.

¹²⁷ Hamidullah, Muhammad Dr., 1970, op. cit. p.134.

¹²⁸ Hassan, H. Hamid, 1997, op. cit. p.234.

¹²⁹ Kamali, Mohammad Hashim, 1991, op. cit. p.229.

¹³⁰ *Ibid.* p. 230.

¹³¹ For example, *Al-Qur'an* 42:13; 5:44; and 6:92.

¹³² Walliullah, Mir, 1982, op. cit. p.37.

¹³³ *Al-Qur'an* 5:45.

¹³⁴ Al-Bukhari, *Muhammad bin Ismail, Sahih al-Bukhari* (2nd ed., Cagri Yayinlari, Turkey, 1413 A.H.) Vol. VIII, p.30.

Muslim bin Hijjaj, *Sahih Muslim* (2nd ed., Cagri Yayinlari, Turkey, 1413 A.H.) Vol. II, p. 1326.

Also see The New Testament, St. John, Chapter VIII, Verses 3-11 (Stoning to death was Jewish Law).

¹³⁵ Hassan, H. Hamid, 1997, op. cit. p.224.

were absolutely unknown to them. Old customs and law of Arabia were examined, and after necessary and appropriate changes, if needed, they were retained.¹³⁶ The guiding principle in this regard is that all that which is not repugnant to the provisions of the *Qur'an* or the *Sunnah* constitutes good law.¹³⁷ A considerable number of technical terms of pre-Islamic customary laws have been adopted either with modified or narrower definitions, or even attributing totally different meaning to them.¹³⁸ The Holy *Qur'an* itself enunciates the validity of custom in determining the maintenance of wife and children.¹³⁹

The acceptance of custom as a source can be found on the injunction of the Holy *Qur'an* which states that no hardship has been laid upon the believers.¹⁴⁰ The disapproval of a prevailing custom would have caused hardship in the cases where there was no explicit conflict with the principles of *Shari'ah*. Custom could be incorporated and assimilated through interpretations based on the exercise of *Ijtihad*, in cases determined by preference, public interest, and even consensus.¹⁴¹ An example of adoption of prevailing custom by *Shari'ah* is the liability of the kinsmen of an offender to share payment of *Diyat* in case of manslaughter.¹⁴² Similarly, sale of a non existing object at the time of conclusion of contract is validated on the grounds of custom.¹⁴³

A custom is binding upon the parties as a lawful agreement between them, for a custom is no more than an agreement between a large number of people.¹⁴⁴ A legal maxim states that a valid custom is like a stipulated condition, the parties are bound by the custom as they are by the condition.¹⁴⁵ Like English law, Muslim jurists have imposed certain conditions, at par with that of English law, for the validity of a custom, among these are; that it should be general and not peculiar to a class of people,¹⁴⁶ it must be

¹³⁶ Hamidullah, Muhammad Dr., 1970, op. cit. p.133.

¹³⁷ Hassan, H. Hamid, 1997, op. cit. p.224.

¹³⁸ Kamali, Mohammad Hashim, 1991, op. cit. p.285.

Schacht, Joseph, 1964, op. cit. p.8.

¹³⁹ *Al-Qur'an* 65:7 and 2:233.

¹⁴⁰ *Al-Qur'an* 22:78.

¹⁴¹ Bosworth, C. E. & Donzel, E. Van, 1997, op. cit. Vol. X, p.887.

¹⁴² Kamali, Mohammad Hashim, 1991, op. cit. p.285.

Gerber, Haim, 1999, op. cit. p.112.

¹⁴³ Kamali, Mohammad Hashim, 1991, op. cit. p.288.

¹⁴⁴ Bosworth, C. E. & Donzel, E. Van, 1997, op. cit. Vol. X, p.888.

¹⁴⁵ Ibn Nujaym, Zain ud din, 1968, op. cit. p.99.

Hassan, H. Hamid, 1997, op. cit. p.227.

¹⁴⁶ Ibn Nujaym, Zain ud din, 1968, op. cit. p.103.

sound and reasonable,¹⁴⁷ it should be in existence at the time of revelation, and it should not contravene a provision of *Qur'an* or *Sunnah*.¹⁴⁸

Whether a custom can be taken as a source of law in the modern age is a complex question. Disintegration of traditional patterns of societies, change in the socio-economic status of people, and unprecedented urbanisation has caused instability in social behaviour which resulted into discontinuation and instability of customs qualifying to be converted into a legal rule. Moreover, modern legislation has diminished the need to rely on custom as a basis of decision making.¹⁴⁹ At the most an authoritative custom may serve as a supplementary source in certain civil matters.

2.4 *Ijtihad in Shari'ah*

Practical utilisation of all the sources of *Shari'ah* needs *Ijtihad* i.e. the exertion of effort in deriving rules from the sources.¹⁵⁰ *Ijtihad* is the ability, occasioned by knowledge, to derive legal rule that requires learned effort.¹⁵¹ The conditions of knowledge and ability suggest that *Ijtihad* is open only to the men of great scholarship who deserve the title of *Mujtahid* and are juristically qualified.¹⁵² Another basic condition is the proficiency in language of the primary sources of *Shari'ah* along with methodological skills to resolve instances of conflict in its conclusions.¹⁵³ A *Mujtahid* must have the knowledge of the legal contents of the *Qur'an* and full grasp of occasions of revelation and doctrine of abrogation.¹⁵⁴ The importance of knowledge of abrogation is reflected by the maxim, *lex posterior derogat priori* that the later rule prevails over the earlier one.¹⁵⁵ The conditions render *Ijtihad* a scientific practice to derive a rule from legal sources.

The scope of *Ijtihad* is limited to the issues about which no clear and defined rule occur and no *Ijma* has been held yet.¹⁵⁶ The *Qur'an* and the *Sunnah* are the roots of *Shari'ah* while the opinions of the jurists can be brought in by way of supplementation where the

¹⁴⁷ Kamali, Mohammad Hashim, 1991, op. cit. p.283.

¹⁴⁸ Hassan, H. Hamid, 1997, op. cit. pp.228-29.

¹⁴⁹ Kamali, Mohammad Hashim, 1991, op. cit. p.293.

¹⁵⁰ *Ibid.* p.367.

¹⁵¹ Weiss, Bernard, 1978, op. cit. p.200.

Ali, Shaheen Sardar, 2000, op. cit. p.23.

¹⁵² Mulla, D. F. Sir, 1988, op. cit. p. xix.

Ali, Shaheen Sardar, 1997, op. cit. p.269.

¹⁵³ Kamali, Mohammad Hashim, 1991, op. cit. p.86.

¹⁵⁴ *Ibid.* p.375.

Coulson, N. J., 1971, op. cit. p.76.

¹⁵⁵ Fitzgerald, P. J., *Salmond on Jurisprudence* (12th ed. Sweet and Maxwell, London, 1966) p.200.

¹⁵⁶ Gibb, H.A.R., 1949, op. cit. p.97.

main sources are silent.¹⁵⁷ In majority of the cases the *Qur'an* and the *Sunnah* do not state law in a strict legal sense, like the statutes, they however contain it, and the duty of a *Mujtahid* is to extract and derive law from these sources.¹⁵⁸ *Ijtihad* enables a *Mujtahid* to apply fundamental unchangeable principles of *Shari'ah* to new situations, in order to solve new problems of human society. In this sense Muslim jurists do not invent new legal rules by unrestricted discretion; they derive these concealed rules by the disciplined interpretation of divine texts.¹⁵⁹ This text oriented approach may be regarded as the true means for the historical development of *Shari'ah*.

The importance of *Ijtihad* has been such a great that the Holy Prophet said that a *Mujtahid* will receive a reward in the hereafter even though he, inadvertently, reaches a wrong conclusion after the exercise of such an effort.¹⁶⁰ An erroneous opinion, formed honestly and not identified as such, is binding as long as the jurist has been sincere and diligent in his scrutiny of the primary source.¹⁶¹ However, a fallible *Ijtihad* of an individual would always be corrected under the doctrine of *Ijma*.¹⁶² *Shari'ah* not only permits rather encourages *Ijtihad* because any restriction will curtail the liberty of the individual to research and express an opinion.¹⁶³ The fact can be proved by a tradition of the Holy Prophet, when he appointed one of his companions Muadh as governor of Yemen and encouraged him to use reasoning and forming personal opinion to settle a dispute, if there was no textual authority.¹⁶⁴

Ijtihad plays a vital role in deducing legal principles regarding the new issues arising in human society.¹⁶⁵ It makes *Shari'ah* capable of embracing human evolution in various fields like politics, economics, social relations and others. Though admitted that the general principle is to follow the injunctions of the *Qur'an* and the *Sunnah*, yet the

Ali, Shaheen Sardar, 2000, op. cit. p.23.

¹⁵⁷ Hassan, Ahmad, 1982, op. cit. p.31.

¹⁵⁸ Weiss, Bernard, 1978, op. cit. p.199.

¹⁵⁹ Gerber, Haim, 1999, op. cit. p.143.

¹⁶⁰ Al-Bukhari, Muhammad bin Ismail, 1413 A.H., op. cit. Vol. VIII, p.157.

Muslim, bin Hijjaj, 1413 A.H., op. cit. Vol. II, p.1342.

Al-Khatib al-Tabrizi, *Mishkat al-Masabih* (Translated in English by James Robson) (Shaikh Muhammad Ashraf, Lahore, Pakistan, 1963) Vol. II, p.793.

¹⁶¹ Weiss, Bernard, 1978, op. cit. p.205.

¹⁶² Von Grunbaum, Gustave E., 1953, op. cit. p.151.

¹⁶³ Kamali, Mohammad Hashim, 1991, op. cit. p.23.

¹⁶⁴ Ahmad bin Hanbal, *Masnad Imam Ahmad bin Hanbal* (Cagri Yayinlari, Istanbul, Turkey, 1981) Vol. V, p.236 & 242.

¹⁶⁵ Gerber, Haim, 1999, op. cit. p.82.

development of *Shari'ah* can be attributed to the doctrine of *Ijtihad* because both these fundamental sources, in most of the cases, do not disclose the precise line to be followed. Where a principle was laid down but it was silent as to an individual case an independent effort is required to apply the principle keeping in view the text of the sources, public interest and equity.

Jurists interpret the provisions of basic sources in the light of their knowledge and experience, and in this way doctrine of *Ijtihad* serves as a bridge between the immutable provisions of the *Qur'an* and the *Sunnah* and the contemporary needs. Personal judgement supported by *Qiyas* or *Istihsan* gives a rational pragmatic character to the legal thinking of the jurists and the differences of opinion are removed by the application of doctrine of *Ijma* to bring uniformity. It is because of *Ijtihad* that the *Shari'ah* exists as a body of positive rules. *Ijtihad* is an ongoing process of deriving rules from the divine sources and *Ijma* transforms these rules into eternal principles which provide material out of which tomorrow's rules may be derived.¹⁶⁶

The opinion, that has almost attained the status of consensus among orientalist,¹⁶⁷ and some Muslim scholars¹⁶⁸ as well that the door of *Ijtihad* was closed in the 10th century, is based upon misconception. Beside others, Professor Coulson and Joseph Schacht are among the supporters of this opinion.¹⁶⁹ Contrary to this opinion, the doctrine of *Ijtihad* never ceased in medieval Islam, rather it continued to the present day. *Ftawa* Imam Ibn Taymiyya (d.1328) is the best example to support this view.¹⁷⁰ It is interesting to mention that Joseph Schacht himself admits that Ibn Taymiyya interpreted the provisions of the *Qur'an* and the *Sunnah* afresh and arrived at novel conclusions.¹⁷¹ This exertion of effort to derive new meaning from the immutable texts and their application on unprecedented conditions is called *Ijtihad*. This process is still operative and can add a lot to the body of *Shari'ah*.¹⁷²

¹⁶⁶ Weiss, Bernard, 1978, op. cit. p.209.

¹⁶⁷ Jackson, Sherman A., *Islamic Law and the State* (E.J. Brill, Leiden, 1996) p.74.

¹⁶⁸ Ali, Shaheen Sardar, 2000, op. cit. p.23.

¹⁶⁹ Schacht, Joseph, 1964, op. cit. p.69.

Coulson, N. J., 1971, op. cit. p.80.

¹⁷⁰ Gleave, R. & Kermeli, E., *Islamic Law: Theory and Practice* (I. B. Tauris, London, 2001) p.119.

¹⁷¹ Schacht, Joseph, 1964, op. cit. p.72.

¹⁷² Hassan, Ahmad, "Ijma in the Early Schools" 6 (1967) *Islamic Studies* 121 at 125.

2.5 Major Schools of Thoughts

During the life time of the Holy Prophet and thereafter in the time of companions' jurisprudence was not a special subject.¹⁷³ The companions acted as judges seeking guidance from the holy *Qur'an* and the *Sunnah* or by exercising their independent opinion and discretion, if necessary, to deal with the issues before them. During the time of second generation, by the expansion of Muslim state to a vast geographical area, independent legal activities started in the various parts of the realm.¹⁷⁴ The second and third centuries A.H. witnessed the establishment and growth of four great schools of Islamic jurisprudence.¹⁷⁵ They comprise the *Sunni* understanding of the *Shari'ah*.¹⁷⁶ *Shari'ah* did not develop through legislation or judicial decisions like English law, but is attributed to the thought and discourse of the great Muslim jurists.¹⁷⁷ The jurists devoted their lives deducing the general discursive rules from the text of the *Qur'an* and the *Sunnah* following certain fixed principles specific to their schools.¹⁷⁸

There are differences of minor nature on various points of law among these schools but no disagreements on the basic principles and doctrines.¹⁷⁹ These differences can be attributed to the way each school accepts, employs, and interpret the sources in a particular issue¹⁸⁰ and may be regarded as simply different manifestations of the same divine will. The interpretations of the four schools enjoyed equal status because they differed in the extent and freedom of individual interpretation which they allowed.¹⁸¹ They all uphold an ideal of *Shari'ah* that unites them and their adherents in a common *Sunni* orthodoxy.¹⁸² Difference of opinion in interpretation is not the unique feature of *Shari'ah*, all the major legal systems have different schools of thought and even in the contemporary legal systems different judges do differently interpret the laws.

¹⁷³ Weeramantry, C. G., 1988, op. cit. p.12.

¹⁷⁴ *Ibid.* p.19.

¹⁷⁵ Hassan, Ahmad, 1982, op. cit. p.49.

¹⁷⁶ Waines, David, 1995, op. cit. p.65.

¹⁷⁷ Lippman, Matthew, 1988, op. cit. p.25.

¹⁷⁸ Nasir, Jamal J., *The Islamic law of Personal Status* (3rd ed., Kluwer Law International, 2002) p.9.

¹⁷⁹ Donohue, John J. & Esposito, John L., (editors) *Islam in Transition: Muslim Perspectives* (Oxford University Press, Oxford, 1982) p.183.

David, Rene, *Major Legal Systems in the World Today* (Stevens & Sons, London, 1985) p.459.

Lippman, Matthew, 1988, op. cit. p.26.

¹⁸⁰ Waines, David, 1995, op. cit. p.78.

¹⁸¹ Endress, Gerhard, *Islam: A Historical Introduction* (2nd ed., Edinburgh University Press, 2002) p.64.

¹⁸² Denny, Frederick Mathewson, *An Introduction to Islam* (Maxwell Macmillan, New York, 1994) p.204.

2.5.1 Hanfite School

The school is named after its founder Abu Hanifa, Al-Numan bin Thabit (699-767).¹⁸³ Abu Hanifa is the greatest jurist throughout the history of the Muslim law, having an immense power of legal reasoning.¹⁸⁴ Abu Yousaf, Muhammad al-Shaybani, and Zufar are his well known disciples responsible for the present shape of Hanfi Jurisprudence,¹⁸⁵ though they disagreed with Abu Hanifa on many legal propositions.¹⁸⁶ *Hanfite* school is the most famous of the four schools of Islamic law.¹⁸⁷ The validity of free and independent opinion is the main characteristic of the school. *Hanfite* regarded the local customs and general practices of a particular place as basis of legal rules, unless these go against the express or implied provisions of the *Qur'an* or the *Sunnah*. Abu Hanifa's legal thought is much superior to that of his contemporaries, technically more highly developed, more circumspect and more refined.¹⁸⁸ *Hanfite* did not confine themselves to the real problems. They went beyond; assuming problems hypothetically that might arise in future and suggested their solutions.¹⁸⁹

The major characteristic of the school is the interpretation of laws in favour of the subjects. The school emphasised the importance of public interest in consideration of legal questions.¹⁹⁰ *Hanfite* would never agree to any proposition of law based on an interpretation which causes undue hardship to anyone.¹⁹¹ The *Fiqh* of the school is more sensible, judicious, moderate, and much easier to follow as compared to any other school.¹⁹² This seems to be one of the main reasons why an overwhelming majority of the *Sunni* Muslims of the world follow this school.¹⁹³

A major base for the legal propositions in the school is *Qiyas*. Though the other schools of law do recognise *Qiyas* as a source of law yet they do not use it so frequently.¹⁹⁴ *Hanfite* would place *Qiyas* above a solitary *Hadith* (based on single testimony) in the

¹⁸³ Mulla, D.F. Sir, 1988, op. cit. p. xi.

¹⁸⁴ Walliullah, Mir, 1982, op. cit. p.48.

¹⁸⁵ Gibb, H.R.A., *The Encyclopaedia of Islam* (Luzac & Co. London, 1960) p.124.

¹⁸⁶ Walliullah, Mir, 1982, op. cit. p.46.

¹⁸⁷ Mulla, D. F. Sir, 1988, op. cit. p. xi.

¹⁸⁸ Gibb, H.R.A., 1960, op. cit. p.123.

¹⁸⁹ Nasir, Jamal J., 2002, op. cit. p.11.

Badr, Gamal Moursi, "Islamic Law: Its Relation to other Legal Systems" 26 (1978) *Am. JCL*.187 at 189.

¹⁹⁰ Hassan, Ahmad, 1982, op. cit. p.50.

¹⁹¹ Walliullah, Mir, 1982, op. cit. p.50.

¹⁹² *Ibid.* p.51.

¹⁹³ Hamidullah, Muhammad Dr., 1970, op. cit. p.254.

¹⁹⁴ Walliullah, Mir, 1982, op. cit. p.48.

order of preference.¹⁹⁵ Abu Hanifa has been reported to set the order of preference of legal sources for the discovery of a legal rule as the *Qur'an*, the *Sunnah*, saying of the companions with a liberty to choose anyone of them in case of difference of opinion among them and in the event of absence of any provision thereby forming his independent opinion.¹⁹⁶ The school was adopted as official law by the Ottoman Empire in Turkey and Moghuls in India.¹⁹⁷ At present the *Hanfite* predominates in Western Asia, Syria, Afghanistan, Bangladesh, Turkish central Asia, lower Egypt and Indo-Pakistan.¹⁹⁸

2.5.2 *Malkite School*

The school was founded by Malik bin Ans (710-795).¹⁹⁹ The greatest work of his life is *Al-Muwatta*, the earliest book of collection of Traditions and *Fiqh*,²⁰⁰ which also contains the general practice of the Muslims of Madina that provides a base for the legal propositions in the school.²⁰¹ He preferred the actual practice in Madina over the contradictory traditions, because in his view the general practice of the Muslims of the city represented the living *Sunnah* and was, therefore, more reliable than verbal traditions.²⁰² The Traditions in the *Al-Muwatta* are arranged subject wise, like text books of codified laws.²⁰³

Like the doctrine of *Istihsan* in *Hanfite* school, Malik had the principle of *Istislah* to set the legal rules in conformity with the requirements of everyday life and equity. He also used free opinion in the cases where practice of Madina did not exist. Most of the followers of Malik were practical lawyers thus the teachings of the school were essentially practical rather than speculative.²⁰⁴ The teachings of Malik spread from Madina to Egypt, north, central and West Africa, Spain, and eastern Arabian coast.²⁰⁵ At present the school is followed in parts of north and West Africa and Upper Egypt.²⁰⁶

¹⁹⁵ Mulla, D. F. Sir, 1988, op. cit. p. xxiii.

¹⁹⁶ Muhawizz, A. Muhammad, *Tarikh al-Tashreeh al-Islami* (1st ed., Dar al-Ktub al-Ilmia, Beirut, 2000) p.80. Al-Saa'is, Muhammad Ali, *Tarikh al-Fiqh al-Islami* (Maktaba Muhammad Ali, Egypt) pp.93-94.

¹⁹⁷ Hassan, Ahmad, 1982, op. cit. p.50.

¹⁹⁸ Mulla, D. F. Sir, 1988, op. cit. p. xi.

Waines, David, 1995, op. cit. p.74.

¹⁹⁹ Hassan, Ahmad, 1982, op. cit. p.51.

²⁰⁰ *Ibid.*

²⁰¹ Walliullah, Mir, 1982, op. cit. p.57.

²⁰² *Ibid.* p.58.

²⁰³ Waines, David, 1995, op. cit. p.67.

²⁰⁴ Hassan, Ahmad, 1982, op. cit. p.51.

²⁰⁵ Mulla, D. F. Sir, 1988, op. cit. p. xiii.

²⁰⁶ Gibb, H.A.R., 1949, op. cit. p.103.

Walliullah, Mir, 1982, op. cit. p.60.

2.5.3 *Shafite School*

The third in chronological order is the *Shafite* school founded by Abu Abdullah Muhammad bin Idrees al-Shafi (767-820).²⁰⁷ He is the first jurist who wrote on Islamic jurisprudence and methodology of law.²⁰⁸ His accomplishments in the religious science were unmatched by anyone of his time.²⁰⁹ One of the prominent features of Shafi's jurisprudence is the fact that he selected such doctrines from other schools as pleased him and borrowed freely from various sources.²¹⁰ The school is particularly strong in logic and reason.²¹¹ As he learnt from Malik and some of the disciples of Abu Hanifa,²¹² his jurisprudence was actually a compromise between the two schools.²¹³

He accepted the doctrine of *Qiyas* but ruled that an analogy may be based on the *Qur'an*, *Sunnah* or *Ijma*.²¹⁴ It means that the points on which there exists an express ruling in the *Qur'an*, the *Sunnah* or *Ijma*, no disagreement is allowed.²¹⁵ The principle restricts the use of discretionary opinion by the jurists.²¹⁶ Though he acknowledged *Ijma* as a source of law²¹⁷ yet he was not a blind follower of the doctrine, according to him the *Ijma* of jurists must be thoroughly scrutinised before its acceptance.²¹⁸ At present the school is followed in Egypt, southern Arabia, Bahrain, some parts of India and Sri Lanka, some parts of central Asia and east Africa,²¹⁹ Indonesia and Malaysia.²²⁰

2.5.4 *Hanbalite School*

The school was founded by Imam Ahmad bin Hanbal in Baghdad (780-855).²²¹ He was a student of Al-Shafi.²²² He spent much more time in collecting *Ahadith* than in the

Waines, David, 1995, op. cit. p.74.

²⁰⁷ Mulla, D. F. Sir, 1988, op. cit. p. xiii.

²⁰⁸ Walliullah, Mir, 1982, op. cit. p.62.

Mulla, D. F. Sir, 1988, op. cit. p. xiii.

²⁰⁹ Waines, David, 1995, op. cit. p.67.

²¹⁰ Walliullah, Mir, 1982, op. cit. p.63.

²¹¹ Hassan, Ahmad, 1982, op. cit. p.52.

²¹² Waines, David, 1995, op. cit. p.67.

²¹³ Walliullah, Mir, 1982, op. cit. p.63.

²¹⁴ Mulla, D. F. Sir, 1988, op. cit. p. xiii.

Waines, David, 1995, op. cit. p.69.

²¹⁵ Hassan, Ahmad, 1982, op. cit. p.52.

²¹⁶ Waines, David, 1995, op. cit. p.69.

²¹⁷ Mulla, D. F. Sir, 1988, op. cit. p. xiii.

²¹⁸ Walliullah, Mir, 1982, op. cit. p.64.

²¹⁹ Mulla, D. F. Sir, 1988, op. cit. p. xiv.

Walliullah, Mir, 1982, op. cit. p.64.

²²⁰ Gibb, H.A.R., 1949, op. cit. p.103.

Hassan, Ahmad, 1982, op. cit. p.53.

Waines, David, 1995, op. cit. p.74.

²²¹ Gibb, H.R.A., 1960, op. cit. p.272.

²²² Mulla, D. F. Sir, 1988, op. cit. p. xiv.

derivation of rules of law.²²³ He collected thousands of *Ahadith* compiled into the book known as *Musnad* of Imam Ahmad bin Hanbal.²²⁴ The collection is arranged according to the transmitters.²²⁵ Unlike Shafi he wrote no treatise on ethico-juristic methodology, however, certain of his decisions bear witness to a judicial subtlety without parallel.²²⁶

Ahmad bin Hanbal was very indulgent to the traditions of the Holy Prophet and the most prominent characteristic of the school is that some times they admit very weak traditions as the basis of legal propositions.²²⁷ Though he does not fully appreciate the value of *Qiyas* as an instrument of juridical systemisation and discovery yet he does not reject it completely.²²⁸ He regarded the legal opinions of the leading companions as the third source of Islamic law because they were the best to understand and practise the Prophet's *Sunnah*.²²⁹ The school is considered as the strictest of the schools, for its rejection of any proposition not based on the *Qur'an* or the *Sunnah*.²³⁰ He extensively used *Istishab*, a method of reasoning which consists in maintaining a given judicial status so long as a new condition arises to authorise its modification.²³¹ *Hanbalite* had its strong following in Iraq and Syria until the Ottoman conquest; however, it was revived in the 18th century in central Arabia, and now is the dominant school in most of the central and northern Arabia, Syria and Palestine.²³² The school enjoys an official recognition in Saudi Arabia.²³³

2.6 Role of These Schools in Development of Shari'ah

The Muslim jurists never had the authority to make law in their own right.²³⁴ Their function is to discover and expound it from its sources. They are more rigidly bound to the text of the *Qur'an* and the *Sunnah* and not the formulators of new laws like the common law judges.²³⁵ Development of *Shari'ah* is attributed to these great jurists

²²³ Walliullah, Mir, 1982, op. cit. p.66.

²²⁴ Gibb, H.R.A., 1960, op. cit. p.273.

²²⁵ Hassan, Ahmad, 1982, op. cit. p.54.

Waines, David, 1995, op. cit. p.70.

²²⁶ Gibb, H.R.A., 1960, op. cit. p.273.

²²⁷ Walliullah, Mir, 1982, op. cit. p.66.

²²⁸ Gibb, H.R.A., 1960, op. cit. p.276.

²²⁹ Waines, David, 1995, op. cit. p.71.

²³⁰ Hassan, Ahmad, 1982, op. cit. p.54.

²³¹ Gibb, H.R.A., 1960, op. cit. p.276.

²³² Gibb, H.A.R., 1949, op. cit. p.103.

Mulla, D. F. Sir, 1988, op. cit. p. xiv.

²³³ Waines, David, 1995, op. cit. p.74.

²³⁴ Hassan, Ahmad, 1982, op. cit. p.55.

²³⁵ *Ibid.* p.56.

independent of government and its legislative organs.²³⁶ The absence of interference from the government in the freedom of opinion of the Muslim jurists proved greatly favourable for the rapid development of law.²³⁷ These schools were not official law-making bodies, rather independent jurists each following certain methodology of his own based on the primary sources of *Shari'ah*; a process of development of law unprecedented in other legal systems.²³⁸ The adoption of peculiar methodology for deducing the principles has led to the disagreement and differences among the schools on certain matters of detail.

It was natural that the legal school favoured by the political power of the time should prevail in the realm.²³⁹ But to say that a school survived because it was favoured is not correct; a political power supports only for its own good and where it found strength already in existence.²⁴⁰ These schools assimilated the culture and traditions of various parts of the world. Abu Hanifa was of Persian origin, whereas the other three were from Arabia.²⁴¹ In the subsequent generations there emerged Muslim jurists from different races; the development of *Shari'ah* was, therefore, an international enterprise.²⁴² Despite their formal differences and divergences in detail, all the schools are in substantial agreement on the more important matters.²⁴³ All of them in practice recognised the same sources: the *Qur'an*, the *Sunnah*, *Ijma* and some form of analogical reasoning; and all recognised each other's systems as equally orthodox.²⁴⁴ They are not to be distinguished as different sects of *Sunnis* but merely as distinct schools.

It may be pointed out that these scholars are all human beings; if they differ among themselves; the people are allowed to follow the one who appears to be more authoritative to them.²⁴⁵ It will be similar to the cases of precedent that a court is allowed to follow one which it consider more authoritative and appropriate under the circumstances.

²³⁶ Kamali, Mohammad Hashim, 1991, op. cit. p.xv.

Hamidullah, Muhammad Dr., 1970, op. cit. p.131.

²³⁷ *Ibid.* p.136.

²³⁸ Badr, G. Moursi, 1978, op. cit. p.189.

²³⁹ Gibb, H.A.R., 1949, op. cit. p.102.

²⁴⁰ Makdisi, George, *The Rise of Colleges* (Edinburgh University Press, 1981) p.5.

²⁴¹ Hamidullah, Muhammad Dr., 1970, op. cit. p.138.

²⁴² *Ibid.*

²⁴³ Gibb, H.A.R., 1949, op. cit. p.103.

²⁴⁴ *Ibid.*

²⁴⁵ Hamidullah, Muhammad Dr., 1970, op. cit. p.130.

2.7 Kinds of command and prohibition in *Shari'ah*

The communication of God, relating to the acts of those who are the subjects of *Shari'ah*, by way of demand to do or abstain from doing an act, or giving them an option for its performance, or declaring a thing to be a cause or condition of such communication or impediment to it, is called a command.²⁴⁶ On the basis of this definition the command may be divided into two major kinds i.e. the command, which demands to do or refrain from doing or gives an option, is called *Hukm taklifi* (the law which defines rights and obligations) and the command which declares a thing to be the cause or condition of a rule or an impediment, is termed *Hukm wadi* (declaratory law).²⁴⁷

The majority of the Muslim jurists have divided *Hukm taklifi* into five categories:²⁴⁸ when an act is declared as obligatory it is *Wajib*, like command to fulfil the covenants;²⁴⁹ when absolutely forbidden it is *Haram*, like prohibition of adultery and fornication.²⁵⁰ The remaining three find their place between these two extremes. These are, reprehensible or disapproved i.e. *Makruh*, which fall short of outright prohibited ones, their omission, however, is preferable over their commission; recommended or *Mandub*, which are regarded as pious conduct worthy of spiritual merit, but their omission does not entail penalty; and finally the permissible or *Mubah*, towards which *Shari'ah* is totally indifferent. The examples of *Makruh*, *Mandub*, and *Mubah* are prohibition from business transactions after call for Friday prayer,²⁵¹ reducing the contract of debt into writing,²⁵² and dispersal to seek the bounty of Allah after Friday prayer²⁵³ respectively.

²⁴⁶ Al-Amidi, *Al-Ihkam fi Usul al-Ahkam* (Matba'at al-Ma'arif, Cairo, 1914) Vol. I, p.137.
Sadr al-Shari'ah, Ubaid ullah bin Masud, *Al-Tanqih ala Al-Tawdih* (Dar al-Ahd al-Jadid Lil-Tibaah, Cairo, 1957) Vol. I, pp.13-14.

Aamer, Abdul Aziz, *Usul al-Fiqh al-Islami* (1st ed. Dar al-Salam al-Ghouria, 1997) Vol. I, p.40.
Weiss, Bernard, 1978, op. cit. p.205.

²⁴⁷ Hassan, Ahmad, 1993, op. cit. p.34.

Al-Zokhali, Wahba, *Usul al-Fiqh al-Islami* (1st ed. Dar Al-Fiker, Damascus, 1986) Vol. I, p.42.

Hassan, H. Hamid, *Al-Hukm al-Shari'i ind al-Usuliyin* (Dar al-Nahdat al-Arabia, Cairo, 1972) p.34.

²⁴⁸ Hassan, Ahmad, 1993, op. cit. p. 34.

Al-Zokhali, Wahba, 1986, op. cit. Vol. I, p.45.

Jackson, Sherman A., *Islamic Law and the State* (E.J. Brill, Leiden, 1996) p.117

Waines, David, 1995, op. cit. p.76.

Rahman, Fazlur, 1966, op. cit. p.84.

²⁴⁹ *Al-Qur'an* 5:1.

²⁵⁰ *Al-Qur'an* 17:32.

²⁵¹ *Al-Qur'an* 62:9.

²⁵² *Al-Qur'an* 2:282.

²⁵³ *Al-Qur'an* 62:10

However, *Hanfite* added two other kinds; *Makruh* has been divided by them into two kinds i.e. *Tahrimi and Tanzihi*. *Makruh Tahrimi* are the matters which are frankly discouraged but the evidence required to declare them *Haram* is uncertain²⁵⁴ or we may say that it is an absolute demand to refrain from an act on the basis of probable evidence.²⁵⁵ An indecisive demand to refrain from an act is called *Makruh Tanzihi*.²⁵⁶ They also add another category of obligatory acts, the *Fard* i.e. the absolute demand to do an act on the basis of decisive evidence; whereas, according to them the *Wajib* is an absolute demand to do an act on the basis of probable evidence.²⁵⁷

Instances of declaratory law have been described in the *Qur'an*. For example, decline of the sun has been declared to be the cause of noon prayer,²⁵⁸ purification (ablution) has been declared as a condition for the validity of prayer,²⁵⁹ and polytheism has been declared to be an impediment to marry an unbeliever.²⁶⁰

Shari'ah differs from secular laws in that its laws are not confined to merely command and prohibition rather often coupled with an appeal to the conscience of man. The classification, contrary to the positive law of valid and invalid, signifies the importance of moral aspect of *Shari'ah*; obligatory, recommended and indifferent acts form the part of valid whereas forbidden are termed as invalid.²⁶¹ This moral appeal may be in the form of a persuasion or warning, an illusion to the possible harm or benefit attached to its obedience or otherwise, a promise for reward or threat of punishment in the hereafter, whereas secular laws are devoid of such an appeal and are confined to an exposition of imperative rules and their tangible results.²⁶² It is a characteristic of *Shari'ah* that the commands and prohibitions are expressed in a variety of forms often open to interpretation and *Ijtihad*.²⁶³

2.8 Legal Maxims in *Shari'ah*

Muslim jurists developed certain uniform rules of universal application. These rules known as *Al-qawa'id al-fiqhiyya*, based upon either a verse of the *Qur'an* or the *Hadith*,

²⁵⁴ Waines, David, 1995, op. cit. p.79.

²⁵⁵ Hassan, Ahmad, 1993, op. cit. p.35.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Al-Qur'an* 17:78

²⁵⁹ *Al-Qur'an* 5:6

²⁶⁰ *Al-Qur'an* 2:221.

²⁶¹ Kerr, Malcolm H., 1966, op. cit. p.9.

²⁶² Kamali, Mohammad Hashim, 1991, op. cit. p.139.

are compatible with the maxims of equity in English law. These maxims have been discussed in the book of *Al-Ishbah Wa Al-Nazair* in *Hanfite* as well as *Shafite* school of thought.²⁶⁴ The maxims deal with the important questions of intention, proof, flexibility, necessity, custom, mischief, and many others providing basis to deduct legal rules.

For example, a maxim related to the intention says that “all matters shall be determined according to the intention.”²⁶⁵ The maxim is based upon the well known saying of the Holy Prophet that deeds are to be adjudged by the intention.²⁶⁶ Another maxim related to the proof enunciates that “certainty cannot be displaced by doubt.”²⁶⁷ Freedom from any civil obligation or criminal liability falls under this maxim unless contrary proved because every one is originally presumed to be innocent. The maxim is based upon the saying of the Holy Prophet which states that the burden of proof is on the proponent; an oath is incumbent on him who denies.²⁶⁸ Similarly the maxim that necessity renders prohibited things permissible²⁶⁹ finds its roots in the verse of the Holy *Qur'an*.²⁷⁰

These maxims provide an authoritative statement of *Shari'ah* in civil and criminal litigation. Distinguished from the general theories, the maxims serve as a parameter for the deduction of particular precepts within the theories.²⁷¹ The maxims are very important because their knowledge makes the detailed study of *Shari'ah* easy, helps to govern the new situations not discussed by the jurists, enlightens the objects of *Shari'ah*, and provides the easiest way, for the lawyers and the students of *Shari'ah*, to explore the enriched scholarship of Muslim jurists.²⁷²

²⁶³ *Ibid.* p. 33.

²⁶⁴ Ibn Nujaym, Zain ud din, 1968, op. cit. pp.21-163.

Al-Suyuti, *Al-Ashbah Wa Al-Nazair* (Dar al-Kutub al-Ilmia, Beirut, 1979).

²⁶⁵ Ibn Nujaym, Zain ud din, 1968, op. cit. p.27.

²⁶⁶ Al-Bukhari, Muhammad bin Ismail, 1413 A.H., op. cit. Vol. I, p.2.

Ibn Majah, 1413 A.H., op. cit. Vol. II, p.1413.

²⁶⁷ Ibn Nujaym, Zain ud din, 1968, op. cit. p.56.

²⁶⁸ Al-Bukhari, Muhammad bin Ismail, 1413 A.H., op. cit. Vol. III, p.159.

Muslim bin Hijjaj, 1413 A.H., op. cit. Vol. II, p. 1336.

²⁶⁹ Ibn Nujaym, Zain ud din, 1968, op. cit. p.85.

²⁷⁰ *Al-Qur'an* 2:173.

²⁷¹ Nasir, Jamal J., 2002, op. cit. p.30.

²⁷² Taqi ud din Al-Husni, Abu Bakr bin Muhammad, *Kitab al-Qawa'id* (1st ed., Maktaba al-Rushed, Al-Riyadh, 1997) Vol. I, pp.37-38.

2.9 English law and Shari'ah Distinguished

2.9.1 Sovereignty

Both English law and *Shari'ah* share the common feature that their application extended far beyond the boundaries of their original birth places.²⁷³ However, the field of differences is very vast. The pivotal point of difference is the concept of sovereignty between the two. The belief in the unity and sovereignty of God is the foundation of the legal, political, social, and moral system propounded by all the Prophets.²⁷⁴ The basic principle of Islamic way of life is that human beings must, individually and collectively, surrender all rights of over-lordship, legislation, and exercising of authority over others and submit to the will of God. No one is allowed to make laws on his own authority and no one is obliged to abide by them.²⁷⁵

In *Shari'ah*, no person, group or even the majority can lay claim to sovereignty. Allah alone is the real sovereign; all others are merely His subjects. They have neither an authority to a totally independent legislation nor for modification of the revealed law.²⁷⁶ It is because "the authority rests with none but Allah. He commands you not to surrender to anyone save Him."²⁷⁷ At another instance it has been revealed "They ask: Have we also got some authority? Say: all authority belongs to Allah alone."²⁷⁸ The believers are bound to adjudicate according to the revelation. "Whoso does not decide by that which Allah has revealed, such are disbeliever."²⁷⁹ Having created every thing He deserves the command, "His is all creation and command."²⁸⁰

According to this theory, ultimate sovereignty, above the legal and political system belongs to Allah.²⁸¹ He alone is the law giver. Since the development of *Shari'ah* is totally independent of the secular authority, there could be no question of interference by the governments with its rules and decisions.²⁸² All administrative matters and questions about which no explicit injunction is to be found in *Shari'ah* are settled by the

²⁷³ Badr, G. Moursi, 1978, op. cit. p.187.

²⁷⁴ Ahmad, Khurshid, 1976, op. cit. p.158.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.* p.159.

Hassan, Ahmad, 1982, op. cit. p.56.

²⁷⁷ *Al-Qur'an* 12:40

²⁷⁸ *Al-Qur'an* 3:154

²⁷⁹ *Al-Qur'an* 5:44

²⁸⁰ *Al-Qur'an* 7:54

²⁸¹ Kerr, Malcolm H., 1966, op. cit. p.4.

²⁸² Gibb, H.A.R., 1949, op. cit. p.104.

consensus of opinion following the process of *Ijtihad*.²⁸³ The qualified persons (*Mujtahid*) can interpret the revealed law by exercising their free opinion.²⁸⁴

The concept is distinguishable from the modern democracy, which places sovereignty in people²⁸⁵ and the law is shaped by public opinion.²⁸⁶ People have a complete right to determine the values and norms of behaviour to be observed by them and they possess an absolute power of legislation accordingly. Law making is their prerogative and the legislation must correspond to their needs and temper of their opinion.²⁸⁷ Law develops within society and is promulgated by a sovereign among human beings who keeps in view the demands of society, and his own political interests while legislating.

2.9.2 Immutability

The *Qur'an* and the *Sunnah* are the fountainheads of *Shari'ah* that cannot be encroached on by any temporal authority. Their provisions, immutable in character, control the society and are not controlled by it and at the same time immune from any type of social or political change.²⁸⁸ Political authority is allowed to exercise delegated legislative powers in conformity with the revealed principles. It is to be noted that *Shari'ah* prohibits only the violation of what Allah has revealed. It does not forbid Muslims from following any law that has not been revealed provided that it should be in conformity with the principles of Divine law.²⁸⁹ Thus it is open for a Muslim society to frame new laws to meet the demands of new situations but it is not permitted to adopt any law repugnant to the revealed principles.

It is the feature of *Shari'ah* that permanence and change co-exist in it. It is neither so rigid that it cannot admit any change even in the matter of details nor it is so flexible and fluid that its distinctive traits have no permanent character of their own. Both the qualities are embodied in such a way that they do not affect its natural distinction.²⁹⁰ It is the law of nature that the element of permanence and change must co-exist in a

²⁸³ *Ibid.* p.161.

²⁸⁴ Kerr, Malcolm H., 1966, *op. cit.* p.4.

²⁸⁵ Bassiouni, M. Cherif, 1982, *op. cit.* p.11.

²⁸⁶ Denham, Paul, *A Modern Introduction to Law* (Edward Arnold, London, 1983) p.2.

²⁸⁷ Ahmad, Khurshid, 1976, *op. cit.* p.176.

²⁸⁸ Coulson, N. J., 1971, *op. cit.* p.1.

²⁸⁹ Ansari, Muhammad Fazl-ur-Rahman, *The Qur'anic Foundations and Structure of Muslim Society* (1st ed. Indus Educational Foundation, Karachi, Pakistan, 1973) Vol. II, p.347.

²⁹⁰ Ahmad, Khurshid, 1976, *op. cit.* p.42. (Like the process of physiological changes in human body, tissues of the body change throughout the life but the person remains the same; leaves, flowers, and the fruits of a tree change every year but the character of the tree remains unchanged.)

harmonious equation. The basic problems of human society remain the same in all ages but the means to solve them may change with the passage of time.

English law, like all other man-made laws is controlled by the society. These laws can be changed, annulled or modified as the society deems it fit taking into account its own specific requirements. These laws uphold the principles believed by the society and are meant to support the system it wishes to establish. The changes in these laws are closely linked with change of policy, government and the passage of time.

2.9.2.1 Is the Concept of Immutability an Innovation in Shari'ah?

The concept of immutability of legal principles is not an innovation for the secular laws. Natural law theory admits that some sort of regulation of human behaviour proceeds from nature or the will of God which cannot be changed.²⁹¹ Principles of natural law are for all the times and no change can be made in these principles.²⁹² These principles determine the condition of perfect human co-existence, progress and development.

According to Austin's point of view divine law may be divided into revealed and un-revealed, the un-revealed divine law is termed as natural law which can be discovered by reason or thought of man.²⁹³ This concept is based upon the belief that God provided human reason with the necessary basis for determining the principles of social morality while only the spiritual issues are to be addressed by the revelation. But according to Islamic belief these un-revealed laws could have been discovered prior to the revelation, once the revelation has arrived these laws may only be discovered in the light of revelation.²⁹⁴ It is because whatever is in the nature of man certainly does not indicate the intention or will of God with respect to man. This does not mean that *Shari'ah* prohibits the use of reason; rather it has been ordained a number of times in the Holy *Qur'an* to use reason. Human reason in some cases could perceive what is good and what is bad; in such cases revelation do no more than confirming this judgement, whereas in certain other cases it is revelation alone that could evaluate the nature of an act which human reason could not otherwise evaluate.²⁹⁵ In this way reason being subordinate to revelation form an integrated combination for the welfare of human beings. Blackstone admitted that the free will of human beings is regulated by the

²⁹¹ Kelsen, Hans, *General Theory of Law and State* (Russell & Russell, New York, 1961) p.8.

²⁹² Finnis, John, *Natural law and Natural Rights* (reprint) (Clarendon Press, Oxford, 1988) p.24.

²⁹³ Austin, John, *Lectures on Jurisprudence* (5th ed. John Murray, London, 1885) p.104

²⁹⁴ Nyazee, Imran Ahsan Khan, *Theories of Islamic Law* (I.R.I. & I.I.I.T., Islamabad, 1994) p.45.

eternal and immutable divine laws, good and evil has been determined by God and men are not bound to obey any human law in breach of such principles.²⁹⁶

2.9.3 Moral Aspect of Law

Shari'ah regards moral virtues as the principal basis of a society, declaring all those acts punishable which are inimical to the moral standards of an Islamic society. It takes meticulous care of moral values because their springs lie in religion which enjoins inculcation of moral virtues and induces man to do good. Morality, whether public or private is the concern of *Shari'ah*, crime and sin cannot be bifurcated, because without religion there can be no morality and without morality there can be no law. That is why law and morality are integrated into a single substance.²⁹⁷

English law completely ignores principles of private morality unless their violation directly affects the public order, peace and tranquillity in society. For example, sexual intercourse out of lawful wedlock is punishable only if done without the consent of the parties, but in *Shari'ah* it is an offence regardless of the consent because it is considered to be detrimental to Islamic morality. The same is the case with intoxication, in English law intoxication itself is not an offence; it amounts to an offence only under the circumstances where it would be a nuisance to others. *Shari'ah*, on the contrary, punishes use of alcohol, regardless of the fact whether or not it produces intoxication, and intoxication caused by any other substance, in order to keep intact its moral standards and the health of the community.

The difference is based upon the fact that in *Shari'ah* law and morality are derived from the same origin, whereas in English law legal rules derive their force from the will of the legislature but the morality finds its roots in religion, and culture. The approach of English law may be criticised on the ground that if the law was concerned only with the public order and morality, it should not have punished incest and bigamy which may be committed without corrupting public morals.

2.9.4 Law as a Part of Religious Belief

The principles of *Shari'ah* enjoy a high level of respect, both in the hearts of the rulers and the subjects because they believe that these laws are revealed by the Almighty Allah and hence sacred. This belief motivates them to follow these principles. Adjudication

²⁹⁵ Edge, Ian, 1996, op. cit. p.488.

²⁹⁶ Blackstone, *Commentaries* (15th Ed. A. Starhan, London, 1809) Vol. I, pp. 40-43.

under the principles of *Shari'ah* and submission to its rule has been declared as the basis for true belief.²⁹⁸ In Islamic history there are a number of instances where the person himself appeared before the Holy Prophet and confessed the offence punishable with capital punishment, where it was not known to anyone whether he had committed such an offence. As per belief, implementation of *Shari'ah* and adjudication according to its provisions is a religious duty of the Muslim rulers and judges respectively.²⁹⁹

It is the natural weakness of humans that personal urges, selfish desires and interests have serious influences on law making. The ruling class legislates to protect its own interests at the cost of the interests of general public. The fundamental difference between *Shari'ah* and the man-made laws is that, *Shari'ah's* laws are not passed by men who desire to legislate in their own interests; these laws are firmly based upon the principle of protection of the interests of whole mankind. In *Shari'ah* all the legislation is subject to the will of God and no one is empowered to go against that.

2.9.5 Implementation of Punishment in the Realm of Criminal Law

The implementation of *Shari'ah's* punishments is a legal as well as a spiritual duty of the state.³⁰⁰ The subjects are bound to get their disputes decided according to the revealed law and not to show any sign of aversion, otherwise they are not true believers.³⁰¹ The implementation of *Hadd* punishment serves as expiation for the wrong done by the offender and re-establishes his relation with God and the society as well.³⁰² It means that if the offender has been punished for his offence in this world, he shall not be liable for the torment of God in the Hereafter. In the implementation of *Hudood*, the position of ruler is like a father who punishes his children to reform and discipline them or a doctor who administers a bitter medicine or a surgeon who operates on his patient to cure the disease.³⁰³ Apparently the operation of a surgeon causes harm to the patient, but actually it is unavoidable to cure him of the disease and to improve quality of his life, same is the case with punishments in *Shari'ah*. On the other hand in secular laws execution of punishments is merely a legal duty having no ties with religious beliefs.

²⁹⁷ Kerr, Malcolm H., 1966, op. cit. p.7.

²⁹⁸ *Al-Qur'an* 4:65

²⁹⁹ *Al-Qur'an* 5:44, 45 & 47.

³⁰⁰ Ansari, Muhammad Fazl-ur-Rahman, 1973, op. cit. Vol. 1, p.292.

³⁰¹ *Al-Qur'an* 4: 65.

³⁰² Al-Khatib, Wali ud din Muhammad bin Abdullah, *Mishkat Al-Masabih* (Al-Maktab al Islami Damascus, Syria, 1961) Vol. II, p.309.

Al-Baihaqi, Abu Baker Ahmed bin Hassan, *Al-Sunan al-Kubra* (Dar al-Fiker, Beirut, 1996) Vol. XIII, p.150.

³⁰³ Ibn Taymiyyah, Taqi ud din, *Al-Sayasat al-Shariah* (Dar al Kutb al Arabi, Egypt, 1969) p.75

These punishments serve as retribution and outweigh the benefits derived by the offender from his offence and clear the account of the offender with the society.³⁰⁴

2.9.6 Perfection

All secular laws are creation of man, whereas *Shari'ah* is divine revelation. This is the basic difference which reflects the qualities of their respective makers. Man-made law is imperfect, inadequate and liable to changes and modifications. It is obvious that it aims at the collection of rules which are in harmony with the social needs of a particular society at a particular time, and no sooner does the society undergo a change, its laws are inevitably changed. *Shari'ah*, on the other hand, is the creation of the perfect God which is for all times and there shall be no modification of His law as He said, "There is no change in the words of Allah."³⁰⁵ The phenomenon of change in secular laws can be understood by taking into account the history of English law that it has undergone countless changes to cope with the requirements of the society, whereas *Shari'ah's* principles since the 7th century are unchanged and these are capable of absorbing and accommodating all the evolutionary changes that take place in human society.

2.9.7 Concept of Rights and Duties

All man-made laws emphasise the rights of man, showing much less concern with his obligations.³⁰⁶ These laws govern only the relationships of man with his fellow men, whereas in *Shari'ah* everyone bears certain obligations towards God, other humans, and even to himself. *Shari'ah* may be termed as a doctrine of duties and a code of obligations, individual's rights have secondary place in it.³⁰⁷ The relationships between the individual and the community are defined in terms of duties not in terms of rights. For example, everyone is under an obligation to respect the right of life of others; if he does not, he shall be liable to the punishment of *Qisas*. Suicide is an offence because it is transgression of the right of God. Man is not allowed to take his own life because he did not create it.

Everyone is bound to fulfil his obligations and no earthly authority can relieve him of these obligations, those who do not fulfil their obligations have no legitimate right. If everyone discharges his duty, the rights of others shall be safeguarded and by this way everyone shall be enjoying his freedom, and rights in peace and security. The emphasis

³⁰⁴ El-Awa, Mohamed S., *Punishments in Islamic Law* (American Trust Publications, USA, 1981) p.28.

³⁰⁵ *Al-Qur'an* 10:64

³⁰⁶ Heer, Nicholas, *Islamic Law and Jurisprudence* (University of Washington Press, 1990) p.74.

³⁰⁷ Fyzee, Asaf A. A., *Outlines of Muhammadan Law* (Oxford University Press, 1949) p.16.

on obligations creates harmony in an Islamic society, because, if everyone performs his duty, the complaints for infringements of rights will naturally vanish, whereas emphasis on rights creates a trouble because everyone having concerns about his rights would hardly have the mind to think of his obligations towards others.³⁰⁸

2.9.8 Setting Standards of Conduct

Unlike secular laws, *Shari'ah* sets the desired standards of conduct and enjoins its subjects to attain these standards and not to transgress. It has been ordained in the Holy *Qur'an*, "And come not near to adultery. Lo! It is an abomination and an evil way."³⁰⁹ In the same *Surah* it has been ordained not to kill any person without any just cause and not to come near the wealth of orphans, to fulfil the covenants and to measure and weigh accurately.³¹⁰ *Shari'ah* ordains Muslims to avoid all kinds of evils and to follow the role model of the Holy Prophet.³¹¹ It teaches man how to act, what to do and what to avoid in order to attain pleasure of Almighty Allah and to be successful on the day of judgement.³¹² A violation of such injunctions will result into criminal liability.

Secular laws, on the other hand, are not concerned with setting the standards of conduct, these laws only describe that if the subjects commit a particular act they will be liable for a specific punishment. *Shari'ah* has adopted a more effective method. It seems to be more logical and realistic that the people are guided about their conduct, the prohibited has been distinguished from the permissible. After this, if some one violates the law, he should be liable for a severe punishment.

2.9.9 Procedural Matters

For the administration of justice, *Shari'ah* from the very beginning not only required the proof by direct evidence but also established the institution of purification of witnesses, to ascertain whether a witness is trustworthy.³¹³ A testimony without corroboration bears no value.³¹⁴ Strict rules of evidence and conditions for witnesses are intended to ensure a fair trial and slim the probability of error. The rules of evidence, qualifications of witnesses and judges, elaborated in the *Qur'an* and the *Sunnah*, fortify the rights of the accused and *Shari'ah* has long led the rest of the world in recognising and applying

³⁰⁸ Ansari, Muhammad Fazl-ur-Rahman, 1973, op. cit. Vol. II, p. v.

³⁰⁹ *Al-Qur'an* 27: 32.

³¹⁰ *Al-Qur'an* 27:33-35.

³¹¹ *Al-Qur'an* 33: "1.

³¹² Schacht, Joseph, 1964, op. cit. p.11.

³¹³ Hamidullah, Muhammad Dr., 1970, op. cit. p.132.

³¹⁴ Heer, Nicholas, 1990, op. cit. p.7.

these rules.³¹⁵ The proof of offences requires the satisfaction of strict evidentiary principles to establish a certainty of guilt which legitimise the infliction of relatively harsh punishments and eliminate the temptation to crimes.³¹⁶ It was only in the 16th century when English law began to admit some rules of evidence.³¹⁷ It suggests that the Islamic society was based on the rule of law from its very beginning, long before the concept became a cornerstone of English society.³¹⁸

The commandments of *Shari'ah* are categorised into four kinds i.e. pertaining to rituals or worship, civil laws, personal laws, and penal laws.³¹⁹ From the very beginning, there were courts exercising separate jurisdictions in civil and criminal matters.³²⁰ The golden thread of modern English law that an accused is presumed innocent unless proved guilty and the wisdom that it is better to acquit one hundred guilty persons than to wrongly convict an innocent were expressly recognised by *Shari'ah* centuries ago.³²¹ There is no doubt that the principle of social justice laid down in Islamic jurisprudence were well suited to the then existing social conditions, these are equally appropriate for good governance and regulation of society of the present day.

Conclusion

Shari'ah knows no distinction between the religious and the secular, but views in one sweep the entire life of man. In the Holy *Qur'an* the two aspects are found interwoven one with the other.³²² The philosophy of ethics, law and morals, manners and mores, forms of social, political and economic organisation, side by side with the problems of worship and theology, have their legitimate place in the all inclusive system of *Shari'ah*.³²³ That is why the ten years of the Prophet's rule in Madina, and thereafter thirty years of the rightly guided caliphs constituted the age in which human society had come as near perfection as could be hoped for.³²⁴ The religious aspect of *Shari'ah* becomes more prominent because it covers the religious duties of its subjects along with secular ones, whereas English law, in particular, and other legal systems in general are not concerned with the religious life of their subjects.

³¹⁵ Lippman, Matthew, 1988, op. cit. p.xi.

³¹⁶ *Ibid.* pp.2-3.

³¹⁷ Holdsworth, W.S., *A History of English Law* (6th ed., Methuen & Co., London, 1938) Vol. I, p.334.

³¹⁸ Badr, Gamal Moursi, 1978, op. cit. p.191.

³¹⁹ *Ibid.* p.26.

³²⁰ Von Grunebaum, Gustave E., 1953, op. cit. p.165.

³²¹ Weeramantry, C. G., 1988, op. cit. p.78.

³²² Gibb, H.A.R., 1949, op. cit. p.89.

³²³ Ahmad, Khurshid, 1976, op. cit. p.200.

Unlike English law that has been developed by judges to meet the changing needs of society; *Shari'ah* is mainly based upon the commandments of God independent of society.³²⁵ English law, developed through the judicial decisions, is well described as judge-made law; *Shari'ah* developed through the endeavours of authoritative jurists, having their opinions well-supported by arguments may be called jurist's law.³²⁶ *Shari'ah's* development may be ascribed to private experts, independent of state's intervention but still awaiting formal codification.³²⁷ In its sources, its scope, and its sanctions *Shari'ah* is the antithesis of English law; despite some religious influence in the beginning, English law remained a temporal affair, the legislature for its enactment and the courts for its enforcement.

After having the knowledge of the sources and the nature of both the legal systems it is appropriate to know that on what grounds the criminal liability in both the systems rests? The succeeding chapter will deal with the principles of criminal liability in English law.

³²⁴ Von Grunbaum, Gustave E., 1953, op. cit. p.143.

³²⁵ Lippman, Matthew, 1988, op. cit. p.2.

³²⁶ Badr, G. Moursi, 1978, op. cit. p.189.

Weiss, Bernard, 1978, op. cit. p.201.

³²⁷ Gerber, Haim, 1999, op. cit. p.24.

Chapter-3 Principles of Criminal Liability in English Law

3.1 Introduction

Criminal liability is based on the grounds that the offender has contravened certain normative system, done something prohibited, which, therefore, prompts the reaction to hold him legally responsible.¹ Once it is established that he is responsible for the unlawful conduct; the next step is to ascertain whether he fulfils the necessary conditions of criminal liability. What are these conditions that give rise to criminal liability? The answer to this question is based upon the principles of a specific legal system.² Generally, if the conditions of capacity and volition are fulfilled, the accused is found guilty and is sentenced to the punishment provided within the legal system to which he is subject. It shows that criminal law basically deals with four major questions;³ Is the accused responsible for the conduct under question? How to assess the gravity of the offences and classify them? What are the criteria to select an appropriate punishment for the offence? What are the conditions that justify punishments?

Although the conditions of criminal liability, criteria for classification of crimes and principles of selecting punishment conceptually vary in various legal systems yet there are some points of intersection and interrelation between them. Most criminal laws forbid certain types of behaviour, therefore, before a person can be convicted, it must be proved that he acted contrary to the law.⁴ Similarly, all the legal systems share the common feature that offences are arranged hierarchically according to their comparative seriousness on the basis of the right infringed, harm produced, or the intention of the offender.

Generally, criminal law does not set the standards of behaviour ought to be followed; it only threatens the consequences of violation of its provisions.⁵ This threat of punishment helps in bringing about the desired social conduct.⁶ Criminal conduct is a behaviour that does not follow normal patterns of behaviour, written or un-written, understood and accepted by the majority.⁷ The aim of law is not only to secure peace in

¹ Ross, Alf, *On Guilt, Responsibility and Punishment* (Stevens & Sons, London, 1975) p.13

² *Ibid* p.29.

³ *Ibid*.

⁴ Sistare, C. T., *Responsibility and Criminal Liability* (Kluwer Academic Publishing, 1989) p.8.

Devlin, Patrick, *The Enforcement of Morals* (Oxford University Press, 1965) pp.6-7.

⁵ Devlin, Patrick, 1965, *op.cit.* p.20.

⁶ Kelsen, Hans, *General Theory of Law and State* (Russell & Russell, New York, 1961) p.19.

⁷ Denham, Paul, *Law: A Modern Introduction* (4th ed., Hodder & Stoughton, London, 1999) p.150.

the society but also to regulate all forms of behaviour. A key object of criminal law is to protect the rights of citizens against intentional violation by others and to protect the weak against the strong.

This chapter will focus in a general way on criminal liability, searching the answers to the questions like: What is meant by criminal liability and how is it determined? What criteria has English law adopted for its determination? Is there any relationship between law and morality? What are the aims and objects of punishment? Do the punishments in English law achieve their objects effectively?

3.2 *Infringement of Rights: Basis of Criminal Liability*

In many legal and constitutional systems, it is possible to distinguish between two kinds of rights i.e. ordinary and fundamental rights. Ordinary rights are those rights that are believed, in a particular society at a particular time, to symbolize an appropriate normative balance between the citizens and the state. These rights are considered to be properly subject to the political process and change or extinction at any time by the state. Fundamental rights are considered to be particularly important, for instrumental or symbolic reasons, and are, therefore, properly given some measure of protection against the operation of the political process.⁸

The executive authority of the state is liable to uphold the fundamental rights of citizens to life, property, dignity and many others. In order to protect these rights, society has developed a formal legal system of rules binding on all its members, and enforced by an authority that guarantees peace, stability and protection of the interests of the society. Any conduct in breach of these rules endangering the safety and stability of a society is rightly regarded as an offence to be repressed with the corresponding severity.⁹

Besides criminal law, religion, customs, and morality are also considered to be the basic forces governing human conduct in a society.¹⁰ All these are similar in their functions but by its coercive nature law can be distinguished from the others. Law exercises compulsion and enforces punishments on the transgressors, whereas others create a

⁸ Feldman, David, *Civil Liberties and Human Rights in England and Wales* (Clarendon Press, Oxford, 1993) pp.50-51.

⁹ Turner, J. W. Cecil, *Kenny's Outlines of Criminal Law* (19th ed., The University Press, Cambridge, 1966) p.2. Asworth, A. J. & Wasik, Martin, (Editors) *Fundamentals of Sentencing Theory: Essays in the Honour of Andrew Von Hirsch* (Clarendon Press, Oxford, 1998) p.18.

¹⁰ MacDonald, H. Malcolm, *The Rule of Law* (Southern Methodist University Press, Dallas, 1961)p.50 Denham, Paul, *A Modern Introduction to Law* (Edward Arnold, London, 1983) p.467.

conviction in favour of what man ought to do. Law deals with the exterior behaviour of a man, whereas others are mainly concerned with his inclinations, feelings, intentions and motives constituting his interior. Further, generally the law operates after an act or omission has taken place but the religion and morality operate to reform the conduct of a man before he acts. Here it may be noted that religion is not entirely internal, religious norms are some times more effective than all other norms including legal ones provided that the subjects believe firmly in the existence and power of a superhuman authority.¹¹

One reason for the obedience of law may be the legal sanctions behind it yet other influences are equally important. Social pressure, displeasure of fellowmen, public opinion and ethical considerations may also be taken into account while considering the behaviour of the people. It may be said that law makes the pressure of other forces more effective. However, existence of all these is essential for maximum happiness, pleasure and well being of a society.¹²

3.3 Criminal Liability and Human Rights

In this Era of modern and civilized world, beside state or domestic laws there are certain regional and international organizations endeavouring to safeguard the basic human rights throughout the world.¹³ All the conventions and charters of human rights declare, accept and protect the right to life, property, liberty, freedom from arbitrary arrest and detention, equality in dignity, non discrimination, protection against torture and inhuman treatment. The states are bound not only to avoid the violation of such rights themselves but also to take positive steps to prevent the infringement of such rights by the individuals.¹⁴

Human rights do not lose their significance in the realm of criminal law. It is desired that it should protect the rights of the community as well as the wrong-doer. In order to achieve this end the criminal law must strike a balance between the rights of individuals and society so as to protect life, liberty, and property of the individual, on the one hand,

¹¹ Kelsen, Hans, 1961, op. cit. p.20

¹² MacDonald, H. Malcolm, 1961, op. cit. p. 32.

¹³ In this regard we can take examples of The European Convention on Human Rights 1950, The American Convention on Human Rights 1969, The African Charter on Human Rights and Peoples Rights 1981, and above all The United Nations Universal Declaration of Human Rights 1948.

¹⁴ Rehman, Javaid, *International Human Rights Law: A Practical Approach* (Longman, 2003) p.9.

In *A v. UK*, VI RJD 2669, ECHR held that governments are under a duty to protect the rights of children and other vulnerable all other vulnerable citizens from being infringed by private individuals and held UK government responsible for breach of its duty.

and social stability and security of society on the other.¹⁵ The right of an accused to a fair trial, a right not to be subjected to inhuman and degrading punishment by the court, safeguard against illegitimate treatment by law enforcing agencies, protection against illegal police actions or abuse of process and many other rights are the concern of human rights.

Human rights ensure that the authorities should treat all human beings, whether suspected, accused, or convicted, in a humane manner and their conduct should not fall below standard of behaviour dictated by civilization and respect for human dignity.¹⁶ These restrictions imposed on the scope of criminal law are meant to prevent its use as an instrument of tyranny and to ensure that zeal for law enforcement does not lead the law enforcing agencies to fall below the standard of treatment demanded by respect for the individual as a human being.¹⁷

3.4 Basic Characteristics of Criminal Law

The governing power in a society is empowered to make rules of law regulating the conduct of individuals. Though this power may make any law that it likes yet it must be reasonable, just, certain, and safeguarding the interests of all the groups in a society and logically acceptable.¹⁸ In order that power should not be the basis of a society, Lord Denning describing the features of criminal law says that it must be certain so that the people may act safely upon it and approve its enforcement. It must be readily ascertainable, so that they may know their rights and duties under it and its enforcement must be by independent and upright judges in whom people have confidence.¹⁹

Pre existence of the criminal law is required so that the prospective offender should weigh the advantage of his crime against the evil of the punishment provided for that offence.²⁰ No conduct may be held criminal unless it is precisely described in the criminal law.²¹ It is unfair to punish someone unless he has an opportunity to know the law and conform to it.²² In the view of Professor Jerome Hall, four types of penal legislation shall be considered the violation of the general principle: retrospective

¹⁵ Morris, Norval & Howard, Colin, *Studies in Criminal law* (Clarendon Press, Oxford, 1964) p.153.

¹⁶ Fitzgerald, P.J., *Criminal Law and Punishment* (Clarendon Press, Oxford, 1962) p.146.

¹⁷ *Ibid.* p. 164.

¹⁸ Lanham, David, "Larsonneur Revisited" [1976] *Crim. L. R.* 276 at 277.

¹⁹ Denning, Sir, Alfred, *The changing law* (Steven & Sons Ltd., London, 1953) pp.3-4.

²⁰ Fitzgerald, P.J., 1962, *op. cit.* p.170.

²¹ Hall, Jerome, *General Principles of Criminal Law* (2nd ed., The Bobbs-Mirrill, Indianapolis, 1960) p.28.

²² Fitzgerald, P.J., 1962, *op. cit.* p.170.

enforcement of criminal law, aggravation of an offence from past date, enhancement of punishment subsequently, and change in the existing rules or standard of evidence detrimental to the rights of the offender.²³

All these conditions have been imposed because criminal liability is the strongest condemnation, inflicted by the society upon a person who has, voluntarily, violated any provision of the criminal law.²⁴ It may amount to death, infliction of pain, deprivation of the civil rights, or imposition of fine. It is justified only if it produces greater pleasure than the pain it causes or prevents a greater pain, protects freedom of individuals and save them from the threat of crimes.²⁵

3.5 Criminal Liability and Moral Values

One of the legitimate functions of criminal law is to protect the moral standards of a society because it is at its heart an instrument of morality.²⁶ If it protects an individual from injury and exploitation but fails to protect the institution and community of ideas whether political or moral, it has not discharged its functions.²⁷ When we refer to criminal liability, what sort of conduct are we talking about? The answer may differ not only from society to society, but also from one era to another in the same society.²⁸ For example, the offences of suicide and homosexuality have been decriminalized in UK.²⁹ Prior to the decriminalization, such acts were considered to be contrary to the moral standards of the society and punishment was justified.³⁰ On the other hand, some forms of insider trading on the stock market and the possession of indecent photographs are crimes now, although they were not so until a few years ago.³¹ Similarly, what are crimes today may not be crimes tomorrow.

In the West, post World War II period has observed a strong campaign to bifurcate morality and religion in the development of law.³² It is believed that there is no justification for the suppression by the state or proscription by the criminal law of the

²³ Hall, Jerome, 1960, op. cit. p.60.

²⁴ Ashworth, Andrew, *Principles of Criminal Law* (3rd ed. Oxford University Press, 1999) p.1.

²⁵ Duff, Antony & Garland, David, *A Reader on Punishment* (Oxford University Press, 1994) p.3

²⁶ McCord, David, "The English and American History of Voluntary Intoxication to Negate mens rea" 11(1990) *JHL*. 372 at 380.

²⁷ Devlin, Patrick, 1965, op. cit. p.22

²⁸ Ashworth, Andrew, 1999, op. cit. p.2.

²⁹ Suicide was a crime in UK until 1961 when by the Suicide Act 1961 it became perfectly lawful to kill oneself; homosexual acts committed in private by male persons who have attained the age of 21 years were offence until 1967 when by Sexual Offences Act 1967 such acts became permissible.

³⁰ Fitzgerald, P. J., 1962, op. cit. p.205.

³¹ Ashworth, Andrew, 1999, op. cit. p.2.

private immorality causing no harm to others.³³ Wolfenden Committee Report³⁴ declared that it is not the function of criminal law to intervene in the private lives of citizen and to enforce any particular pattern of behaviour³⁵ rather it ought to give an individual freedom of choice and action in private morality.³⁶ The Committee drew a distinction between private and public morality by allowing prostitution and prohibiting it in the streets.³⁷ It is claimed that the function of criminal law is to preserve public order and decency, protection of citizens from what is injurious or offensive, and to provide sufficient safeguards against exploitation or corruption.³⁸ The legislation based on the committee's report, allowing homosexuality, is full of inconsistencies, discrimination and can be termed beyond logic.³⁹ The inconsistency becomes more prominent by another example, the lease of a house for immoral purposes is invalid and cannot be enforced by law, now if what goes on inside a house is a matter to be dealt under private morality and it is not the law's concern then law need not inquire into the object of the lease.⁴⁰ There is no justification for allowing such acts on ground of distinction between public and private morality. The only justification might be the principle of liberty of the individual.

Whether the law is concerned with private morality or not may be a debatable question but there can be no second opinion that law should not allow any kind of discrimination. If the plea of the committee is admissible then number of other acts like, incest, suicide pacts, duelling, abortion, euthanasia should also be excluded from the realm of criminal law.⁴¹ Another point that suggests relationship between law and morality is that it is wrong to punish the un-blameworthy or one who cannot be held morally responsible for

³² Up to the end of the 19th century even slaughtering a sheep in view of other sheep was an offence as decided in *Collman v. Mills* [1897] 1 QB 396.

³³ Feinberg, Joel, *Harmless Immoralities and Offensive Nuisance* in Care, Norman (ed) *Issues in Law and Morality* (The Press of Case Western University, 1973) p.83.

³⁴ Report of the Committee on Homosexual Offences and Prostitution, Cmnd. 247 (1957).

³⁵ *Ibid.* Ch.2, Para-14.

³⁶ *Ibid.* Ch.5, Para-61.

³⁷ *Ibid.* Ch. 9, Para-285.

³⁸ *Ibid.* Ch. 2, Para-13.

³⁹ Homosexual acts of the members of Armed forces and Merchant Navy are offences under section 1(5) and 2 (1) respectively, of the Act. Similarly, homosexual acts done in private by more than two person are logically to be treated in the like way whereas under section 1(2) (a) of the Act if three persons are indulged in homosexual acts the fact that the act was being done in private does not provide any defence.

⁴⁰ Devlin, Patrick, 1965, *op. cit.* p.7.

⁴¹ *Ibid.*

his actions.⁴² A law that punishes an un-blameworthy conduct would be too severe for that society to bear.⁴³ The distinction between murder and manslaughter and the defences, especially infancy and insanity, are based on the concept of moral blameworthiness.

Morality helps to attain the highest standards of goodness in a society because law regulates the conduct of an individual while morality emphasises the perfection of his character.⁴⁴ Despite the difference of opinion about the role of morality in English law, it can be concluded that "Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either dies."⁴⁵

3.6 Intention and Its Importance in Criminal Liability

In all the modern legal systems criminal liability depends on two elements; the outward act forbidden by the law and a certain condition of mind, called intention, accompanying the act.⁴⁶ An intention may be termed as the purpose or the design with which an act is done.⁴⁷ The offender shall be liable only if he intended the harm caused or foresaw the consequences of his conduct and nevertheless continued recklessly.⁴⁸ An act is intentional as to a consequence if it is done with the wish, desire, purpose or aim of producing the result in question.⁴⁹ Hence intention is made up of foresight of specific consequences or knowledge of unlawfulness of the conduct irrespective of consequences.⁵⁰ In the words of Lord Asquith, intention means a state of affairs, which the offender decides to bring about and for which he has a reasonable foresight of being able to do so by his own act of volition.⁵¹ Intention according to J.F. Stephen is "the result of deliberation upon motives and is the object aimed at by the action caused or accompanied by the act of volition."⁵² It suggests that English criminal law recognizes two kinds of intentions; direct intention i.e. where the consequences were aimed at and

⁴² Robertson. G., *Freedom: The Individual and the Law* (7th ed. Penguin Books, London, 1993) p.433.
Beck, Stanley M. & Parker, Graham E., "The Intoxicated Offender: A Problem of Responsibility" 44 [1966] *Can. Bar Rev.* 563 at 564.

⁴³ Holmes, Oliver Wendell, *The Common Law* (Harvard University Press, Cambridge, 1963) p.42.

⁴⁴ Husik, Issac, *The Theory of Justice* (The Macmillan Co., New York, 1925) p.40.

⁴⁵ Devlin, Patrick, 1965, op.cit. p.22.

⁴⁶ Hart, H .L. A., *The Morality of Criminal Law* (Oxford University Press, London, 1965) p.6

⁴⁷ Kent, Edward Allen, *Law and Philosophy: Reading in Legal Philosophy* (Prentice-Hall, Inc., Englewood Cliff, New Jersey, 1970) p.172.

⁴⁸ *R. v. Cunningham* [1957] 2 QB.396.

⁴⁹ Williams, Glanville, "Oblique Intention" 46 [1987] *CLJ.* 417 at 418.

⁵⁰ The Law Commission, *Codification of the Criminal Law: General Principles* (Working Paper No.31, 1970) p.30

Williams, Glanville, *Criminal Law: The General Part* (2nd ed., Stevens & Sons, 1961) p.34.

⁵¹ *Cunliffe v. Goodman* [1950] 2 KB. 237 at 253.

there is a direct relation between the cause and the consequence, and oblique intention i.e. though the consequences may not be directly linked with the cause, however, these are foreseen, collateral or virtually certain.⁵³

A person does not incur criminal liability unless he intended to bring about, or recklessly brought, those elements, which constitute the crime. The concept has been traditionally expressed in the maxim "*actus non facit reum nisi mens sit rea*" i.e. an act does not make a man guilty of a crime unless his mind is also guilty. An inquiry into the state of mind of accused is made simply to make sure that the exception of the accused from punishment will not weaken the authority of criminal law.⁵⁴

The Latin phrase *mens rea* is generally used as a comprehensive term to denote this mental condition. Formally, *mens rea* can be stated as the mental state of the defendant as required by the definition of an offence with respect to the *actus reus*.⁵⁵ For example, murder is the intentional killing of a human being, so the defendant is not guilty of murder unless he intentionally killed someone.⁵⁶ Though *mens rea* may differ in different crimes yet there is one common essential element in all the crimes that it is the voluntary doing of a morally wrongful act,⁵⁷ forbidden and made punishable by the criminal law.⁵⁸ In its broad sense *mens rea* may be defined as a general immorality of motive, vicious will or evil mind.⁵⁹

There are a number of words indicative of the requirement of *mens rea*, like, knowingly, maliciously, wilfully, dishonestly, malice, intention, recklessness. Similarly, awareness, belief, consciousness, desire, deliberateness, foresight, heedlessness, wickedness, all implies states of mind some of which are synonyms in the eye of the law while some others are not.⁶⁰ It would be nice to be able to say that *mens rea* or the internal element

⁵² Stephen, J. F., *A History of Criminal Law of England* (Macmillan, London, 1883) Vol. II, p.110.

⁵³ Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation*, Edited by: Willford Harrison (Basil Blackwell, Oxford, 1948) p.202.

Williams, Glanville, "Oblique Intention" 46 [1987] CLJ 417 at 421.

R. v. Mathew & Alleyne [2003] EWCA Crim. 192 in 67 (2003) *Journal of Criminal Law* 292 at 293.

⁵⁴ Hart, H.L.A., *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) p.42.

⁵⁵ Lacey, N., & Wells, C., *Reconstructing Criminal Law: Text and Materials* (Butterworths, 1998) p.39.

Kadish, Sanford, "The Decline of Innocence" 37 [1978] CLJ. 274.

⁵⁶ Dressler, Joshua, 1995, op. cit. F. N. 56. pp.102-103.

⁵⁷ Hall, Jerome, 1960, op. cit.p.103

⁵⁸ *Allard v. Selfridges* (1925) 1 KB 129 at 137.

⁵⁹ Dressler, Joshua, 1995, op. cit. F. N. 56. p.102

⁶⁰ Card, Richard, *Card, Cross and Jones Criminal Law* (15th ed., Butterworths, 2001) p.62.

of an offence is simply an evil and wicked mind that invariably must be proved to obtain a conviction.⁶¹ *Mens rea* not only plays an important role in the conviction of an offender, it is also important at the subsequent stage of determining punishment for the act done.⁶² The essence of principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have. This approach is based on the principle of autonomy. Individuals are regarded as autonomous with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.⁶³

3.6.1 How to prove intention?

Merely an intention to commit a crime without any manifestation of *actus reus* is not culpable; no criminal liability will ensue while the unlawful intention remains concealed,⁶⁴ for it is the deviant conduct not the thoughts that the law is primarily designed to control.⁶⁵ Intention is the core element of all the offences; the intangible condition of mind that cannot be proved directly. It is not possible to look into the mind of an accused to ascertain his intention at a particular time. In the words of Blackstone, "No temporal tribunal can search the heart, or fathom the intention of the mind, otherwise than as they are demonstrated by outward actions. It, therefore, cannot punish for that it cannot know."⁶⁶

Now, the question does arise, how to ascertain the intention of an accused? The answer is very simple that it is a question of fact depending on the experience and observation of a common man taking into account the conduct of the accused at the time of commission of the offence and other circumstances.⁶⁷ Circumstantial evidence, like what he did or said at a particular time under question will also be very helpful.⁶⁸ The jury can infer his intention from his acts and all the circumstances proved before them.⁶⁹

Wilson, William, *Criminal Law: Doctrine and Theory* (2nd ed., Longman, 2003) p.119.

Simester, AP. & Sullivan, GR., *Criminal Law: Theory and Doctrine* (Portland Oregon, Oxford, 2002)p.114.

Allen, Michael J., *Textbook on Criminal Law* (6th ed., Blackstone Press, 2001) p.49.

⁶¹ Scanlan, Gary, *An Introduction to Criminal Law* (Financial Training Publications, London, 1985) p.34.

⁶² Hart, H.L.A., 1970, op. cit. F.N. 54. p.162.

⁶³ Ashworth, Andrew, 1999, op. cit. pp.151-52.

⁶⁴ L. Crispin. Warmington, *Stephen's Commentaries on the Law of England* (21st ed., Butterworth, London, 1950) Vol. IV, p.38.

⁶⁵ Colvin, Eric, "A Theory of the Intoxication Defence" 59 (1981) *Can. Bar. Rev.* 750 at 752.

⁶⁶ Blackstone, *Commentaries on the law of England* (15th ed. A. Starhan, London, 1809) Vol. IV, p.20.

⁶⁷ Per Lord Reid in *Gollins v. Gollins* [1964] A.C. 644 at p.663.

⁶⁸ Per Lord Bridge of Horwich in *R. v. Moloney* [1985] AC 905 at p.918.

⁶⁹ Per Barry J. in *R. v. Charlson* [1955] 1 WLR 317.

As already mentioned that the intention of the offender is related to his foresight of the consequences, English courts used the criterion to determine his intention. In *R. v. Hancock*⁷⁰ the court held that foresight of consequences is directly related to the probabilities, the higher the probability, the more certain it is to find that the defendant foresaw and therefore intended it. However, if a consequence cannot be foreseen it cannot be avoided.⁷¹

In *D.P.P. v. Smith*,⁷² the court adopted the doctrine of objective liability to determine the intention. The case suggested that in certain circumstances there is a conclusive presumption that the accused intended the natural consequences of his acts and this presumption applies until contrary is proved.⁷³ This doctrine imputes to an accused the knowledge or intention which he may not, but an average man would have had. The only test to determine the liability of the accused is whether the harm caused by an unlawful voluntary act of the accused was the natural and probable consequence of his act. For this test, foresight of an ordinary prudent man shall be used instead of that of the accused.⁷⁴ The doctrine leads to the conclusion that acts should be adjudged by their tendency under the known circumstances, not by the actual intent accompanying them.⁷⁵ In fact, the law does not consider, and need not consider, in determining criminal liability, of an offender, what he actually intended, it imputes to him the intention that an ordinary man equipped with ordinary knowledge, would be taken to have had in acting as the accused did.

However, the principle of objective liability has been overruled by section 8 of the Criminal Justice Act 1967. It states expressly that a court or jury is not bound in law to draw inferences of intention even in the absence of any rebutting evidence.⁷⁶ It requires the fact finder to examine all the evidence before deciding whether the accused did foresee the result brought about by his conduct.⁷⁷ The irrefutable presumption of law

⁷⁰ *R. v. Hancock* [1986] AC. 455 at 473

⁷¹ Holmes, Oliver Wendell, 1963, op. cit. p.47.

⁷² *DPP v. Smith* [1961] AC. 290.

⁷³ Tapper, Collin, *Cross and Tapper on Evidence* (8th ed., Butterworths, London, 1995) p.128.

⁷⁴ Holmes, Oliver, Wendell, 1968, op. cit. p.327

⁷⁵ Holmes, Oliver Wendell, 1963, op. cit. p.40.

⁷⁶ Dennis, I. H., *The Law of Evidence* (2nd ed., Sweet & Maxwell, London, 2002) p. 420.

⁷⁷ Keane, Adrian, *The Modern Law of Evidence* (5th ed., Butterworths, London, 2000) p.637.

has been converted into presumption of fact and the prosecution is under a duty to prove that the accused actually foresaw the specified result.⁷⁸

English courts have taken a U turn towards the relation of foresight with intention of the offender. In a number of cases it has been decided that to equate foresight of consequences of wrongful act with the intention of murder is wrong in a direction on the *mens rea* of the offence. In *R. v. Woollin*,⁷⁹ the House of Lords held that in a case of murder the jury should be directed that they are not entitled to infer the intention unless they feel sure that the death was a virtual certainty and the accused appreciated that such was the case. This case suggests that foresight of certainty must not be a condition of intention because intention is a state of mind and a person may well believe a result to be certain when in fact it is not. For example, pulling the trigger of a gun on a person with an intention to kill where the gun has been unloaded without the knowledge of the offender or the victim was wearing a bullet proof vest.⁸⁰ The result in this case is not certain though undoubtedly intended by the offender.

The Criminal Justice Act and the decisions of the courts have unduly changed the balance in favour of the offender. As a matter of law an intention to kill is sufficient for the conviction of murder, whether it was known or not to the accused that the death was virtually certain, highly probable or merely possible; he will be liable even though the possibility of result was remote.⁸¹ Had it not been the principle it would have been impossible to convict any offender of murder on the grounds that he was a very poor at shot or that it was unlikely to cause death from such a distance.

It can be summed up that the actual state of a person's mind is not an easy thing to prove unless the accused himself confesses.⁸² In the absence of any such confession intention can be inferred only by the use of common sense taking into account all the available circumstantial evidence. The absence of any direct evidence to prove intention has led the English courts to adopt different attitudes at different times and no satisfactory and uniform principles have been laid down in this regard. Taking into

⁷⁸ Smith, J.C., *Smith & Hogan Criminal Law* (10th ed., Butterworths, Lexis Nexis, 2002) p.359.

⁷⁹ *R. v. Woollin* [1999] 1 AC.82.

⁸⁰ Smith, J.C., 2002, op. cit. p.71.

⁸¹ *Ibid.* p.330.

⁸² Allen, Michael J., *Textbook on Criminal Law* (4th ed., Pitman Printing Press, London, 1997) p.53.

account the prevailing unsatisfactory condition, the Law Commission and the House of Lords suggested that a statutory definition of intention should be provided to make it clear that to foresee a result of one's act as virtually certain is to intend it.⁸³ The proposed solution may lead to many complications, intention is the internal condition of mind of a person which cannot be perceived by the senses; a statutory definition will deprive the courts from using their common sense to infer it from the conduct of the offender that is the most reliable method to determine it.

3.7 Offences of Strict Liability

The presumption that *mens rea* is an essential and basic element in every offence is liable to be displaced either by words of statute creating the offence or by the subject matter with which it deals.⁸⁴ In certain crimes, nearly all of which are created by statute, a person may incur criminal liability even though he has acted without intention or recklessness in relation to one or more of the elements of that crime.⁸⁵ Such crimes where prosecution need not prove *mens rea* are known as crimes of strict liability, the only requirement is to prove the existence of an act or omission causing the delinquent behaviour.⁸⁶ The object of strict liability is to ensure a high standard of care⁸⁷ and this view has been approved in a number of English cases.⁸⁸ The doctrine is generally viewed with great abhorrence and admitted as an exception to the general principles of criminal liability; the principles have been sacrificed to secure a higher measure of conformity and conviction of offenders.⁸⁹ The doctrine denotes the preference of public interest over individual responsibility⁹⁰ and its application is justified so far as it furthers deterrence and promotes the enforcement of the regulatory requirements.⁹¹

3.8 Concurrence of *Actus reus* and *Mens rea*

According to the criminal law doctrine, it is the coincidence of *actus reus* and *mens rea* that constitutes offences and justifies punishment.⁹² The requirement implies the temporal existence of *actus reus* and *mens rea*, an *actus reus* at one moment and *mens*

⁸³ Law Commission, *A Criminal Code for England & Wales* (Law Com. No. 177) (Commentary on Draft Criminal Code Bill) Vol. II. Clause 14, p.184.

Report of Select Committee of House of Lords on Murder & Life Imprisonment, 1988-89, Vol. XIII, Para 195, p.50.

⁸⁴ *Sherras v. De Rutzen* [1895] 1 QB. 918.

⁸⁵ *Chisholm v. Doulton* (1889) 22 QB. 736.

⁸⁶ *R. v. Lemon and Other* [1979] Crim. LR. 311

⁸⁷ Howard, Colin, "Strict Liability in the High Court of Australia" 76 (1960) *LQR* 547.

⁸⁸ *Lim Chin Aik v. R* [1963] AC. 160; *Warner v. Metropolitan Police Commissioner* (1968) 52 Cr. App. R. 373; *Gibson* [1991] 1 All ER 439.

⁸⁹ Hart, H.L.A., 1970, op. cit. F. N. 54. p.20

⁹⁰ Jackson, B.S, "Storkwain: A Case Study in Strict Liability and Self-regulation" [1991] *Crim.LR* 892.

⁹¹ Richardson, G. "Strict Liability for Regulatory Crime: An Empirical Research" [1987] *Crim.LR*. 295 at 296.

⁹² Denham, Paul, 1999, op. cit. p.182.

rea at another do not give rise to criminal liability. There must be a combination of physical and mental element with respect to each aspect of the offence.⁹³ The prosecution must prove that the accused perpetrated the *actus reus* and at that time possessed necessary mental state.⁹⁴ Suppose that the accused drives to the victim's house, intending to kill him. On his way, a person is run over by his car, giving him no chance to avoid, and is killed. If the deceased turns out to be the victim, clearly it will not be a murder.⁹⁵ However, if the accused has already done an act with intent to cause the *actus rea*, it is immaterial that he has repented before the occurrence of *actus reus*.⁹⁶

Similarly, in cases where the *actus reus* is continuing act, it is sufficient that the accused has *mens rea* at any moment during the continuance of the *actus reus*.⁹⁷ Where the *actus reus* is a part of a larger transaction, it may be sufficient that he had *mens rea* during that transaction, though not at the moment the *actus reus* is accomplished.⁹⁸ It can be concluded that presence of *mens rea* whether at the time of inception or completion or during continuance of a criminal act is sufficient for concurrence and to give rise to the criminal liability.

3.9 Intention and Motive

A motive is the driving force, which induces a man to do or omit to do a certain act or it may be termed as the reason to seek certain objectives.⁹⁹ Some times it may be taken as an emotion such as jealousy or greed and some times a species of intention.¹⁰⁰ The reason, why it is considered merely a motive, is that it is a consequence ulterior to the *mens rea* and *actus reus*; it is no part of a crime.¹⁰¹ It is the motive, which gives birth to intention and a person's motive is his reason for doing as he did.¹⁰² Motive is thus used to mean an emotion prompting an act and hence must always precede intention in

⁹³ Lacey, N. & Wells, C., 1998, op. cit. p.47.

⁹⁴ Seago, Peter, *Criminal Law* (4th ed., Sweet & Maxwell, London, 1994) p.82.

⁹⁵ Smith, J.C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.79.

⁹⁶ *R. v. Jakeman* [1983] Crim. LR. 104.; (1983) 76 Cr. App. R. 223.

⁹⁷ *Fagan v. Commissioner of Metropolitan Police* [1969] 1 QB.439; [1968] 3 All. ER. 442.

⁹⁸ Smith, J.C., 1996, op. cit. F. N. 95. p.79.

Thabo Meli & Others v. R [1954] 1 All ER. 373.

⁹⁹ Robinson, Paul H., *Criminal Law Defences* (West Publishing Co., USA, 1984) Vol. II, p.17.

¹⁰⁰ Smith, J.C., 2002, op. cit. F. N. 78. p.96.

¹⁰¹ Smith, J.C., 1996, op. cit. F. N. 95. p. 82.

¹⁰² Card, Richard, *Card, Cross and Jones Criminal Law* (14th ed., Butterworths, London, 1998) p.79.
Hall, Jerome, 1960, op. cit. p.84.

time.¹⁰³ It means that one cannot have an intention for a motive but can have a motive for an intention.¹⁰⁴

As a general principle motive is irrelevant to the substantive criminal law.¹⁰⁵ The irrelevancy can be supported by a number of decided cases as well.¹⁰⁶ In criminal proceeding the prosecution will have to prove that the offender has committed the crime. It does not need to prove why he committed. A murder committed out of motive of compassion is as heinous as out of enmity or for any other bad motive.¹⁰⁷ Proof of motive although not necessary for conviction can often strengthen the prosecution's case¹⁰⁸ and generally it may be crucial in determining punishment.¹⁰⁹

However, motive will be pertinent to criminal liability if it provides the defendant with a discrete defence as in duress¹¹⁰ and self-defence fear and self-preservation are of fundamental importance.¹¹¹ It is also relevant in racially aggravated offence under Crime and Disorder Act 1998, if motivated by hostility towards members of a racial group.¹¹² Similarly, motive is always relevant as evidence. In a case *R. v Williams*,¹¹³ the Court of Appeal held that, "evidence of motive was admissible to show that it was more than probable that an accused has committed the offence charged." It suggests that both intention and motive, being the part of a single transaction, may be taken into account to understand the conduct of the offender.¹¹⁴ Though as a matter of principle English criminal law denies relevancy of motive to criminal liability, however, the principle has been violated by English courts¹¹⁵ in *R. v Steane*¹¹⁶ and *Arthur Gray*.¹¹⁷

¹⁰³ Wasik, Martin, "Mens Rea, Motive, and the Problem of Dishonesty in the Law of Theft" [1979] *Crim. LR.* 543 at 544.

¹⁰⁴ Kenny, A., *Action, Emotion and Will* (Routledge & K. Paul, London, 1963) p.87.

¹⁰⁵ Robinson, Paul H., 1984, op.cit. Vol. II, p.17.

¹⁰⁶ *The Queen v. Senior* [1899] 1 QB 283; *Chandler v. D.P.P.* [1964] AC 763.

¹⁰⁷ Smith, J.C., 1996, op. cit. F. N. 95. p.81.

¹⁰⁸ McCord, David, 1990, op.cit. p.375.

Smith, J.C., 1996, op. cit. F.N. 95. p.83.

¹⁰⁹ *Ibid.* at 545.

¹¹⁰ Wilson, William, 2003, op. cit. p. 131.

¹¹¹ Wasik, Martin, 1979, op. cit. p.550

¹¹² Smith, J.C., 2002, op. cit. F. N. 78. p.96.

¹¹³ *R. v Williams* (1987) 84 Cr. App. R. 299.

¹¹⁴ Wasik, Martin, 1979, op. cit. p.545.

¹¹⁵ Jefferson, Michael, *Criminal Law* (3rd ed., Pitman Publishing, London, 1997) p.124.

¹¹⁶ *R. v Steane* [1947] KB. 997.

¹¹⁷ Reported in "The Times" Thursday, October 7, 1965 at p.6

3.9.1 Good Motive and Criminal Liability

Apart from such defences as are recognized by criminal law, criminal nature of an act is not eliminated by good motive. Because, to allow a man to substitute for law his own notion of right would be in effect to destabilize the law.¹¹⁸ If a man commits an offence, law is not concerned why he commits.¹¹⁹ However, now it is proposed to abolish the principle of irrelevancy of motive, and to take into account a good motive in the cases of homicide by way of partial excuse under the diminished responsibility rules.¹²⁰ The C.L.R.C. in its 12th Report¹²¹ recommended that there are certain cases of murder to which special consideration apply, like the case of causing death deliberately from motive of compassion. They thought that where a mother killed her deformed child or a husband terminated the agonies of his dying wife, the mandatory imposition of life imprisonment is intolerable and indeed no sentence of imprisonment is appropriate. The same recommendation was re-affirmed in 1976 in a working paper of the Committee.¹²² The committee tentatively suggested that there should be a new offence, which would apply to a person who, from compassion, unlawfully kills another person who is or is believed by him to be: permanently subject to great bodily pain or suffering, or prominently helpless from bodily or mental incapacity, or subject to rapid and incurable bodily or mental degeneration. Maximum punishment suggested for the new offence is an imprisonment of two years. This suggestion, if accepted will give a license for the killing of handicapped and mentally retarded persons particularly, and generally for all those who are believed by the killer subject to great bodily pain, helpless due to bodily or mental incapacity or suffering from an incurable disease.

A sick person may be a cause of considerable unhappiness for his friends and family. They may cut short this unhappiness and disturbance by causing his death in the name of mercy killing.¹²³ Allowing Euthanasia would put many dying people at risk of losing their lives unjustly.¹²⁴ How illogical is it that the committee itself admits that the killing was for a good cause and on the other hand suggested that a new offence should be

¹¹⁸ Williams, Glanville, *Criminal Law: The General Part* (2nd ed., Stevens & Sons, 1961) p.748.

¹¹⁹ Card, Richard, 1998, op.cit. F. N. 102. p.603.

Kennedy, I. & Grubb, A., *Principles of Medical Law* (Oxford University Press, 1998) p.846.

¹²⁰ Wasik, Martin, 1979, op.cit. p.550

¹²¹ Criminal Law Revision Committee, *Penalty for Murder* (12th Report, Cmnd. 5184, 1973) Para 42.

¹²² Criminal Law Revision Committee, *Working Paper on the Offences Against the Person* (Home Office, 1976) Paras 79-87, pp.31-34.

¹²³ Devine, Philip E., *The Ethics of Homicide* (Cornell University Press, London, 1978) p.155.

¹²⁴ Deigh, John, "Physician Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences" 88 (1988) *JCL*. 1155 at 1157.

created to deal with such situations of murder. While dealing with the cases of Euthanasia we must also keep in our mind that it is not just relief of distress or pain. It is the relief of pain achieved through the destruction of life of the victim.¹²⁵ To allow it in the name of relieving distress and pain of the victim is analogous to the situation where a person was shot dead, just above his eye, on forehead. One of his stupid friends seeing the corpse said, "Thank God that the bullet has spared the eye." The person was dead but the stupid friend was happy that the deceased's eye was saved from damage. However, it should be kept in mind that in a positive legal system any law can be changed with a change in the attitude, cultural approach, ideals and moral values of a society. A change in the law may make mercy killing completely lawful. The European Convention on Human Rights guarantees that no one will be guilty of an offence for a conduct if it did not constitute an offence under national or international law at the time under consideration.¹²⁶

Life of a human being is the most precious thing on earth; it either ought never be directly attacked, or else that it should be done only when it is unavoidable to save, equally valuable, other's life. Anything short of this would require a very heavy burden of justification, which mercy killing does not provide.¹²⁷ Allowing Euthanasia is not merely a question of sympathy of a doctor with a patient in acute distress but it also involves changes in the legal framework. An offence of murder is to be redefined and a proviso be added to cover the cases of Euthanasia. Human rights, emphasizing protection of life rather than ending it, are to be reconsidered. There is no justification for supporting euthanasia; the hospices should be supported for better pain relief where it is needed. Not all terminally ill people want to die they need help instead of supporting a quick fix of just pushing them out of this world. It would be very wrong for the law to say that in certain circumstances people can die or be assisted to death.

3.10 Punishment: Its Justification

When a crime is committed it shocks the public by its atrocity. There are demands made for fierce retribution on the culprit, partly on the plea that he ought to be made to suffer, and partly for the purpose of deterring others from offending.¹²⁸ Criminal law is the machinery that allows organized pressure of society to be brought to bear on the

¹²⁵ Devine, Philip E., 1978, op. cit. p.169.

¹²⁶ Article 7, European Convention on Human Rights.

¹²⁷ Devine, Philip E., 1978, op. cit. p.178.

¹²⁸ Devon, James, *The Criminal and the Community* (2nd Impression, John Lane, London, 1912) p.164.

offender.¹²⁹ It allows the victim to get legitimate revenge and assists in promotion and maintenance of public order. Hence imposition of punishment can be justified either on utilitarian or retributive grounds.¹³⁰

Taking into account the past conduct of the offender, retributists justify punishment because the offender deserves it.¹³¹ The magnitude of the punishment should correspond to the wrong done because punishing people without regard to the gravity of their offences is no punishing at all.¹³² It should be the primary concern of criminal law that the magnitude of the punishment should be proportionate to the gravity of the crime or it should adequately express the moral condemnation of society.¹³³ It is quite natural to say that criminals should be punished as severely as they deserve and as much as it contributes towards crime control.¹³⁴

A wrong-doer certainly provokes and excites the feelings of anger and hatred of all right thinking members of society.¹³⁵ Traditionally English jurisprudence admitted that all the hatred and contempt that are behind the word felon are enlisted against the offender, for he has done wrong to society.¹³⁶ Punishment is the legal, civilized and efficient way in which such feelings may be directed towards their proper object. In general, we may say that punishments institutionalize feeling of resentment and hatred of society that are directed towards the wrong doer.¹³⁷

According to utilitarian theory punishment is justified by its good future consequences rather than the past conduct of the offender.¹³⁸ According to Bentham, the basic purpose of criminal law should be to create an environment, suitable to promote happiness and well being of society, to provide an opportunity to all its subjects to lead a peaceful and trouble free life, to ensure security of their lives, property and other values.¹³⁹ He says, punishments in themselves are evils and, therefore, cannot be justified except in so far

¹²⁹ Thompson, D., *Criminal Law Reform: An Inaugural Lecture* (University of Keele, 1965) p.3.

¹³⁰ Primoratz, Igor, *Justifying Legal Punishment* (Humanities Press International, London, 1989) p.9.

¹³¹ Ashworth, Andrew, *Sentencing & Penal Policy* (Weidenfeld & Nicolson, London, 1983) p.18.

¹³² Primoratz, Igor, 1989, op. cit. p.6.

¹³³ Hart, H.L.A., 1970, op. cit. F. N. 54. p.236.

¹³⁴ Ashworth, Andrew, 1983, op. cit. p.18.

¹³⁵ Stephen, J.F., 1883, op. cit. Vol. II, p.81.

¹³⁶ Holdsworth, W. S., *A History of English Law* (3rd ed., Methuen, London, 1923) Vol. II, p.358.

¹³⁷ Stephen, J. F., 1883, op. cit. Vol. II, p.81

¹³⁸ Primoratz, Igor, 1989, op. cit. p.12

as they result in a greater sum of good.¹⁴⁰ This greater sum of good is the deterrence of the criminals in order to eliminate crimes from the society.¹⁴¹ This will lead to secure the rights of majority and to maximize the protection of rights.¹⁴² State is justified in criminalising any conduct that causes harm, and to inflict punishment by its power, to secure the society from harm. J. S. Mill states this principle as, "the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁴³ It means that punishments are not an end themselves but they are means to an end; means of responding to undesired and prohibited behaviour.¹⁴⁴

Retributists and utilitarians have attempted to deal with the justification of punishment from different view points. However, in doing so they looked at only their own side of view and failed to take into account the other side. Both the theories are not mutually exclusive rather interdependent. A punishment, in its real sense, will be justified and effective only if it combines both, the retributive as well as the utilitarian elements. Punishment can, in fact, never be justified merely as means for promoting a future good, ignoring the magnitude of the crime. Criminal justice is done only when offenders are duly convicted and punished.¹⁴⁵ We may say that in order to justify punishment, a court should look at the past conduct of the offender as well as its future consequences.¹⁴⁶

3.11 Aims and Objectives of Punishment

Among the normative aims that have been suggested for punishment, deterrence, retribution, reformation or rehabilitation and denunciation are the most important. Another possible aim, to educate people about social values, is clearly related to denunciation, for education is often achieved by condemning conduct contrary to the values.¹⁴⁷ When a punishment is to be imposed, the first decision to be made should be as to the object to be achieved by it. Is the aim simply to mete out a justified punishment

¹³⁹ Bentham, Jeremy, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, Oxford, 1879) p.2

¹⁴⁰ *Ibid.* & Atkinson, Charles Milner, *Bentham's Theory of Legislation* (Milford Oxford University Press London, 1914) Vol. II, p.148.

¹⁴¹ Primoratz, Igor, 1989, op.cit. p.10

¹⁴² Murphy, Jeffrie G., *Philosophy of Law: An Introduction to Jurisprudence* (Rev. ed. Westview Press, 1990) p.118.

¹⁴³ Mill, J. S., *On Liberty* (Oxford University Press, 1974) p.15.

¹⁴⁴ Harding, C. & Ireland, R. W., *Punishment: Rhetoric, Rule and Practice* (Routledge, London, 1989) p.13.

¹⁴⁵ Waldron, Jeremy, *The Law* (Routledge, London, N. York, 1990) p.178.

¹⁴⁶ Rawls, John, *Punishment* in Feinberg, Joel & Gross, Hyman, *Philosophy of law* (4th ed., Wadsworth Publishing, 1991) p.652.

¹⁴⁷ Bayles, Michael D., *Principles of Law: A Normative Analysis* (D. Reidel Publishing, 1987) pp.281-82.

to the wrong doer; special or general deterrence, to reform the offender or a combination of all these? When this decision is made, a second decision what measure is most appropriate to achieve the desired object must follow. Here is a brief description of these aims.

3.11.1 Deterrence

Punishment occupies a distinct functional and symbolic position with a high profile in general social consciousness.¹⁴⁸ Deterrence is the deliberate threat of harm with the purpose of discouraging criminal conduct.¹⁴⁹ Infliction of punishment may deter offenders and serve to reduce the number of crimes in a society.¹⁵⁰ Punishment can be justified on the ground that it would be effective in preventing offences and there is no other means that could be equally effective at no greater cost to other values.¹⁵¹

In the absence of any punishment, a much larger number of persons, who now refrain, might have committed crimes.¹⁵² Seeing others punished for delinquent behaviour can create in people a sense that such behaviour is wrong and unacceptable for the society. Punishments, thus, help them to harmonize their behaviour with the norms of the society. In *R v. Kingston*,¹⁵³ the Court of Appeal held that, "the purpose of criminal law is to inhibit, by proscription and by penal sanction, antisocial acts which the individual may otherwise commit."¹⁵⁴ Punishment, proportional to the magnitude of wrong, inflicted on one offender would indicate to others who might be tempted to commit a crime that if they commit, they were likely to be punished.¹⁵⁵

3.11.1.2 How to Achieve Objects of Deterrence?

To deter an offender from reoffending, a punishment should be severe enough to outweigh in his mind the benefits of the crime.¹⁵⁶ Objects of deterrence can be achieved effectively only if the magnitude of the punishment is proportional to the seriousness of harm caused by the offender.¹⁵⁷ Neither should it exceed the appropriate limits nor

¹⁴⁸ Harding, Christopher, *Punishment: Rhetoric, Rule and Practice* (Routledge, London, 1989) p.13.

¹⁴⁹ Walker, Nigel, "The Efficacy and Morality of Deterrents" [1979] *Crim. LR.* 129 at 129.

¹⁵⁰ Fitzgerald, P.J., 1962, op. cit. p.203.

Dressler, Joshua, *Cases and Materials on Criminal Law* (West Publishing Co., U.S.A., 1994) p.24.

Bayles, Michael D., 1987, op.cit. p.282.

¹⁵¹ Feinberg, Joel, *Harm to Others* (Oxford University Press, 1984) p.26.

¹⁵² Von Hirsch, Andrew, *Doing Justice, The choice of Punishments* (Hill & Wang, N. York, 1976) p.39

¹⁵³ *R. v. Kingston* [1994] QB 81.

¹⁵⁴ *Ibid.* at p.89

¹⁵⁵ *R. v. Fairman* [1983] *Crim. LR.* 197.

¹⁵⁶ Dressler, Joshua, 1994, op. cit. F. N. 149. p.25.

¹⁵⁷ Primoratz, Igor, 1989, op. cit. p.20

should it be less than what the offender actually deserves.¹⁵⁸ Wrong is the negation of right, punishment is the negation of that negation, or retribution, so it must be proportionate to the wrong because its purpose is to destroy the wrong.¹⁵⁹ Severity of the punishment can be determined by taking into account seriousness of the harm caused, circumstances of the offence and character of the offender.¹⁶⁰

However, it should be remembered that in English society, in particular, and in Western societies in general the principle of proportionality of the punishment has been violated by abolishing death sentence for the offence of murder.¹⁶¹ Nothing could be proportional to the life of the victim except the capital punishment for the convicted. The equilibrium disturbed by the offender cannot be restored unless death of the offender has been caused by the law.

3.11.2 Reformation

If people are disposed to commit crimes, the law should intervene to reform them.¹⁶² Conviction and imposition of a punishment might contribute to reform if they help an offender become aware that he has acted wrongly.¹⁶³ However, reform is usually conceived as involving more positive steps to alter basic character in order to make an offender less antisocial.¹⁶⁴

Reforming methods include making the offender realise his moral guilt and inducement of state of repentance from crimes, awareness of the demands of society, provision of education and vocational training.¹⁶⁵ The states are to achieve this end by the most appropriate means available within their resources. Education and training programmes can render legitimate employment, a more attractive alternative to criminal behaviour. These may indirectly help enhance self-respect, but their primary purpose is to alter the option that the released convict will face.¹⁶⁶

¹⁵⁸ Ashworth, Andrew, 1983, op. cit. p.18.

¹⁵⁹ Holmes, Oliver Wendell, 1963, op.cit. p.36.

¹⁶⁰ Report of the Interdepartmental Committee on the Business of the Criminal Courts, Cmnd.1289 (1961) Para.257 p.76.

Ashworth, Andrew, 1983, op. cit. p.21.

¹⁶¹ Death penalty was abolished in UK by Murder (Abolition of Death Penalty) Act 1965.

¹⁶² Cavadino, M. & Dignan, J, *The Penal System: An Introduction* (2nd ed., Sage Publications, 1997) p.36.

¹⁶³ Robinson, Paul, H., *Fundamentals of Criminal Law* (Little, Brown & Co. Boston, 1988) p.27
Primoratz, Igor, 1989, op. cit. p.20.

Bayles, Michael D., 1987, op. cit. p.289.

¹⁶⁴ Dressler, Joshua, 1994, op. cit. F. N. 149. p.25.

¹⁶⁵ Hart H.L.A., 1970, op. cit. F. N. 54. p.26.

¹⁶⁶ Dressler, Joshua, 1994, op. cit. F. N. 149. p.25.

The idea is very attractive and impressive but the question does arise that how many states of the world can run such a programme? Developing and underdeveloped countries are not in a position to provide basic necessities of life, like education, health, and shelter to their subjects. How is it possible for them to allocate sufficient budget for the reformation of offenders? Of course, only a few countries of the international community can afford this luxury, hence the scope of this particular object is very limited. Scope of reformation can also be observed by taking into account the conditions of jails; originally meant for the reformation of the offenders. Nowadays, jails can be considered training camps for the criminals. A person who has committed an offence for the first time and was imprisoned for that, on his release he may have been converted into a hardened and seasoned criminal due to the company of other criminals in the jail.¹⁶⁷

Reformation can never be the sole aim of punishment because if it were so, every prisoner should have been released as soon as it is proved that he has changed his character and now he will not repeat the offence. Moreover, the principle of reformation does not reconcile with the capital punishment.¹⁶⁸ Reformation, though, more difficult to achieve yet is also more worthy of effort, for the offender will not reoffend even when he knows that his crime cannot be detected.

The difference between reformation and deterrence lies in motive for not committing crimes. Deterrence involves a desire to avoid future punishment, while reformation removes the desire to commit crimes. Consequently, reform provides more security than deterrence.¹⁶⁹

3.11.3 Retribution

If some one violates a rule of criminal law, he has an unjust advantage over the others; justice requires that this wrong be rewarded or expiated by punishment.¹⁷⁰ While punishing the offender it is to be taken into consideration that the punishment should adequately reflect the revulsion felt by society for that particular crime. The retribution means that the potential benefits of the offender are outweighed by the potential harms

¹⁶⁷ Cavadino, M & Dignan, J, 1997, op. cit. p.36.

¹⁶⁸ Holmes, Oliver Wendell, 1936, op. cit. p.36

¹⁶⁹ Bayles, Michael D., 1987, op. cit. p.290.

¹⁷⁰ Ashworth, Andrew, 1983, op. cit. p.18.

of the punishment.¹⁷¹ The principle requires that the punishment must always be equal to the wrong done.¹⁷² It suggests that the punishment is not just a means of crime prevention but a merited response to the offender's deed restoring the equilibrium and expressing moral reprobation of the defender for the wrong.

The severity of punishment reflects the moral gravity of the crime. The degree of suffering of the offender should be equal to the evil of his conduct.¹⁷³ If retribution is not exact, the public conscience will be outraged as to take law into their own hands.¹⁷⁴ The infliction of desert punishment will make the individuals believe that they are being protected against the wrongful conduct of the offender. The concept of retribution differs from deterrence; in the theory of deterrence punishment is justified to the extent that it deters occurrence of future crime either by the offender or by others, whereas retribution justifies punishment on that which has already occurred. The deterrence looks to the future whereas retribution takes notice of past conduct of the offender.¹⁷⁵

3.11.4 Denunciation

A court's judgement that a person is guilty of a crime constitutes denunciation.¹⁷⁶ The object of denouncing wrongdoing is attaching a stigma to the convicted person for the act he has done. The stigma of conviction and sentence makes the offender to conform to the law.¹⁷⁷ The real punishment lies in the stigma which the society brands upon him.¹⁷⁸ Certainly those who simply fear society's condemnation should be deterred by the mere stigma of public condemnation. This aim cannot be achieved unless the offender is publicly convicted and known to suffer the penalty.

It is generally accepted that a punishment should have the characteristic properties of deterrence, prevention, reformation and retribution. As a deterrent, punishment may be considered to be a social protective of the values of the society, no more and no less. As reformatory, punishment may aim to make the criminal to conform to the conventions of his society. As retributive, it may be considered as means of rationalizing revenge and thus to put an end to further disorder in the society.

¹⁷¹ Holmes, Oliver Wendell, 1936, op. cit. p.285.

¹⁷² Cavadino, M. & Dignan, J., 1997, op. cit. p.33.

¹⁷³ Hart, H.L.A., 1970, op. cit. F. N. 54. p.233.

¹⁷⁴ Fitzgerald, P.J., 1962, op. cit. p.204.

¹⁷⁵ Jackson, Kathryn N., "Punishment as Therapy: A reply to Halleck" 49 (1986) *Law and Contemporary Problems* 147 at p.147.

¹⁷⁶ Bayles, Michael D., 1987, op. cit. p.290.

¹⁷⁷ Fitzgerald, P.J., 1962, op. cit. p.204.

3.12 Do the Punishments in English Law Achieve the Objects?

Generally speaking, infliction of punishment may be justified on the ground of crime control.¹⁷⁹ Do the punishments in English criminal law serve the purpose? Let us have a look at the facts. Official reports reveal that the punishments in English legal system failed to achieve any of the objects mentioned. A study reveals that 54% of prisoners were re-convicted within two years, while over five years the figure rose to 60%.¹⁸⁰ The situation becomes graver if we differentiate reconviction from re-offending. A crime survey suggests that out of every 100 offences committed only two result in a conviction. Only 50% of the crimes committed are reported to the police; only 30% are recorded by police as a crime; 7% of crimes are cleared up; 3% result in caution or conviction.¹⁸¹

The research reports of Home Office show that the punishment of imprisonment is an expensive way of making bad people worse.¹⁸² There are 138 prisons in England and Wales having a capacity to accommodate 709827 offenders and to take care of these offenders a staff amounting to 44000 has been employed.¹⁸³ The prisons are unable to meet the increasing number of criminals and hence more committals of the convicted to the prisons.¹⁸⁴ It shows that criminal justice system annually spends millions of pounds and yet leaves the society with little more than a sense of futility.

At a time when the common man all over the world is in economical fix and finds it difficult to earn livelihood for himself and his family, there is a logical reasoning involved in the consideration that he can procure such subsistence and a good many facilities and services by simply committing a crime. The ever increasing burden of building and maintaining prisons, payments of staff, care, proper food, medical, and other facilities for persons of proved anti-social character is undoubtedly an expensive way of converting a bad offender into worse one.

¹⁷⁸ Allen, Carleton Kemp, Sir, *Law in the Making* (7th ed., Clarendon Press, Oxford, 1964) p.68.

¹⁷⁹ *Ibid.* p.19.

¹⁸⁰ Llyod, Charles & Mair, George, *Explaining Reconviction Rates: A Critical Analysis* (Home Office Research No. 136, HSMO, London, 1994) p.20.

¹⁸¹ *Ibid.* p.5.

¹⁸² Cavadino, M. & Dignan, J., 1997, op. cit. p.36.

¹⁸³ HM Prison service (<http://www.hmprisonservice.gov.uk/>) 2002.

¹⁸⁴ On 12 July 2002 the prison service announced that prisons are over-crowded and there are 71,480 prisoners in the British prisons, the over crowding has forced the service to house some inmates in police cells. (<http://news.bbc.co.uk>).

The reconviction rates show that the aims of sentencing are forgotten or relegated to a minor role. The nominal punishments, in any case, are not sufficient to deter the criminal-minded people from commission of crimes. Imprisonment for two or three years does not serve the aims of punishment as discussed, rather it provides an opportunity to the new offenders to become habitual in the company of criminal-minded in the prisons and all that is done at the cost of taxpayers.¹⁸⁵ Objects of punishment can only be achieved by its proportionality to the severity of the crime. If the criminals do not refrain out of fear of punishment, they are not deterred and infliction of punishment with the intention of deterring would not be justified if the evidence clearly shows that it did not achieve the object.¹⁸⁶

Conclusion

The state's liability is either to support the existing social values without guiding its subjects towards a desirable and ideal way of life or to pursue and introduce particular views of a good society, leading its subjects to a desirable direction.¹⁸⁷ All the spheres of social life are guided in terms of social policy of the state. To resolve the conflicts of the subjects is not only the object of law, it has also a preventive function to guard against and try to prevent conflicts.¹⁸⁸ In order to achieve this end it provides standards and punishments so that the individual may forecast the result of their behaviour.¹⁸⁹ If this role of law is admitted then there must be some moral standards of behaviour to be announced and protected by the government. Unfortunately this particular aspect of law has been totally ignored in English legal system. Deviation from moral principles of legislation has led to inconsistencies and discriminations. Violation of the principle of proportionality between the offence and punishment has affected the efficacy of criminal justice and the basic objects of punishments are no more achievable.

The next chapter shall focus on the principles of criminal liability in *Shari'ah* and a comparison of its principles with that of English law.

¹⁸⁵ Tunick, Mark, *Punishment: Theory and Practice* (University of California Press, 1992) p.2.

¹⁸⁶ Walker, Nigel, "The Efficacy and Morality of Deterrents" [1979] *Crim. LR.* 129 at p.129.

¹⁸⁷ Damaska, Mirjan, *The Faces of Justice and State* (Yale University Press, 1980) pp.72-82.

¹⁸⁸ Roebuck, Derek, *The Background of the Common Law* (2nd ed., Oxford University Press, New York, 1990) p. 3.

¹⁸⁹ *Ibid.*

Chapter-4 Criminal Liability in *Shari'ah*

4.1 Introduction

Like most developed legal systems of the contemporary world, *Shari'ah* has its own criminal justice system. The system is characterized by direct reliance, in its foundation and general principles, upon Divine revelation.¹ Some of its injunctions have historical roots in pre-Islamic Arab traditions and practices and at the same time it recognises certain Judeo-Christian traditions. *Shari'ah* provides a unique way to tackle the incidence of crimes in society, which other secular systems do not. Islamic criminal law has a dominant religious flavour that incites an individual to follow its provisions. This chapter shall deal with both the preventive and punitive measures adopted by *Shari'ah*, to control crimes. It will be obvious that *Shari'ah* is predominantly proactive and emphasis to prevent the commission of crimes rather than punishing the offenders after commission. Offences, punishments and their objectives will be discussed. Major concepts, principles and practices will be highlighted and, of course, a comparison with the English criminal law shall find its appropriate place. During the course of comparison, an attempt shall be made to establish that though the basis of criminal liability are similar in both, English and Islamic law, yet the system of sanctions is altogether different.

4.2 Prevention of Crimes and Islamic Criminal Law

In order to eliminate crimes from society, *Shari'ah* imposes checks to wipe out their very possibility. Belief in the Hereafter is the backbone of these checks. It reminds everyone that every action, major or minor, of every human being is being recorded very accurately and this record will be placed before each individual on the Day of Judgment.² This belief gives rise to the concept of self-accountability in those people who are good by nature and guided by instinct.

Shari'ah leaves no stone unturned to block all the channels leading to commission of crime. To combat crimes it does not prescribe only the punitive measures but also preventive means so as to arrest the growth of crime before it takes place.³ The best example in this regard can be taken of the fact that *Shari'ah* condemns promiscuity and seclusion between the members of opposite sexes because that constitutes a means which may lead to sexual immorality.⁴ Unnecessary, irresponsible and free union of a

¹ Bassiouni, M. Cherif (ed.), *The Islamic Criminal Justice System* (Oceana Publications, 1982) p.128.

² *Al-Qur'an* 18:49.

³ Abu Zohra, Muhammad, *Usul Al Fiqh* (Dar Al-Fiker Al-Arabi, Beirut) p.288.

⁴ Ibn Qayyim, *Al-Jawziyah*, op. cit. F.N. 4. p.271.

man and a woman is not tolerated as an innocent amusement or harmless flirtation. To extinguish adultery and control the sexual desire, public appearance of painted and pampered women is forbidden completely.⁵ Ibn Qayyim Al-Jawziyah has given ninety nine instances to mark administration of *Shari'ah* by such preventive measures.⁶ In addition, certain external elements that encourage the commission of crime, like use of liquor and other intoxicants, are strictly prohibited. The religious and spiritual duties contain material advantages to extinguish evils from the society. Prayer, obligatory upon every adult and sane Muslim, five times a day, has been described as a means to prevent indecency and evil in the society.⁷ Similarly, fasting during the month of *Ramadan* has been declared serving the same purpose.⁸

It is not enough that a person avoids evil and does good deeds in his personal life; he is also bound to safeguard his family from all types of sins and evils so as to save them from the torment of God.⁹ The Holy Prophet extended the applicability of this principle beyond family to all those falling under his authority, in any capacity, to enjoin good and forbid evil.¹⁰ If every one discharges his duty, in his capacity, to build the moral character of his dependants and subordinates, the chances for corruption and evil deeds in the society shall be reduced to the minimum.

Publicity of crimes may create a temptation to commit crime. *Shari'ah* prohibits their publicity by the threat of a painful punishment in this world and the Hereafter.¹¹ The Holy Prophet said if a sin is committed secretly it will not harm but the offender; however, if disclosed and publicised it would invoke Allah's displeasure.¹² Commission of an offence is a matter between man and his creator and it is disliked to publicise it among his fellows.

Shari'ah enjoins upon Muslims to propagate goodness and to prevent social evils.¹³ It is the duty of every Muslim not only to follow the divine law in his daily life, but also to

⁵ *Ibid.* p.269

⁶ Ibn Qayyim, Al-Jawziyah, *I'lam Al-Mawaqquain* (Dar Al-Fiker, Beirut, 1977) Vol. III, pp.149-171

⁷ *Al-Qur'an* 29: 45

⁸ *Al-Qur'an* 2:183

⁹ *Al-Qur'an* 66:6

¹⁰ Al-Bukhari, Muhammad bin Ismail, *Saih al-Bukhari* (Cagri Yayinlari, Turkey, 1981) Vol. I, p.215.

¹¹ *Al-Qur'an* 24:19.

¹² Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VII, p.89.

Muslim bin Hijjaj, *Saih Muslim* (Cagri Yayinlari, Turkey, 1981) Vol. III, p.2291.

contribute, according to his capacities, to the propagation of good and prevention of evil in the society. This duty is said to characterise Muslims as the best of all the communities in the world.¹⁴ It is also prescribed that the manners adopted for the propagation of goodness and prevention of evil should be based upon wisdom and fair exhortation.¹⁵ Co-operation in noble acts and righteousness has been described as a religious duty of Muslims as it is to avoid sin and transgression.¹⁶ A Muslim's duty to act in defence and propagation of what is right is as much part of his faith as is his duty to prevent wrong.

It is the characteristic of the believers that they are protecting friends of one another; they enjoin right and forbid wrong.¹⁷ Beside propagation of goodness, they are also enjoined to suppress evil within their power.¹⁸ The preservation of social order depends on each and every member of society, freely adhering to the same moral principles and practices. Choice is given according to the capacity and ability of the person and the circumstance in which he found himself. Thus in an Islamic state the functionaries of the government, public institutions and the individual, all are to combat evil in all its forms. This combined effort will lead to a situation where goodness takes its roots in the society and evil is eradicated.

It shows that the strategy of *Shari'ah* to control crime is mainly based upon the corrective, preventive and reformative measures and less often it is punitive. Law can punish the offenders, punishments can deter the people from committing crimes, but it cannot reform them and cannot root out crimes from society. It is required that a change must occur in the soul of man. Development of both body and soul is the object of all the teachings of *Shari'ah* creating a harmonious equilibrium in man as a whole. It addresses the conscience and intellect of man and induces him to voluntarily obey its commands. The preventive measures, definitely, play much more important role in eradicating crimes from society than the punishments.

¹³ *Al-Qur'an* 3:104

¹⁴ *Al-Qur'an* 3 :110

¹⁵ *Al-Qur'an* 16 :125

¹⁶ *Al-Qur'an* 5:2

¹⁷ *Al-Qur'an* 9:71.

¹⁸ The Holy Prophet said, "Anyone of you who sees an evil and has power to suppress it, must weed it out with his hands. If he cannot, he must verbally forbid it. If he is not in a position to prohibit it verbally, he ought to abhor it in his heart. This is the lowest degree of faith." {(Al-Tirmidhi, Muhammad bin Isa, *Al-Jameh al-Saih* (Cagri Yayinlari, Turkey, 1981) Vol. IV, p.470)}

As a society is composed of good and bad, such types of exhortations are sufficient only for the good and noble but the bad people cannot be prevented unless a fear of worldly punishment is created in their hearts. *Shari'ah*, like an expert surgeon, does its best to treat the patient (criminal minded) by the suitable medicine (exhortations) and at the same time if the medicine proved ineffective, is ready to use surgical instruments (punishments) to eradicate the roots of crime from society.¹⁹ Punishments are considered to be one amongst several means to oblige the subjects to follow the law.

Criminal law cannot be isolated from the social and moral doctrines of *Shari'ah* which require spiritual as well as material welfare of man and tend to reduce or eliminate the temptation to crime²⁰ by his moral development.²¹ *Shari'ah* has adopted a policy to repel crime by its teachings before its commission and deter by infliction of punishments after its commission. It suggests that *Shari'ah* possesses proactive and reactive characteristics simultaneously.

4.3 Penal Policy in Islamic Law

Shari'ah has, as we will see later, a well developed concept of crime and punishment capable of meeting the needs of modern society. A crime has been defined as violation of a legal prohibition imposed by Allah, which entails punishment prescribed by Him.²² Here legal prohibition includes commission of a forbidden act and omission of an act enjoined by the lawgiver.²³ The commandments of God are communicated to the people through His Prophets; the torment of God has been linked with the knowledge of these commandments and subsequent violations thereof.²⁴ The Muslim jurists, from the provisions above, have derived a principle that there is no crime and no punishment without legal provisions.²⁵ It is a general principle of *Shari'ah* that penal provisions are not effective unless they have been declared and made known to the people.²⁶ It is desired that the law should give a fair and adequate notice of prohibited conduct entailing punishment if the punishment for that conduct is to be justified.

¹⁹ Ministry of Interior Kingdom of Saudi Arabia, *The Effect of Islamic Legislation on Crime prevention in Saudi Arabia* (Ministry of Interior Kingdom of Saudi Arabia and United Nation Social Defence Research Institute, 1980) p.153.

²⁰ Bassiouni, M. Cherif, 1982, op. cit. p.132.

²¹ Lippman, Matthew, *Islamic Criminal Law and Procedure* (Praeger, London, 1988) p.37.

²² Al-Mawardi, Muhammad bin Habib *Al-Ahkam al-Sultania* (Dar al-Kutub al-Ilmia, Beirut) p. 92.

²³ Oudah, Abdul Qadir, *Al-Tashrih al-Jinai al-Islami* (Al-Risalah Publishing, Beirut, 1997) Vol. I, p.66

²⁴ *Al-Qur'an* 17:15-16 and 28:59.

²⁵ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.118.

²⁶ *Ibid.* p.261

Another condition for the imposition of punishment is that such commandments and prohibitions should be declared prior to the commission of an offence. Describing the prohibited degrees of marriage in *Shari'ah*, it has been stated in the Holy *Qur'an*, "And marry not those women whom your fathers married, except what has already happened (of that nature) in the past."²⁷ The same principle was enunciated while prohibiting marriage with two real sisters at a time²⁸ and addressing the disbelievers to stop persecution of believers.²⁹ The verses show that any act done prior to the promulgation of any specific law does not give rise to criminal liability. A person can only be punished for an act which was declared unlawful prior to its commission, made known to him, defined with sufficient clarity and was not extended by analogy.

Hudood and *Qisas* cannot be inflicted in cases of doubt.³⁰ The principle is based upon the saying of the Holy Prophet "Doubt nullifies *Hudood*."³¹ The doubt mentioned above is in the mind of the accused at the time of commission of an act as to its permission or vice versa on the basis of conflicting opinions of the Muslim jurists on the point.³² So it must be distinguished from the benefit of doubt that goes to the accused and which is a doubt in the mind of the judge as to proof of the crime.³³ The ambiguities, if any, are to be resolved in favour of the accused. If the guilt of the offender has not been established beyond doubt, it is better for the judge to err in his acquittal than in punishing him.³⁴

These principles are analogous to the principles of English law that no penal provision shall take effect retrospectively to the disadvantage of the accused. It is compulsory that the law be known and expressly promulgated. Its meaning be clearly defined and its statement and intent both must be general. *Shari'ah* has the superiority that it promulgated the principles of criminal liability in the 7th century which most civilized nations of the world incorporated in their legal systems in the 19th and the 20th century.

²⁷ *Al-Qur'an* 4:22

²⁸ *Al-Qur'an* 4:23

²⁹ *Al-Qur'an* 8:38

³⁰ Al-Sarakhasi, Shamas ud din, *Al-Mabsut* (3rd ed., Dar Al-Marfah, Beirut) Vol. XVI, p.37.

³¹ Al-Shoukani, Muhammad bin Ali, *Neil Al-Aoutar* (Mataba Mustafa Al-Babi, Egypt) Vol. VII, p.118.

³² Nyazee, Imran Ahsan Khan, *General Principles of Criminal Law* (Advanced Legal Studies Institute, Islamabad, 1998) p.62.

³³ *Ibid.*

³⁴ Al-Tirmidhi, Muhammad bin Isa, *Al-Jameh al Sahih* (Cagri Yayinlari, Turkey, 1981) Vol. IV, p.33.

4.4 Human Rights of Accused in *Shari'ah*

Shari'ah acknowledges most of the universally recognised human rights.³⁵ Its teachings have always stressed the dual protection of society and the rights of the accused. Protection of society has been ensured by the severe punishments for the violation of its rights, whereas the rights of an accused have been protected by strict rules of evidence, qualifications and conduct of witnesses and judges.³⁶ *Shari'ah* demands the satisfaction of very strict evidentiary requirements to establish certainty of guilt of the offender, which justifies the infliction of relatively harsh punishments.³⁷ The judges are under a duty to do justice to every possible extent. The duty of a judge is so important, delicate and difficult that the Holy Prophet said that one appointed as a judge has been slaughtered without a knife.³⁸

The conditions of existence of the law and non-retroactivity provide the accused a right to rely on the law at the time of commission of the act under question. The society is under an obligation to its individuals to prevent the misuse of criminal law by fairly defining the prohibited acts and omissions, fixing punishments reasonably proportional to the conduct and character of the accused following a just, rational, transparent, and fair procedure of conviction. Freedom from arbitrary arrest and detention is ensured. Personal liberty cannot be encroached upon without any reasonable ground. The Holy *Qur'an* says, "O ye who believe! If an evil-liver bring you tidings, verify it, lest ye smite some folk in ignorance and afterward repent of what ye did."³⁹ The verse makes it clear that no one should be arrested or detained unless credible information has been received and confirmed by a just and fair inquiry.⁴⁰ The provisions govern the rights of an accused at pre-trial procedure as well as trial stage of a criminal proceeding.

4.5 Criminal Liability in *Shari'ah*

As mentioned earlier, criminal liability in *Shari'ah* is based upon the violation of divine commandment and prohibition. When man was sent down to earth, God Almighty promised to send guidance for his success in this world and in the Hereafter, through His prophets.⁴¹ This revealed guidance kept on coming till the Prophet-hood of

³⁵ Bassiouni, M. Cherif, 1982, op. cit. p. xvii.

³⁶ Lippman, Matthew, 1988, op. cit. p.xi.

³⁷ *Ibid.* pp.2-3.

³⁸ Ibn Majah, Muhammad bin Yazid, *Sunan Ibn Majah* (Cagri Yayinlari, Turkey, 1981) Vol. II, p.774.

Abu Daoud, Salman bin Ash'ath, *Sunan Abu Daoud* (Cagri Yayinlari, Turkey, 1981) Vol. IV, pp.4-5.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. III, p.614.

³⁹ *Al-Qur'an* 49:6

⁴⁰ Malik, bin Ans, *Al-Muwatta* (Cagri Yayinlari, Turkey, 1981) Vol. II, p.720.

⁴¹ *Al-Qur'an* 2: 38

Muhammad (Peace be upon him). People are bound to obey this guidance to protect their individual and collective interests. Punishments are prescribed as a means through which society can protect its political, economic and social interests.⁴² Though, like positive law, *Shari'ah's* objectives are the protection of public and private interests, yet it differs in determination of these interests. In *Shari'ah* these interests have been determined by the lawgiver Himself, whereas in the positive law the society itself determines them. In order to protect these interests *Shari'ah* emphasizes safeguarding certain rights.

4.6 Classification of Rights in Shari'ah

Before dealing with the punishments under *Shari'ah*, it seems appropriate to consider rights and their classification, because criminal liability depends upon transgression of these rights. The rights have been divided into four kinds⁴³ and these are;

4.6.1 Rights of Allah

These rights are termed as rights of Allah because they comprehend public benefit of a great significance and general nature.⁴⁴ They are either specific to Allah or aim to safeguard public interest and social order and not the private right of an individual.⁴⁵ These rights include right of worship, *Hudood* and expiation in cases of homicide by mistake or for intentionally breaking fast during the Holy month of *Ramadhan*.⁴⁶ The enforcement of these rights is the duty of the state⁴⁷ and parties are not allowed to compromise.⁴⁸ The violation of this right and the resulted offence is equal to public wrong in positive law. However, these rights may be differentiated from the rights of state which fall under the authority of political power and are known as *Siyasa Sharhia*.⁴⁹

4.6.2 Mixed Right with the Predominance of Allah's Right

The rights deal with the situations where right of Allah and that of man exist side by side with predominance of Allah's right; like *Hadd* for *Qadhif*.⁵⁰ According to Muslim

⁴² Bassiouni, M. Cherif, 1982, op. cit. p.128.

⁴³ Al-Sarakhasi, Muhammad bin Ahmad, *Usul al-Sarakhsi* (Lajna Ehya Al-Muaraf al-Noamania, Hyderabad, India). Vol. II, pp. 289-300.

Bukhari, Abdul Aziz, *Kashaf al-Asrar* (Al-Sadaf Publishers, Karachi, Pakistan). Vol. IV, p.134.

⁴⁴ Al-Taftazani, Saad al-din Masud bin Umar, *Al-Tawih ala al-Tawdih* (Dar al-Ahd al-Jadid Lil Tabah, Cairo, 1957). Vol. II, p. 151.

Khallaf, Abdul Wahab, *Ilm Usul al-Fiqh* (8th ed., Dar Al-Ilm, Kuwait) p.211

⁴⁵ Oudah, Abdul Qadir, 1997, op. cit. Vol. I., p. 205.

⁴⁶ Nyazee, Imran Ahsan Khan, *Theories of Islamic Law* (I.I.I.T & I.R.I. Islamabad, 1994) pp. 60-61.

⁴⁷ Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed., I.R.I., Islamabad, 1993) p.279.

⁴⁸ Ibn Qayyim, Al-Jawziyah, 1977, op. cit. F. N. 6, Vol. I, p.108.

⁴⁹ Nyazee, Imran Ahsan Khan, 1994, op. cit. F. N. 46. p.58.

⁵⁰ Hassan, Ahmad, 1993, op. cit. p.284. (*Shafite* hold that in *Qadhif* right of man is predominant admitting forgiveness from the victim by contrast to the *Hanfite* who declare it a right of Allah and consequently the victim has no right to forgive (*Ibid*.286)

jurists, though the victim has been defamed and it is his interests that have been directly injured but he has no right to pardon the offender or compromise with him.⁵¹ In majority of the cases of *Qadhf* the victim is a woman, stigmatized by such an accusation and the honour of the entire family is called into question. The offence, therefore, is likely to cause infamy, injure the reputation of the victim and lead to hatred and animosity among the members of society.⁵² That is the reason to include the *Hadd* in the rights of Allah. The punishment for the offence is deterrent causing public benefit.⁵³

4.6.3 Mixed Right with the Predominance of Man's Right

Third kind of rights is once again a mixed right but here the right of man is predominant over the right of Allah like *Qisas* for murder and other bodily injuries.⁵⁴ The right of individual arises from the fact that the offence causes loss and sorrow to the heirs of the victim in case of homicide, or pain and anguish to the victim himself in case of bodily injuries. The loss suffered by the victim is more than the loss suffered by the society.⁵⁵ As in this kind of rights man's right is dominating, so in its nature it can be linked with the rights which can be called as exclusive rights of man. The victim or his heirs have a right to compound by taking compensation or to pardon the offender without any compensation to promote good relationships between the two families in future.⁵⁶

4.6.4 Right of Man

This kind includes all the rights that have not been included in the preceding three categories and man is at liberty to exercise them within the prescribed limits.⁵⁷ The rights of man correspond to private rights in positive law, like right to enforce a contract, protection of property, compensation for damages etc. These rights are designed to protect the individual interests; they admit compromise, waiver, and compensation.⁵⁸ The enforcement of these rights depends upon the discretion of the man whose right has been infringed; he may demand or forgo them.⁵⁹

4.6.5 Importance of this Classification

This classification is important because it is directly linked with the procedure to be followed and the punishment to be implemented in case of transgression of a particular

⁵¹ Bukhari, Abdul Aziz, op. cit. F.N. 43. Vol. IV, p.159.

Ibn Qayyim, Al-Jawziyah, 1977, op. cit. F. N. 6, Vol. I, p.108.

⁵² Al-Zokhali, Wahba, *Usul al-Fiqh al-Islami* (1st ed., Dar al-Fiker, Damascus, 1986) Vol. I, p.156.

Badran, Abu Al-Ainain, *Usul al-Fiqh al-Islami* (Moassasa Shabab al-Jamah, Alexandria, 1984) p.311.

⁵³ Hassan, Ahmad, 1993, op. cit. p.286.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Bassiouni, M. Cherif, 1982, op. cit. p.205.

⁵⁷ Nyazee, Imran Ahsan Khan, 1994, op. cit. F. N. 46. p.61.

⁵⁸ Ibn Qayyim, Al-Jawziyah, 1977, op. cit. F. N. 6, Vol. I, p.108.

⁵⁹ Hassan, Ahmad, 1993, op. cit. p.280.

right. *Shari'ah* divides offences into two major kinds i.e. offences against rights of Allah and against rights of man.⁶⁰ If a right of Allah, or the right in which right of Allah is predominant, has been violated the punishment shall be a *Hadd*. In these cases the magnitude of the offences is not to be taken into account rather the disgrace caused to the injunctions which preserve Islamic virtues is important. For example, in the offence of theft, fulfilling all other conditions, if the value of the stolen property equals the prescribed standard i.e. *Nisab*, the offence shall be liable to amputation of hand and the punishment would remain unaffected in the case this standard stands exceeded to any extent.⁶¹ Similarly, the punishment for use of liquor is the same, regardless of its quantity. But the offences which are related to rights of man or in which right of man is predominant, it is required that the punishment must be proportional to the crime.⁶² In these cases the punishment shall be from the realm of *Qisas* or *Tazir*.⁶³

4.7 Punishments in Shari'ah

Shari'ah has a different system of punishments as compared to English law. Punishments with respect to the time of implementation have been divided into two major kinds i.e. punishments to be inflicted in the Hereafter and worldly punishments.⁶⁴

4.7.1 Punishments to be Inflicted in the Hereafter

Certain wrongs that cannot be proved by evidence, like back-biting, hypocrisy, personal grudge, jealousy, malice, sneaking whisper though disapproved by the Lawgiver yet not punishable in this world but in the Hereafter. Likewise, if an offence committed secretly or where the accused has managed to escape his liability due to lack of evidence, his personal influence or by any other means. He shall be punished on the Day of Judgment and these punishments are much more severe than the worldly punishments. At a number of places in the Holy *Qur'an* this fact has been prescribed that "Know that Allah is severe in punishment"⁶⁵ and that "He is swift in prosecution."⁶⁶ Every believer is bound to avoid the displeasure of his Lord by following His commandments and avoiding all kinds of evil. As these punishments are not related to this study, we need not discuss them.

⁶⁰ Lippman, Matthew, 1988, op. cit. p.2.

⁶¹ Abu Zohra, Muhammad, *Al-Aqooba* (Dar-Al-Fiker al Arabi, Cairo) pp 9-10

⁶² *Ibid.* p.10.

⁶³ Nyazee, Imran Ahsan Khan, *Islamic Jurisprudence* (I.I.I.T. & I.R.I., Islamabad, 2000) p.98.

⁶⁴ Abu Zohra, Muhammad, op. cit. F.N. 61. p.62.

⁶⁵ *Al-Qur'an* 5:98

⁶⁶ *Al-Qur'an* 7:166

4.7.2 Worldly Punishments

The other kind of punishments, worldly punishments, is prescribed for the acts which have been declared unlawful by *Shari'ah* and are considered to be sufficiently injurious to the interests of society. Islam, like all other revealed religions, has certain basic objects to be achieved. These objects have been enumerated as; protection and preservation of religion, life, family life, intellect, and property.⁶⁷

The words 'protection' and 'preservation' emphasize a dual aspect, that these interests are not only affirmed by the eternal law but also safeguarded.⁶⁸ These objects are of such importance that it is just impossible to imagine a peaceful life without their preservation and protection. Almost all the criminal codes of civilized nations emphasize the protection of the same interests and any act detrimental to them is an offence, like offences against, person, property, state, public tranquillity, etc. These are, therefore, indispensable for peace and security in a society and their absence would disrupt life and lead to disorder and anarchy. In order to protect these five important indispensable interests, *Shari'ah* provides a system of worldly punishments, in addition to that in the Hereafter. In fact, by doing so, it has adopted two parallel courses to preserve them by cultivating religious consciousness through moral education; and by inflicting deterrent punishments upon one who violates the legal norms.

Shari'ah has its distinguishing feature dividing punishments with reference to their nature into fixed and discretionary. There are fixed punishments for major crimes, like, murder, highway robbery, theft, adultery and fornication, false accusation of adultery and drinking *Khamr*. *Shari'ah* places the protection of religion, safety of life and property, preservation of chastity and reputation and safeguarding intellect at the highest priority. Therefore, crimes involving violation of these most precious values are subject to fixed punishments. The fixed punishments can further be subdivided into two kinds i.e. *Hudood* and *Qisas*; whereas discretionary punishments are termed as *Tazir*. Offences in *Shari'ah* are classified on the basis of punishments, whereas in English criminal law classification is based upon the harm arising out of the crime, like crime against the person or property.⁶⁹

⁶⁷ Al-Shatibi, Ibrahim bin Moosa, *Al-Muwafaqat fi Usul al-Shari'ah* (2nd ed., Dar al Marafa, Beirut, 1975) Vol. II, pp.8-12.

⁶⁸ Nyazee, Imran Ahsan Khan, 1998, op. cit. F.N. 32. p.25.

⁶⁹ Lippman, Matthew, 1988, op. cit. p.38.

4.7.2.1 *Hudood*

Hudood is plural of *Hadd*, which literally means limit, prevention, hindrance, restraint or prohibition.⁷⁰ These punishments are designated as *Hudood* because they prohibit the commission of crimes, restrain its instances in an Islamic society and draw a line of demarcation between permissible and prohibited.⁷¹ A *Hadd* may be defined as "Fixed punishment to be implemented as the right of God."⁷²

Since God is perfect and eternal, so are His laws perfect and comprehensive. Hence the punishments ordained by God are immutable and invariable. No human tribunal is empowered to change *Hudood* punishments in either way i.e. no increase or decrease can be made on any ground.⁷³ The immutability of *Hudood* is supported by the verse of the Holy *Qur'an* which states, "These are the limits of Allah. Transgress them not. For whoso transgresseth Allah's limits, such are wrongdoers."⁷⁴ As mentioned above the major crimes in the eyes of *Shari'ah* are, murder, it is punished with capital punishment (*Qisas*),⁷⁵ *Zina* by a married adulterer is punished with stoning to death⁷⁶ and by an unmarried fornicator by one hundred lashes,⁷⁷ highway robbery by amputation of right hand and left foot,⁷⁸ whereas theft has been provided with the punishment of amputation of right hand of the thief,⁷⁹ drinking wine or the use of any other kind of intoxicant is punished with eighty lashes,⁸⁰ similar number of lashes have been prescribed for

⁷⁰ Ibn Manzur, *Lisaan Al-Arab* (Dar Sader, Beirut) Vol. III, p.140.

⁷¹ Aamer, Abdul Aziz, *Al-Tazir* (5th ed., Dar Al-Fiker al-Arabi, 1976) p.13.

⁷² Al-Kasani, Ala-ud-din, *Badai al-Sanai* (H. M. Saeed Co., Karachi, Pakistan, 1979) Vol. VII, p.33.

Al-Sarakhasi, *Al-Mabsut* (Idara Al-Qur'an Wal Uloom Al-Islamia, Karachi, Pakistan) Vol. IX, p.36.

⁷³ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, pp.686-87.

⁷⁴ *Al-Qur'an* 2:229

⁷⁵ *Al-Qur'an* 2:178.

Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p.38.

Muslim bin Hijjaj, 1981, op. cit. Vol. II, p.1302.

Al-Nissai, Ahmed bin Shoaib, *Sunan Al-Nissai* (Cagri Yayinlari, Turkey, 1981) Vol. VII, p.90.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.847.

Abu Daoud, Salman bin Ash'ath, 1981, op. cit. Vol. IV, p.522.

⁷⁶ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p.120.

Muslim bin Hijjaj, 1981, op. cit. Vol. II, p.1325.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p. 852.

Abu Daoud, Salman bin Ash'ath, 1981, op. cit. Vol. IV, p.593.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.39.

Malik bin Ans, 1981, op. cit. F. N. 40. Vol. II, p.820.

⁷⁷ *Al-Qur'an* 24:2

⁷⁸ *Al-Qur'an* 5:33

⁷⁹ *AL-Qur'an* 5:38

⁸⁰ Muslim bin Hijjaj, 1981, op. cit. Vol. II, p.1336.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.858.

Qadhf.⁸¹ Similarly, death punishment for high treason⁸² and apostasy⁸³ has been fixed by the *Sunnah* of the Holy prophet.

All these are fixed punishments and except the punishment of murder all other are designated as *Hudood*. It should be kept in mind that the fixed punishments provided for the offences are maximum when all the conditions of the offence are fulfilled. In all other cases society is authorized to make laws suitable to its own requirements within the maximum and minimum limits.

4.7.2.1.1 Number of *Hudood*

As far as the *Hudood* punishments are concerned, there is no difference of opinion among the Muslim jurists that these are fixed and immutable. However, they differ on the number of *Hudood* offences. According to the majority of the Muslim jurists there are seven kinds of *Hudood* and these are; (*Zina*) unlawful sexual intercourse, (*Qadhf*) false accusation of unlawful sexual intercourse, (*Saraqah*) theft, (*Haraba*) highway robbery, (*Khamr*) drinking wine, (*Riddah*) apostasy, and (*Baghi*) high treason.⁸⁴ This view has been accepted by a number of contemporary Muslim scholars as well.⁸⁵ The opinion is based upon the fact that the punishment for these offences has been fixed either in the Holy *Qur'an* or *Sunnah* and all these are considered to be the violation of right of Allah or the society at large.

However, *Hanfite* jurists do not agree with the opinion; they exclude apostasy and high treason from *Hudood* offences. The reason might be that in case of high treason the ruler has a right to forgive the offenders, if he believes it in the best interest of society, and similarly in the cases of apostasy the court is bound to give the offender at least

⁸¹ *Al-Qur'an* 24:4-5.

⁸² Muslim bin Hijaj, 1981, op. cit. Vol. II, p.1373 &1480.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1303.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. VII, p.153.

Ahmad bin Hanbal, *Masnad Imam Ahmad bin Hanbal* (Cagri Yayinlari, Turkey, 1981) Vol. II, p.161.

⁸³ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p.162.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.848.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. VII, p.104.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.59.

Abu Daoud, Salman bin Ash'ath, 1981, op. cit. Vol. IV, p.521.

⁸⁴ Ibn Qadama, *Al-Mughni* (Maktaba Al-Mustafa Al-babi al-Halbi, Egypt) Vol. VII, p.104.

Al-Dasooqi, *Hashiat Al Dasooqi* (Dar al-Ahya Al-Kutab al-Arabia, Egypt) Vol. IV, p.298

Al-Khatib, *Al-Iqnah* (Dar Al-Marfa Litabbah wa Al-Nasher, Beirut, 1979) Vol. II, p.177.

Ibn Hazm, Ali bin Ahmad bin Saeed, *Al-Mohallah* (Dar Al-Afaq al-Jadeeda, Beirut) Vol. XI, p.118.

Al-Fatoohi, Taqi-ud-din Muhammad, Muntahi *Al-Iradat* (Alam al-Kutab, Beirut) Vol. II, p.456.

Al-Bahooti, *Kasshaf al-Qannah* (Maktaba Al Nasar al-Hadisa, Riyadh) Vol. VI, p.77.

⁸⁵ Sabiq, Al-Sayyed, *Fiqh Al-Sunnah* (3rd ed., Dar Al-Kitab al Arabi, Beirut, 1977) Vol. II, p.355.

three days to rethink and renounce apostasy while such relaxation is not allowed in the cases of other *Hudood* offences.⁸⁶

There is a difference of opinion on the number of *Hudood* among the *Hanfite* jurists themselves. In one opinion there are six kinds of *Hudood*, excluding apostasy and high treason, and they add *Hadd* for intoxication in addition to drinking wine.⁸⁷ A second opinion excludes the highway robbery from the realm of *Hudood*, lowering their number to five.⁸⁸ The reason for excluding highway robbery might be that this offence seldom occurred in the early history of Islam. The third opinion treats the *Hadd* for intoxication and drinking liquor as one reducing the number of *Hudood* to four,⁸⁹ because the object of its implementation and magnitude are the same, though the reason for its becoming due may be different.

4.7.2.2 *Qisas*

Murder is amongst the most heinous crimes known to mankind. The Right to life is the most important right in the view of *Shari'ah*, any transgression on this right is very strongly condemned. An unjustified killing of one human being is declared as murder of the whole humanity.⁹⁰ *Shari'ah* provides punishment of *Qisas* for the offences against human body in the cases of intentionally causing death or loss of any of organs or limbs. The word *Qisas* means equality⁹¹ and the Muslim jurists have defined it as the infliction of the same harm upon the offender as he caused to the victim.⁹² *Qisas* is the best example of retribution and the principle of proportionality emphasised by *Shari'ah*.

Punishment of *Qisas* was the part of Jewish law. The Holy *Qur'an* continues the tradition of the Judeo-Christian teachings, "The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation."⁹³ The basic feature of *Qisas* is that the victim of the offence has a right to compound for compensation or pardon the offender, thus having an important

Oudah, Abdul Qadir, 1997, op. cit. Vol. I, pp. 612 & 634.

⁸⁶ Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen* (Maktaba Majdia, Quetta, Pakistan) Vol. III, p.312

⁸⁷ *Ibid.* p.153.

⁸⁸ Al-Kasani, 1979, op. cit. Vol. VII, p.33.

Ibn Nujaym, Zain ud din, op. cit. F.N. 89. Vol. V, p.2.

⁹⁰ *Al-Qur'an* 5:32

⁹¹ Ghurbal, M. Shafiq, *Al-Mawsu'ah al-Arabia al-Muyassarah* (Dar al-Jeel, Beirut, 1995) Vol. II, p.1382.

⁹² Ibn Qadama, Ahmed bin Muhammad, *Al-Mughni* (Dar al-Hadith, Cairo, 1996) Vol. XI, p.417.

Ibn Manzur, *Lisaan Al-Arab* (Dar Sader, Beirut) Vol. VII, p.76.

⁹³ *Al-Qur'an* 5:45

role in the prosecution of the accused.⁹⁴ The Holy *Qur'an* clearly prefers payment of *Diyat* or compensation over the execution of *Qisas*.⁹⁵ The preference indicates the bond of continuity between the law and religion since the act of forgiveness will be rewarded in the Hereafter.⁹⁶

Punishment of *Qisas* has been prescribed as it saves life, though apparently it causes death of the offender and takes life of another member of society. The Holy *Qur'an* says, "And there is life for you in *Qisas*, O men of understanding, that you may ward off (evil)."⁹⁷ It is worth mentioning here that in this verse the addressees are not the Muslims only, rather generally the men of intellect and understanding. If a person who intended to kill someone is sure that if he kills he will be killed in *Qisas*, definitely he will think hundred times before commission of such a heinous crime and will refrain from committing it. In this way two lives have been saved, life of the person whose death was intended and life of the would be murderer. The fact can be proved by the crime statistics report of Interpol. In Saudi Arabia, where punishment of *Qisas* is implemented, 147 murders were committed in 2000, whereas in the same year 766 murders were committed in England and Wales.⁹⁸ The frequency of murders in UK is gradually increasing after the abolition of death punishment, in 2002, 1048 murders were reported to police,⁹⁹ where as prior to abolition of death punishment during 50 years(1900-1949) a total number of 7,454 murders were known to the police in England and Wales.¹⁰⁰ It is important to mention that though only 632 convicts were executed during the period mentioned above¹⁰¹ yet it was the fear of death punishment which kept the offence of murder under control. Certainly there could be a number of other factors involved for such a low prevalence rate of homicide, however application of *Shari'ah* punishments is the most important of all.

⁹⁴ Bassiouni, M. Cherif, 1982, op. cit. p.204.

Lippman, Matthew, 1988, op. cit. p.41.

⁹⁵ *Al-Qur'an* 3:159.

⁹⁶ Bassiouni, M. Cherif, 1982, op. cit. p.205.

⁹⁷ *Al-Qur'an* 2:17

⁹⁸ (<http://www.interpol.int/Public/Statistics/ICS>) 2003. (The same source estimated Saudi Arabia's population in the year to 20, 846, 884 and UK's to 52,427, 906)

⁹⁹ *Ibid.*

¹⁰⁰ Royal Commission on Capital Punishment (1949-1953) Cmd. 8932 (HMSO, London) p.19.

¹⁰¹ *Ibid.*

It should be remembered that *Shari'ah* recognises various degrees of homicides, like intentional or negligent homicide.¹⁰² *Qisas* is the punishment provided only for intentional homicide or murder. It is important to mention here that after 39 years of abolition of capital punishment the Tory shadow home secretary Mr. David Davis suggested bringing back death penalty for some premeditated and cold blooded murders.¹⁰³

4.7.2.3 *Tazir*

Tazir punishments are applied to the offences which fall out of the domain of *Hudood* and *Qisas*.¹⁰⁴ These are the discretionary punishments to be inflicted for transgression against the rights of individual, or right of Allah for which there is neither a fixed punishment nor a penance or expiation.¹⁰⁵ *Tazir* punishment may also be inflicted in the cases of *Hudood* and *Qisas* if the required standard of proof is not available or an essential element of offence is missing, hence preventing the execution of *Hadd* or *Qisas*.¹⁰⁶ Similarly, all other acts damaging interests of an individual or society are to be punished by sole discretion of the judge.¹⁰⁷ Basically, *Tazir* offences are less serious than the *Hudood* and *Qisas*; they include any conduct that violates Islamic norms like obscenity, usury, breach of trust, false testimony and contempt of court.¹⁰⁸

Though the criminalisation of conduct and fixing of *Tazir* punishment has been left to the discretion of the court, yet at the time of awarding the sentence the court is bound to take into account certain factors like gravity of the offence, its frequency in society,¹⁰⁹ circumstances of the case and the character of the offender.¹¹⁰ Hence

¹⁰² Ibn Qadama, op. cit. F.N. 84. Vol. VII, p.637.

Al-Khatib, *Mughni Al-Mohtaj* (Dar-Ihya al-Taras Al-Arabi Beirut, 1933) Vol. IV, p.3

Ibn Al-Hamam, *Sharah Feth Al-Qadeer* (Dar Ahya al-Taras al-Arabi, Beirut) Vol. IX, p.137.

Malik Bin Ans, *Al-Mudawana Al-Kubra* (Dar Al-Fiker, Beirut) Vol. IV, p. 432.

Lippman, Matthew, 1988, op. cit. p.50.

¹⁰³ (<http://news.bbc.co.uk>) 16 Nov. 2003.

¹⁰⁴ Ibn Qayyim, *Al-Jawziyah*, op. cit. F.N. 4. p.145.

¹⁰⁵ Al-Sarakhsi, op. cit. F.N. 72. Vol. IX, p.36.

Ibn Al-Hamam, *Sharah Al-Feth Al-Qadeer* (Dar Ahya al-Taras al-Arabi, Beirut) Vol. VII, p.119.

Al-Bahooti, op. cit. F.N. 84. Vol. IV, p.72.

Al-Mawardi, Muhammad bin Habib, op. cit. F.N. 22. p.224.

Al-Rammali, *Nihayat al-Mohtaj* (Al-Maktaba al-Islamia) Vol. VII, p.77.

¹⁰⁶ Al-Bahooti, op. cit. F.N. 84. Vol. VI, p.121.

Abu Zohra, Muhammad, *Al-Jarima Wa al-Aqooba* (Maktab al-Anglo al-Misria, Cairo) p.126.

Bhansi, Ahmad Fathi, *Al-Aqooba Fi al-Fiqh al-Islami* (5th ed. Dar Al-Sharooq, Beirut, 1983) p.134.

¹⁰⁷ Gerber, Haim, *Islamic Law and Culture 1600-1840* (Brill, Leiden, 1999) p.39.

¹⁰⁸ Lippman, Matthew, 1988, op. cit. p.53.

¹⁰⁹ Ibn Tamiyya, Taqi ud din, *Al-Siyassa al-Shariah* (Dar al-Ktub al-Arabi Egypt, 1969) p.53.

¹¹⁰ Aamer, Abdul Aziz, 1976, op. cit. p.69.

Ibn Qayyim, *Al-Jawziyah*, 1977, op. cit. F.N. 6, Vol. II, p.29.

Ibn Tamiyya, Taqi ud din, 1969, op. cit. p.97.

punishment of *Tazir* may differ from society to society, time to time and person to person, but *Hudood* and *Qisas* are not subject to such changes.¹¹¹ Gravity of an offence can be determined by taking into account three things i.e. the anguish suffered by the victim, the magnitude of alarm and fright caused to the society by the offence and the quantum of disgrace caused to the Islamic virtues.¹¹² The principle that the severity of punishment should be commensurate with the seriousness of the wrong is admitted in secular systems of criminal laws, and the seriousness of the offence is determined by taking into account the harm caused by the act and the past conduct of the offender.¹¹³

Tazir punishment provides the court with a further jurisdiction and freedom to inflict a more appropriate penalty on the offender taking into account the circumstances of the crime and the criminal. In English law, a court may be confronted with a case where there is a little evidence against the offender but under the rigid and inadequate legal rules it is bound to acquit the accused. The best example in this case can be the use of force in the exercise of the right of private defence.

This classification of punishments is the characteristic of an ideal penal system to provide criminal justice to the society. Basic values of human life have been positively protected and the punishments for transgression of such values have been fixed by the Lawgiver Himself. Out of hundreds of criminal offences only a few have been dealt with in the Holy Book and the traditions of the Holy Prophet. The rest have been left to the discretion of man, with an authority and freedom to legislate taking into account the needs of society in any age and in a way which suits the conditions of that age.¹¹⁴

4.8 *Hudood, Qisas and Tazir Distinguished*

It is important to know the differences among these three kinds of punishments because the jurisdiction of the court and its powers vary with the punishment to be imposed on the offender. Beside their fixed and variable character there are many other grounds on which these three kinds of punishments can be differentiated. Some of the differences are as follow;

¹¹¹ Ibn Farhoon, *Tabsarat al-Hukkam* (Maktba Mustafa Al-babi Al-halbi, Egypt) Vol. I, p.366.

Al-Qarafi, Shahab ud din Ahmad bin Idrees, *Al-Frooq* (Alam al-Kutab, Beirut) Vol. IV, p.181.

¹¹² Abu Zohra, Muhammad, op. cit. F.N. 61. p.8

¹¹³ Von Hirsch, Andrew, *Doing Justice: The Choice of Punishments* (Hill & Wang, N. York, 1976) p.68.

¹¹⁴ Kamel, Taymour, *The Principle of Legality*, in Bassiouni, M. Cherif (ed) *The Islamic Criminal Justice System* (Oceana Publications, 1982) p.167.

1. *Qisas* offences fall into the category of civil wrongs, for it is the victim or his heirs who have right to initiate prosecution, demand retaliation, accept *Diyat* or pardon the offender altogether.¹¹⁵ In the cases of amicable settlement the court can impose only an appropriate *Tazir*, if deemed necessary.¹¹⁶ *Hudood* offences are public wrongs, no amicable settlement, either by the victim, by the court or even by the head of state, is allowed. In *Tazir* offences the court can waive the punishment,¹¹⁷ provided it does not prejudice the rights of aggrieved party.¹¹⁸ Similarly, the victim may forgive the offender to the extent of his own rights without prejudicing the rights of society.¹¹⁹
2. Standard of evidence to prove *Hudood* offences is higher than that for *Qisas* and *Tazir*. According to majority opinion of Muslim jurists, evidence of woman is not admissible in *Hudood* and *Qisas* offences,¹²⁰ unlike *Tazir*.¹²¹ Similarly, in *Qisas*, as opposed to *Hudood*, evidence in writing or by the signs of a dumb witness is admissible.¹²² In the offence of *Zina* four male eye witnesses of the act of penetration are required. The minimum number of witnesses to prove other *Hudood* and *Qisas* offences is two, whereas in *Tazir* offences a single witness would suffice to prove it.¹²³ The judge, if himself an eye witness, is allowed to decide a case of *Qisas* relying upon his own knowledge, whereas in *Hudood* knowledge of the judge is of no value and he is bound to decide the case in the light of evidence produced before him.¹²⁴ The reason being that his personal knowledge does not inspire confidence in the public, but instead breeds doubt sufficient to avoid *Hadd*.¹²⁵
3. An unreasonable delay in prosecution of the offender by the victim affects admissibility of evidence in *Hudood* except *Hadd* for *Qadhif*, whereas such delay does not affect evidence in cases of *Qisas* and all other cases for recovery of

¹¹⁵ Bassiouni, M. Cherif, 1982, op. cit. p.41.

¹¹⁶ Aamer, Abdul Aziz, 1976, op. cit. p.68.

¹¹⁷ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.687.

¹¹⁸ *Ibid.* p.81.

¹¹⁹ Ministry of Interior, KSA, 1980, op. cit. p.46.

¹²⁰ Ibn Taymiyyah, Taqi ud din, 1969, op. cit. p.78.

Abi Shaiba, *Mussanif* (Idara al-Qur'an & Uloom al-Islamia, Karachi, 1986) Vol. X, p.59.

¹²¹ Aamer, Abdul Aziz, 1976, op. cit. p.70.

Ibn Al-Humam, *Sharh Fateh Al-Qadeer* (Dar Ahya Al-Taras al-Arabi, Beirut) Vol. VI, p.450.

¹²² Ibn Nujaym, *Al-Ashbah Wa Al-Nazair* (Idara Al-Qur'an Wa Al-Uloom Al-Islamia, Karachi) Vol. I, p.118

¹²³ Oudah, Abdul Qadir, 1997, op. cit. Vol. I., p.83.

Ibn Qayyim, *Al-Jawziyah*, op. cit. F.N. 4. p.93.

Aamer, Abdul Aziz, 1976, op. cit. p.44.

¹²⁴ Ibn Nujaym, op. cit. F.N. 122. Vol. I, p.118.

¹²⁵ Bassiouni, M. Cherif, 1982, op. cit. p.112.

personal rights.¹²⁶ There are short periods of limitations, generally one month, except in drinking wine where it is the time during which smell of wine persists.¹²⁷

4. Intercession for the offender is allowed in *Qisas* prior to or after prosecution, but in cases of *Hudood*, except in theft prior to prosecution, generally it is not permissible.¹²⁸ Once the case has been reported for prosecution, no intercession or waiver can be affected, rather it has been disliked.¹²⁹ Similarly, arbitration and mediation is allowed only in the cases of *Qisas*.
5. Minors and insane, being incapable of committing crimes, are not subject to the punishment of *Hudood* or *Qisas*.¹³⁰ However, *Tazir* may be inflicted on them taking into account their standard of maturity or understanding, because *Tazir* is a disciplinary punishment having an element of education and its lesser degree may start merely with reprimand.¹³¹ This can be equivalent to the trial of minors by juvenile courts, under the rules of positive law, and to keep them in young offender's institutions for some time.
6. Repentance of the offender has no effect on the *Hudood* and *Qisas* except in apostasy if he repents within three days,¹³² highway robbery if he repents before his arrest¹³³ and in theft where after active repentance he returns the stolen property before an application for prosecution.¹³⁴ However, on the effect of repentance on *Tazir*, there are two opinions, According to *Shafite*, if announced sincerely, repentance may provide a defence to the punishment of *Tazir*,¹³⁵

¹²⁶ Ibn Nujaym, Zain ud din op. cit. F.N. 122. Vol. I, p.118.

Schacht, Joseph, *An Introduction to Islamic Law* (The Clarendon Press, Oxford, 1964) p.177.

¹²⁷ Schacht, Joseph, 1964, op. cit. p.176.

¹²⁸ Doi, Abdur Rahman I., *Shari'ah: The Islamic Law* (Taha Publishers, London, 1997) p.224.

The view is based upon the saying of the Holy Prophet, where the cloak of Abu Sufyan was stolen; he caught the thief and took him before the Holy Prophet. After the proof of the offence the offender was sentenced to amputation of hand. Abu Sufyan said I never intended this and I endow this property to him, the Holy Prophet denied the settlement and said this was better to be done before you raised the case. {Ibn Nujaym, Zain ud din, op. cit. F.N. 89. Vol. V, p.2}; Hazrat Zubair has also been reported to have said that once the case of Hadd has been reported for prosecution the curse of Allah be upon the intercessor and interceded. {(Malik bin Ans, *Al-Muwatta* (Cagri Yayinlari, Turkey, 1981) Vol. II, p.835}.

¹²⁹ Ibn Nujaym, Zain ud din, op. cit. F.N. 89. Vol. V, p.2

¹³⁰ Aamer, Abdul Aziz, 1976, op. cit. p.71.

¹³¹ Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen* (Dar Al Fiker, Beirut) Vol. III, p.183.

¹³² Ibn Nujaym, Zain ud din, *Ashbah Wa Al-Nazair* (Moassasa Al-Halbi, Cairo, 1968) p.189

Al-Sherazi, Ibrahim Bin Ali, *Al-Mohazzib* (Dar Al-Qalm, Damascos, 1996) Vol. V., p.209.

¹³³ *Al-Qur'an* 5:34

¹³⁴ Schacht, Joseph, 1964, op. cit. p.176.

¹³⁵ Al-Mawardi, Muhammad bin Habib, op. cit. F.N. 22. p.239.

Al-Qarafi, Shab ud din Ahmad bin Idrees, *Al-Frooq* (Alam al-Kutab, Beirut) Vol. IV, p.181.

whereas *Hanfite* opined that it does not affect the liability.¹³⁶ Both the opinions can be combined by saying that if the offence of *Tazir* was related to the right of Allah and the offender repented, he may be discharged of liability, however in the cases of right of man his repentance will be of no effect.

It is a practice in positive law that if a serious offence has been committed and the offender is anonymous, an accomplice joining the prosecution to bring the offenders to accountability shall be exempted from liability. *Shari'ah* has taken a realistic account of this aspect, specifically in the cases of highway robbery where in most of the cases, the offenders manage to escape without any clue, if someone sincerely repented before his arrest and appeared before the authorities and gave information regarding the offence, he shall not be liable for *Hadd*.

7. *Hudood* and *Qisas* punishments have been prescribed just to combat the crime under question, without any reference to the rank or the social status of the offender; whereas in the cases of *Tazir*, a court is entitled to take into account such factors. The Holy Prophet is reported to have said, "Ignore the minor mistakes, other than *Hudood*, of your respectable."¹³⁷ It enjoins upon the court that the personality of the offender, his moral character and other circumstances should necessarily be taken into account while passing a sentence upon him in a *Tazir* offence.¹³⁸

It should be kept in mind that in *Shari'ah* respectable does not mean the men of wealth or power in society rather the term denotes the scholars and the noble men.¹³⁹ Basically, punishments are designed to deter people from commission of crimes. But people are temperamentally different; for some people rebuke or scold will be enough, like the scholars of a society, there are others who may need intimidation or even a slap to set them right, and still there are others who cannot be corrected except by the execution of a severe punishment.¹⁴⁰ So while passing *Tazir* sentence a court may take into account all these factors and may reduce the severity of the punishment.

¹³⁶ Ibn Nujaym, *Zain ud din*, 1968, op. cit. F.N. 132. p.188.

¹³⁷ Al-Baihaqi, *Al-Sunan al-Kubra* (Dar al-Fiker, Beirut, 1996) Vol. XIII, p.161

¹³⁸ Oudah, Abdul Qadir, 1997, op. cit. Vol. I., p.612.

¹³⁹ Ibn Farhoon, *Tabsarat al-Hukkam* (Matba Mustafa Al-babi Al-halbi, Egypt) Vol. II, p.208.

¹⁴⁰ Ibn Al-Humam, op. cit. F.N. 121. Vol. V, p.112.

8. According to majority opinion of Muslim jurists if the offence of *Hadd*, pertaining to right of Allah is proved by the confession of the offender, he is allowed to retract his confession at any stage of the proceeding and thereby he shall not be liable.¹⁴¹ The reason for the opinion is that there is uncertainty of his truthfulness either in his confession or retraction, casting a doubt sufficient to prevent the implementation of *Hadd*.¹⁴² The Muslim jurists, relying upon the tradition of the Holy Prophet, also enjoin the court to bring it to the notice of the offender that he has a right to retract.¹⁴³ On the other hand, if his confession is pertaining to the right of man like *Qisas* or where the right of man is predominant like a *Hadd* for *Qadhif*, he is not allowed to retract.

4.9 Are the Punishments in *Shari'ah* very Harsh?

Shari'ah's punishments, specifically *Hudood*, seem to be harsh and severe. Are they really so? The following study will provide an answer to the question. Punishments in *Shari'ah* have two-fold objects, spiritual benefits and social welfare of the community, whereas secular laws lack the element of spiritual benefits of their subjects. *Shari'ah* lays emphasis on maintenance of order and peace at all costs by prescribing severe punishments for crimes which are a menace to society and deteriorate the moral values. A punishment is not a revenge or cruelty inflicted on the offender. Muslim jurists admit that punishment itself is misery and evil but it prevents more misery than it inflicts.¹⁴⁴ It protects a greater interest i.e. secures the rights of individuals, maintains law and order in the society and preserves the purity of its morals.¹⁴⁵ The same principle has been incorporated in the theory of utility by Bentham to justify the implementation of punishments.

It is not only in *Shari'ah* that severe punishments are provided. If we take into account the English criminal law, up to the 19th century capital punishment was provided for

¹⁴¹ Schacht, Joseph, 1964, op. cit. p.177.

¹⁴² Al-Sarkhasi, Shamas ud din, op. cit. F.N. 30. Vol. IX, p.182.

Al-Kasani, 1979, op. cit. Vol. VII, p.232.

Al-Khatib, 1933, op. cit. F.N. 102. Vol. IV, p.150.

Al-Sherazi, Ibrahim Bin Ali, *Al-Mohazzib* (Maktabah Isa Al-Babi Al-Halbi, Egypt) Vol. II, p.345.

Ibn Qadama, *Al-Mughni* (Maktaba Al-Riaz al-Hadisa, Riyadh) Vol. VII, p.197.

Malik Bin Ans, *Al-Mudawana Al-Kubra* (Dar Al-Fiker, Beirut) Vol. IV, p.383.

¹⁴³ Malik bin Ans, 1981, op. cit. F. N. 40. Vol. II, p.820.

Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p.22.

Muslim, Muslim bin Hijaj, 1981, op. cit. Vol. II, p.1321.

¹⁴⁴ Abu Zohra, Muhammad, op. cit. F.N. 61. p.6.

¹⁴⁵ *Ibid.* p.7

very minor offences.¹⁴⁶ There were approximately two hundred offences punishable with death.¹⁴⁷ It was admitted that there is no other country in the world where so many offences were punishable with death.¹⁴⁸ Initially English criminal law was not concerned with intention of the offender; criminal liability was imposed only by taking into account the outward conduct.¹⁴⁹ There was little discrimination on ground of age; children and teenagers were not only sentenced to death but executed as well.¹⁵⁰ It is irrefutable evidence that English criminal law was cruel and arbitrarily administered without affording adequate guarantee to the essential rights of the subjects. The harsh and brutish punishments were justified on the ground that as under the English criminal law the rights of accused are well safeguarded, so the punishments of those found guilty should be exemplary.¹⁵¹

It is worth mentioning here that in *Shari'ah* there are only three offences, murder, adultery by a married adulterer and apostasy, for which death sentence has been provided by the Lawgiver.¹⁵² Except these three cases it is not permissible to take the life of anyone. Great sanctity is attached to the protection of human life, chastity and unity of the community; he who violates this sanctity voluntarily shall have to suffer not only the capital punishment in this world but also the torment of Hell in the Hereafter. Those who contend that such punishments are harsh, ignore the harmful effects of such crimes on individual and society.¹⁵³

By prescribing severe punishments, *Shari'ah* attempts to strike a fair balance between the interests of the accused and the society. Though the *Shari'ah* punishments are undoubtedly severe, yet admittedly their severity has been reduced by provision of a tough criminal procedure and high standard of proof requiring certainty of guilt, to

¹⁴⁶ Radzinowicz, L. & Turner, J.W.C., *The Modern Approach to the Criminal law* (Collected Essays) (Macmillan & Co. London, 1948) p.39.

¹⁴⁷ Radzinowicz, L, Sir, *A History of English Criminal law and its Administration from 1750* (Stevens & Sons, London, 1948) Vol., I, p.4.

Radzinowicz, L., & Turner, J.W.C., 1948, op. cit. p.44.

¹⁴⁸ Radzinowicz, L. Sir, 1948, op. cit. Vol., I, p.3.

¹⁴⁹ Pollock & Maitland, *The History of English Law* (2nd ed., University Press, Cambridge, 1968) Vol. II., p.470.

¹⁵⁰ Radzinowicz, L, Sir, 1948, op. cit. Vol., I, pp.12-13.

¹⁵¹ *Ibid.* p.27

¹⁵² Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p. 38.

Muslim bin Hijjaj, 1981, op. cit. Vol. II, p. 1302.

Abu Daoud, Salman bin Ash'ath, 1981, op. cit. Vol. IV, p.522

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. VII., p.90.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.847.

¹⁵³ Bassiouni, M. Cherif, 1982, op. cit. p.197.

avoid error and prevent abuse of judicial discretion.¹⁵⁴ Western scholars admit that severity is one of the characteristics of punishments which render them most effective.¹⁵⁵ A person burnt on a hot stove will very unlikely touch it again.¹⁵⁶ Crime is called the cancer of human society that disrupts the whole social life; this cancer must be treated by the most appropriate and effective medicine. The criticism on the harshness of *Shari'ah*'s punishments may also be tempered by the recognition of the fact that their deterrent nature has effectively reduced the incidence of serious crimes in Islamic societies.¹⁵⁷ Taking into account the impact of punishments in English criminal law it may also be argued that infliction of effective and severe punishments in rare instances is more reasonable as compared to the nominal and ineffective punishments on a large number of offenders.

Although the punishments in *Shari'ah* are severe yet these are to be inflicted as a last resort.¹⁵⁸ Criminal law is not the whole system of *Shari'ah* rather it is a small part of it. These punishments are to be implemented only in an Islamic society where *Shari'ah* is implemented in its complete form in all the spheres of life. Application of *Hudood* has been restricted, beside other defences, by their narrow definitions, peculiar conditions, and strict standard of proof, active repentance and dominance of role of doubt.¹⁵⁹ These factors altogether temper the severity of punishments and restrict their application to very limited cases. The application of the most severe punishment of *Zina* is restricted by the fact that accusation of the offence is discouraged by threat of punishment of *Qadhf*, if the accuser failed to prove the accusation by four eye witnesses.¹⁶⁰ Further, so many evidentiary requirements have been imposed as to make the conviction impossible unless the perpetrator confesses.¹⁶¹ However, if these punishments are applied, apart from the whole system, it will not be appropriate.

4.10 Retributive and Deterrent Functions of these Punishments

In *Shari'ah* punishments serve two major objects: Firstly, preservation of virtues, moral excellence enunciated by *Shari'ah* and condemnation of vice prevailing in society. Secondly, protection of public interests, safeguarding collective security and furtherance

¹⁵⁴ Lippman, Matthew, 1988, op. cit. p.121.

¹⁵⁵ McGuire, James (ed), *What Works: Reducing Reoffending* (J. Wiley & Sons, Chichester, 1995)p.13

¹⁵⁶ Felson, Marcus, *Crime and Everyday Life* (Pine Forge, London, 1994) p.10.

¹⁵⁷ Bassiouni, M. Cherif, 1982, op. cit. p.196.

¹⁵⁸ Lippman, Matthew, 1988, op. cit. p.85.

¹⁵⁹ Schacht, Joseph, 1964, op. cit. p.176.

¹⁶⁰ Lippman, Matthew, 1988, op. cit. p.46.

¹⁶¹ Forte, David F., *Studies in Islamic Law* (Austin & Winfield Publishers, 1999) p.81.

of social welfare.¹⁶² In order to achieve these objects punishments must be based upon the principles of deterrence and retribution.¹⁶³ It is unfair that an offender should gain an advantage over law abiding people through contravening a prohibition and get away with that advantage. It is, therefore, justifiable that he should be subjected to such a disadvantage so as to outweigh the benefits. This object cannot be achieved unless the offender receives what he actually deserves.¹⁶⁴ Execution of a merited punishment upon the offender creates a satisfaction for the victim and his family, which in turn plays an important role in the process of social control.

Social justice and respect for law cannot be maintained without punishing the offender as he deserved. The retributive function of *Hudood* punishments has been specifically mentioned in the Holy *Qur'an* for the offences of highway robbery¹⁶⁵ and theft.¹⁶⁶ In both the cases the punishment has been described as reward for the evil deeds of the offenders. At another place it has been provided that, "And those who earn ill deeds, (for them) requital of each ill deed by the like thereof;"¹⁶⁷

Recognition of deterrent aspect of punishments in *Shari'ah* is stronger than any other legal system.¹⁶⁸ Deterrence has been considered as predominant justification for punishments. Especially *Hudood* punishments have been defined as "deterrent punishments ordained by Allah to prevent man from committing crimes."¹⁶⁹ In order to achieve the object of general deterrence execution of *Hadd* punishment has been ordained to be executed in public.¹⁷⁰ The Holy *Qur'an* commands that the punishment for *Zina* be carried out in public.¹⁷¹ When the people will witness the execution of punishment on the offender they will be deterred from the commission of crime. *Hudood* punishments are severe and immutable; these two characteristics give them as full a retributive effect as possible and combat the inclination of man to break law.

¹⁶² Abu Zohra, Muhammad, op. cit. F.N. 61. p.28.

¹⁶³ Lippman, Matthew, 1988, op. cit. p.84.

¹⁶⁴ *Al-Qur'an* 42:40

¹⁶⁵ *Al-Qur'an* 5:33

¹⁶⁶ *Al-Qur'an* 5:38

¹⁶⁷ *Al-Qur'an* 10:27

¹⁶⁸ El-Awa, M. Salim., *Punishment in Islamic Law* (American Trust Publications, Indianapolis, 1981) p.30.

¹⁶⁹ Al-Mawardi, Muhammad bin Habib, op. cit. F.N. 22. p.191.

¹⁷⁰ Lippman, Matthew, 1988, op. cit. p.84

¹⁷¹ *Al-Qur'an* 24:2

The most common evidence of deterrent effects of *Hudood* punishment is the significant decrease in crime-rate in Saudi Arabia, where the criminal law is based upon the principles of *Shari'ah*. The total crime-rate per 1000 habitants was 32 in 1966 that reduced to 18 per 1000 inhabitants in 1975.¹⁷² In 2000, there were only 147 murders and 30 rapes against 766 murders and 8409 rapes in England and Wales in the same year.¹⁷³ An official figure shows that *Hadd* punishment for theft has never been carried out in Saudi Arabia more than twice a year.¹⁷⁴ There is only one reported case of amputation of hand for five years i.e. from 1972 to 1976.¹⁷⁵ It is admitted that respect for *Shari'ah* is a major reason for the relative stability enjoyed by Saudi Arabia in the turbulent Middle East.¹⁷⁶

Punishments provided in *Shari'ah* contain all the major objects individually and collectively. The punishment provided for the offence of fornication is reformatory in its nature and implies the spiritual purification of the offender, whereas, punishments provided for the offence of theft and highway robbery are deterrent in their character while the punishment for murder is based upon the concept of retribution.¹⁷⁷

4.11 Role of Intention in Determining Criminal Liability

In *Shari'ah*, violation of command and prohibition based upon rational understanding and volition of the offender gives rise to criminal liability.¹⁷⁸ A person shall be criminally liable only when he rationally understands what he is doing and at the same time has an option to do otherwise. If a person is capable of forming intention but has no option to do otherwise, he shall not be liable, like acts done under coercion.¹⁷⁹ A minor and an insane are exempted from criminal liability because they are incapable of forming intention and knowing the nature and consequences of their acts. There is a tradition of the Holy Prophet narrating that all the acts and omissions of a man are to be judged in the light of intention with which these are done.¹⁸⁰ The tradition not only reveals the importance of intention, rather another important principle of criminal law as well that there should be concurrence between the act and the intention. It is the

¹⁷² Ministry of Interior, KSA, 1980, op. cit. p.500.

¹⁷³ International Crime Statistics (<http://www.interpol.int/Public/Statistics/ICS>) 2003.

¹⁷⁴ El-Awa, M. Salim., 1981, op. cit. p.30.

¹⁷⁵ Ministry of Interior, KSA, 1980, op. cit. p.560.

¹⁷⁶ Lippman, Matthew, 1988, op. cit. p.107.

¹⁷⁷ Ansari, *The Qur'anic Foundations* (1st ed., Indus Educational Foundation, Karachi, 1973) Vol. II, p. xxiv.

¹⁷⁸ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.393.

¹⁷⁹ *Ibid.*

¹⁸⁰ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. I, p.2

intention which renders an act lawful or unlawful, valid or void, obedience or disobedience.¹⁸¹

It is the importance of intention that led the *Hanfite* jurists to classify homicide into five kinds, homicide with deliberate intention, quasi deliberate intention, by mistake, quasi mistake and indirect homicide.¹⁸² This classification results in the variation of degree in the liability of the offender. In the cases of murder liability is *Qisas*, whereas in all other kinds of homicide the liability is to pay blood money (*Diyat*) with certain variation in its amount. The classification indicates that *Hanfite* jurists had a general idea of the modern concept of *mens rea*, representing various states of minds of an offender.

As it is known that the intention of a man is the internal condition of his heart and mind and normally it is impossible to prove it by any direct evidence. Comparatively it is more difficult to know what is in the mind of a man than to know what he has done. So some external circumstantial evidence is required to prove his intention. Muslim jurists adopted an objective method to prove it in the cases of homicide. They have taken use of a weapon as a parameter to determine the intention of the offender.¹⁸³ Homicide with deliberate intention or murder means killing of a human being with a weapon which is sharp and specifically designed for killing.¹⁸⁴ So all the weapons primarily designed for killing like swords, daggers and arrows, used in the past and following the analogy all the lethal weapons of the present day, if used in a homicide prove that the offender not only intended the act but also the result i.e. death of the victim. Similarly, all the weapons, which in the ordinary course of nature are likely to cause death, may lead to the same conclusion.

This particular circumstantial evidence to determine the intention of the offender was considered by English judges also. In *R. v. Meakin*¹⁸⁵ while directing the jury Baron Alderson said that use of a deadly weapon by the accused, even in state of intoxication, leads to the conclusion that the accused intended death of the victim. It shows that at a time English judges were stricter to infer intention from the weapon of the offence,

¹⁸¹ Ibn Qayyim, *Al-Jawziyah*, 1977, op. cit. F.N. 6, Vol. III, p.108

¹⁸² Ibn Al-Hamam, *Sharah Feth Al-Qadeer* (Dar Ahya al-Taras al Arabi, Beirut) Vol. IX, p.137.
Ibn Nujaym, *Zain ud din*, op. cit. F.N. 89. Vol. VII. p.287.

¹⁸³ Ibn Al Hamam, *Sharah Feth Al-Qadeer* (Dar Ahya al-Taras al-Arabi, Beirut) Vol. IX, p.138.

¹⁸⁴ *Ibid.*

¹⁸⁵ *R. v. Meakin* (1836) 7 C & P 297; 173 ER 131.

notwithstanding the mental capacity of the accused. The same view was affirmed by Coleridge J. in *R. v. Monkhouse*¹⁸⁶ by saying that when a man put a pistol on the head of another and shot him dead, he intended nothing except to cause his death. In another case *R. v. Doherty*¹⁸⁷ Stephen J. addressing the jury said that it is difficult to see how a man can fire a loaded pistol at another without an intention to cause his death or grievous bodily harm.¹⁸⁸ The cases prove that in English law up to the 19th century weapon of the offence was used to determine the intention of the accused. The principle has not lost its validity; in the absence of any evidence to the contrary use of a deadly weapon is the best circumstantial evidence to prove that the defendant intended death or grievous bodily harm.

It is clear that intention is very important in determining the liability of the offender. However, in *Shari'ah*, motive, good or bad, has no impact on the offence or its punishment. It cannot be taken into account neither determining liability nor at the sentencing stage. Powers of the courts have been curtailed in the offences for which fixed punishment has been provided. However, as already mentioned, in the offences of *Tazir* the punishment depends upon discretion of the court, so practically it is possible for the court to take into account motive of the offender for commission of the crime and mitigate the punishment if deems appropriate.¹⁸⁹ This view is in line with practice in English criminal law, as discussed in 3.9.1, particularly in the instances of good motive.

4.12 Morality and Law in *Shari'ah*

In *Shari'ah*, morality, being the sense of good and bad in a society, derives its existence and force from the divine law. It has been established by experience that man is incapable of perceiving his own true interests. It is the natural weakness of man that in most of the affairs he takes into account only one aspect of reality, swayed by emotions and desires, and loses sight of other aspects, hence rendering his judgements usually one sided.¹⁹⁰

¹⁸⁶ *R. v. Monkhouse* (1849) 4 Cox. CC 55.

¹⁸⁷ *R. v. Doherty* (1887) 16 Cox. CC 306.

¹⁸⁸ *Ibid.* at 308.

¹⁸⁹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.411.

¹⁹⁰ Ahmed, Khurshid, *Islam: Its Meaning and Message* (Ambika Publications, N. Delhi, 1977) p.162. (An example of this phenomenon is the enactment of prohibition law in 1920 in America. The people of America thought that prohibition of alcoholic beverages is in the best interest of their nation but just after thirteen years of experience the same people demanded the repeal of law.)

The incapacity of man to determine ultimate good and evil has been stated in the Holy *Qur'an*, "It may happen that you hate a thing which is good for you, and it may happen that you love a thing which is bad for you. Allah knows, you know not."¹⁹¹ What is absolutely good or evil is an important question to be determined in the light of revelation, if no answer has been provided the believers are allowed to follow the dictates of reason in accordance with certain definite principles.¹⁹²

The sense of goodness and evil springs from the consciousness of a man and his conscience makes him incline to obey righteousness. Yet morality should not be accepted as self-imposed, because self can also dispense with it even as it can impose. Consequently it should be imposed by some authority and such an authority in an Islamic society is God. The revealed law has been referred to as criterion to distinguish between right and wrong, vice and virtue.¹⁹³ The Holy *Qur'an* communicates, "O you who believe! If you fear God, He will grant you a criterion (to judge between right and wrong), remove from you all evil (that may afflict you) and bestow upon you forgiveness."¹⁹⁴ Even in the secular societies it is admitted that a super intelligence, knowing fully all the passions of mankind and its nature but having no contact with these passions, independent of mankind is required, to determine goodness, and there is no such super intelligent but the God almighty.¹⁹⁵

The revealed religion is a force in the moral development of man. Religion, law, and morality are knitted with each other; little distinction is made between moral and legal. All the ideals of honesty, virtue, piety, truth, loyalty, sympathy, mercy, forgiveness, tolerance, charitableness, moderation, generosity, tenderness, respect for elders and number of other moral and ethical ideals are established, promoted and safeguarded by the religion. They bear the transcendental dimensions of a Muslim's personality by strengthening the moral fibre which results into nourishing his faith. The private life of an individual is regulated by the teachings of *Shari'ah* so morality is essentially governed by its teaching.

¹⁹¹ *Al-Qur'an* 2:216

¹⁹² Fyze, Asaf A. A., *Outlines of Muhammadan Law* (Oxford University Press, 1949) pp.15-16.

¹⁹³ Gibb, H.A.R., *Mohammedanism: An Historical Survey* (Oxford University Press, 1949) p.91.

¹⁹⁴ *Al-Qur'an* 8:29

¹⁹⁵ Rousseau, J.J., *Social Contract* (Greenwood Publishers, Westport-Connecticut, 1980) p.205.

There has been a significant polarisation among Western scholars on the extent to which the criminal law should intervene in protecting moral values but such a division never existed in *Shari'ah* because of integral relationship between law and morality.¹⁹⁶ *Shari'ah* is the law of morality which culminates in the hearts of its followers the purity of motives, sympathy for the poor and weak, fear of God and the Day of Judgement and hatred for cruelty and injustice. The Holy Prophet is reported to have said, "I have been sent to perfect the moral goodness".¹⁹⁷ Thus, there is no dichotomy in *Shari'ah* between criminal law and moral principles. It is almost impossible to deny that the notion of crime is inextricably linked with the moral blameworthiness. The traditional view of Common law as well as *Shari'ah* has been that crimes are essentially immoral acts deserving punishments.

Beside a number of opinions of important English jurists¹⁹⁸ the best exposition of relation between crime and moral guilt is enshrined in the maxim "*actus non facit reum nisi mens rea*."¹⁹⁹ There are certain occasions where *mens rea* is used to refer to moral wrong doing²⁰⁰ and criminal liability has been linked to the moral blameworthiness.²⁰¹ It can further be argued that had there been any distinction between them there had been no difference between the wilful and accidental or un-intentional conduct. In *Shari'ah* all crimes are immoral acts but not vice versa, for in the realm of *Tazir* the court may punish any act on the grounds of social expediency and not because of its immoral nature. It is no wonder that *Shari'ah* prescribes two types of punishments for every wrongful act. The first one imposed by the authorities in this world for the wrongs declared as crimes and the second one imposed by God in the Hereafter for moral sins. The standards of Islamic morality are universal. It is admitted that in a number of Muslim states these standards are not being observed but it is a fact that even those who do not observe these principles do not deny them.

4.13 Characteristics of Islamic Criminal Law

All the principles of *Shari'ah* are based upon equity and equality of human beings. It emphasises the fact that all humans are creature of the same Lord and it is piety, which

¹⁹⁶ Bassiouni, M. Cherif, 1982, op. cit. p.132.

¹⁹⁷ Malik bin Ans, *Al-Muwatta* (2nd ed., Cagri Yayinlari, Turkey, 1992) Vol. II, p.904.

¹⁹⁸ Hale, Matthew, Sir, *Pleas of the Crown* (Catherine Lintot, London, 1759) Vol. 1, p.31.

Hawkins, Williams, *Pleas off the Crown Law* (E & R Nutt, London, 1728) pp.1-2.

Blackstone, *Commentaries* (A. Starhan, London, 1809) Vol. IV, p.21.

¹⁹⁹ Hall, Jerome, *General Principles of Criminal law* (Bobbs-Merril, Indianapolis, 1960) p.81.

²⁰⁰ Williams, Glanville, *Criminal law: The General Part* (Stevens & Sons, London, 1961) p.27.

²⁰¹ Per Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 at 580.

is the only criterion of grandeur of an individual.²⁰² There is no discrimination on account of race, colour, caste, wealth, power or anything else among humans. God has created all human beings as equals, the nations and tribes are only for identification and not for discrimination. Muslims have been enjoined to respect the rights of their fellow-beings, irrespective of their faith and belief.²⁰³

Islamic justice is some thing higher than the formal justice in man-made laws. Administration of justice is related to the innermost motives because the judge is to act as in the presence of Allah, to whom all things, acts and motives are known. To act justly is a religious duty and a devotional act. No one, even the head of a state, is exempted from law and all are to be treated equally. The Holy Prophet warned against discrimination, between common people and nobility in applying punishments, stating that if his own daughter had committed theft, he would have amputated her hand.²⁰⁴

This fact was acknowledged by the first Caliph Abu Bakr, who declared in his very first address to the Muslims after being elected as their leader "Co-operate with me when I am right, and correct me when I commit error. Obey me so long as I follow the commandments of Allah and his Prophet but turn away from me when I deviate."²⁰⁵ It suggests that the head of state is bound to follow the divine law and individuals are subject to his authority only when this authority is being exercised in conformity with the commandments of *Shari'ah*. The concept of accountability of the highest authority is contrary to the English legal maxim that king can do no wrong.²⁰⁶

Administration of justice being a religious duty has been commanded to be discharged free from personal liking and disliking.²⁰⁷ A judge is bound to stand firm and discharge his duty in all sincerity. Love of God has been linked with Justice.²⁰⁸ It has been

²⁰² *Al-Qur'an* 49:13

²⁰³ Bassiouni, M. Cherif, 1982, op. cit. p.19.

²⁰⁴ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. II, p.17.

Muslim, Muslim bin Hijjaj, 1981, op. cit. Vol. II, p.1315.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.37.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. VIII, p.69.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.851.

²⁰⁵ Ibn Al-Athir, *Al-Kamal Fi Al-Tarikh* (Dar al-Sader, Beirut, 1965) Vol. II., p.332.

Al-Tibri, Abu Jafar, *Tarikh al-Umum wa al-Malook* (Al-Matba al-Hussania al-Misria, Egypt) Vol. III., p.203.

Ibn Hisham, Abu Muhammad Abdul Malik, *Al-Seerah al-Nabvia* (Dar Al-Jeel, Beirut) Vol. IV, p.228.

²⁰⁶ Blackstone, *Commentaries on the law of England* (15th Ed. A. Starhan, London, 1809) Vol. I, p.68.

²⁰⁷ *Al-Qur'an* 5:8

²⁰⁸ *Al-Qur'an* 49:9

ordained, "If you judge between man kind, that you judge justly."²⁰⁹ *Shari'ah* seeks to inculcate within every Muslim the need to search for justice and to apply it to himself as well as to others. Justice in *Shari'ah* is totally impartial. Every Muslim has been commanded to stand firm for justice though it may be detrimental to his own interests or to the interests of those who are near and dear to him.²¹⁰

Shari'ah guarantees justice, protection and promotion of human rights in such a way that peasant and prince, rich and poor, weak and strong, ruler and subject are treated equally before law. No one is allowed to transgress the rights of others. In his last sermon, termed to be the first charter of human rights, the Holy Prophet emphasised that all human beings are equal no one has precedence over the other except through his degree of piety. Life, honour, property and all other legal rights of every one are inviolable for others. All the weak are to be protected against oppression of the strong.²¹¹ This is a comprehensive quotation proving equal and non-discriminatory attitude of *Shari'ah* towards human beings. No individual or group of individuals will suffer any disability on account of birth, social status, gender, or profession that may in any way impede the growth of his faculties or hamper the development of his personality. Pride of colour, race, and language is wholly condemned. It makes only one decisive test about the grandeur, the loftiness, and greatness of human character which consists in his capacity to control himself so as to be able to practise righteousness.²¹²

An objection may be raised that the norms dealing with the human rights are basically moral and religious in their nature. There is no sanction or judicial enforcement behind them and these moral and religious recommendations have not been incorporated into Islamic legal system. We have already mentioned that under *Shari'ah* religion, morality and law are inter knitted and it is not possible to separate them. The Holy *Qur'an* is not a code of law rather it is a scripture covering the eternal guidance. It is more particularly an appeal to faith and the human soul rather than a classification of legal prescriptions. Legal provisions have been promulgated only in a few cases and the rest of the things,

²⁰⁹ *Al-Qur'an* 4:58

²¹⁰ *Al-Qur'an* 4:135

²¹¹ Al-Shaibani, Ibn Dabih, *Hadiq Al-Anwar* (Maktbah bani Hashim al Katbi, Syria) Vol. II, p. 718.

Shibly, Noamani, *Seerat al-Nabi* (4th ed. National Book Foundation, Pakistan, 1985) Vol. II, p.158.

Abu Daoud, Salman bin Ash'ath, 1981, op. cit. Vol. V, p.340.

Ibn Saad, *Al-Tabqat al-Kubra* (Dar Sader, Beirut) Vol. II, p.185.

Ibn Hisham, Abu Muhammad Abdul Malik, *Al-Seerah al-Nabvia* (Dar Al-Jeel, Beirut) Vol. IV, p.185.

describing merely the principles, have been left to the discretion of the ruler. The rulers are bound to legislate in the light of these principles and if they fail to make laws in conformity with these injunctions they shall be liable in the Hereafter.

The discussion above suggests that human rights declared by the international organisations and adopted by the modern states in the 20th century are guaranteed by the provisions of *Shari'ah* from its early days. The rights guaranteed are compatible with many of the rights enunciated by the contemporary international human rights instruments.²¹³ These rights are granted by God, not by any parliament, and therefore can never be abolished or changed by any temporal authority for any reason.

Conclusion

Comparing the provisions of both the systems it becomes clear that *Shari'ah* has a rational approach to deal with the crimes in a society. It has laid down such rules and principles of criminal liability fifteen hundred years ago which, the most civilised nations of the world introduced to their legal systems just a century ago. *Shari'ah* emphasises that magnitude of punishment to be inflicted on the convicted must be proportional to his guilt. A diversity of punishments, available in *Shari'ah*, for various offences ranging from different kinds of *Hudood* to *Tazir* seems very natural from the view point of the objectives of punishment.

A structural difference between *Shari'ah* and the English law may be that under *Shari'ah* offences are classified on the basis of punishment, like offences of *Hudood*, *Qisas* and *Tazir*, whereas in English law the classification is based upon the harm caused, like offences against person and property.²¹⁴ There exist clear definitions of offences and their prescribed punishments in *Shari'ah*. This characteristic is compatible with the modern criminal statutes that define offences and stipulate punishments.

The principles of criminal liability enunciated by *Shari'ah* and the strategy adopted by it to eradicate crime from a Muslim society are comparable to any legal system of the world. The research refutes the suggestion of orientalist that there does not exist penal system of Islam nor there is a well developed concept of guilt and criminal liability.²¹⁵ *Shari'ah* has precedence in adopting very effective punitive and preventive measures,

²¹² Ahmad, Khurshid, *Islam: Its Meaning and Message* (Islamic Council of Europe, London, 1976) p.89.

²¹³ Bassiouni, M. Cherif, 1982, op. cit. p.5.

²¹⁴ Lippman, Mathew, *Islamic Criminal Law and Procedure* (Praeger, London, 1988) p.38.

²¹⁵ Schacht, Joseph, 1964, op. cit. p.187.

based upon sound principles, which the English legal system is in lack of. In the beginning there was no concept of intention or *mes rea* in English criminal law and this approach resulted in the liability of inanimate objects, animals and human beings without proof of any blameworthy state of mind.²¹⁶ On the other hand, in *Shari'ah* the requirement of state of mind had been developed and settled since its early days. The idea that *Shari'ah* being primitive cannot cope with the present day needs must be discarded. The world today tormented by social problems, unrest, delinquency, disorder, anarchy, perversions, corruption, disintegration of the family as a social unit, violence, uncontrolled and abundant use of intoxicants, needs a legal system to relieve it of all its worries, and the facts suggest that the principles of *Shari'ah* may provide the relief sought.

The next chapter deals with the concepts of defences to criminal liability and their basis in both the legal systems.

²¹⁶ Holmes, Oliver Wendell, *The Common Law* (The Belknap Press of Harvard University, 1963) p.10.

Chapter-5 Defences to Criminal Liability

5.1 Introduction

It is a general principle of criminal law that a person should not be held liable unless the prosecution has proved beyond any reasonable doubt that he has caused, with a specific state of mind, certain event forbidden by the criminal law.¹ A defendant may offer several types of defences to the prosecution's allegations and the criminal law must unequivocally guarantee the protection of right of the accused or the suspect to claim defence. In certain cases, he may straightforwardly deny all or some of the facts alleged by the prosecution, like the plea of *alibi*.² There may be instances where the defendant, instead of denying the accusation, alleges that though he is responsible for the conduct, there were certain special circumstances which excuse him from liability or render his conduct justified. When the abnormal conditions of the person who does the act are such that all the elements of crime which constitute liability are not present then, of course, criminal liability does not arise.³ Studying defences is very important because criminal liability is not exclusively based upon the nature of the act done rather it needs the consideration of all the circumstances leading to the commission of such an act.⁴

This chapter has been devoted to deal with the defences that may be invoked by a defendant when charged with any offence. The study shall be based on the questions like why the defences are important in criminal proceeding. How do they affect the liability of the offender? How the justificatory and the excusatory conduct of the defendant can be differentiated? Finally it shall be analysed whether *Shari'ah* recognises the concept of defences in criminal liability and whether the concept is compatible with modern principles of criminal justice.

5.2 Rationale of Defences

Is it appropriate to punish a person if he did not intend to commit a crime because either he lacked the capacity to know the nature and consequences of his act or the capacity to conform to the law? Punishment always needs justification, since it is almost always something that is harmful, painful, and unpleasant to the recipient.⁵ There is no justification for punishing someone who has not deliberately and wrongfully broken a

¹ Fletcher, George P. "Two Kinds of Legal Rules" 77 (1968) *Yale LJ* 880 at 883.

² Fitzgerald, P. J., *Criminal law and Punishment* (Clarendon Press, Oxford, 1962) p.119.

³ Markby, William, Sir, *Elements of Law: Considered with Reference to Principles of General Jurisprudence* (6th ed., Oxford at the Clarendon Press London, 1905) p.346.

⁴ Robinson, Paul H., "Criminal Law Defences: A systematic Analysis" 82 (1982) *Columb. LR.* 199 at 250.

⁵ Cavadino, M. & Dignan, J., *The Penal System: An Introduction* (2nd ed., Sage Publications, 1997) p.32.

law and thereby exercised a freedom to which he was not entitled.⁶ On the basis of this principle execution of punishment would be justified only by showing that it serves the aims of rehabilitation, deterrence or retribution.⁷

Criminal law enunciates the general principles of criminal liability and everyone is subject to these principles except those who have been exempted by the law itself.⁸ Criminal liability depends upon the presence or absence of certain excusing or justifying conditions.⁹ It means, though proving that the accused brought about the *actus reus* of an offence with the required *mens rea* is necessary for the criminal liability, yet not a sufficient condition for conviction. It may be concluded that a crime is made up of three elements, *actus reus*, *mens rea*, and the absence of a valid defence.¹⁰ An accused shall be liable only where the prosecution has successfully proved that his *actus reus* was accompanied by the relevant *mens rea* and he is not entitled to any defence.¹¹

All legal systems show their respect for the principle that no one should be punished if he could not have done otherwise, either due to his incapacity or absence of a fair opportunity to act otherwise.¹² An unlawful act accompanied by a vicious will is necessary to constitute a crime.¹³ It is nothing else but a determination of one's choice to do or to abstain from a particular action. All the pleas and excuses that can be taken to protect the accused from punishment may be reduced to a single consideration, the want or defect of will. An involuntary act, where the will does not concur with it, cannot induce criminal liability; rather a choice to do or avoid an act is the only criterion that renders human actions praiseworthy or culpable.¹⁴ It might be said that all the offences presuppose a voluntary choice to do evil or good, and where there is no such choice there is no appropriate ground for criminality. In order to determine the culpability or innocence of an accused the court shall take into account three things, the act, the will, and the capacity to form that will.

⁶ *Ibid.* p.53.

⁷ Fletcher, George P., 1968, *op.cit.* p.888.

⁸ Blackstone, *Commentaries on the law of England* (15th ed., A. Starhan, London, 1809) Vol., IV, p.20.

⁹ Mousourakis, George, *Criminal Responsibility and Partial Excuses* (Ashgate, Aldershot, 1998) p.5.
Wells, Celia, "Swatting the Subjectivist Bug" [1982] *Crim. LR.* 209 at 210.

¹⁰ Lanham, David, "Larsonneur Revisited" [1976] *Crim. LR.* 276.

William Wilson, *Criminal Law: Doctrine and Theory* (Longman, London, New York, 1998) p.206

¹¹ Williams, Glanville, "Criminal Law: Statutory Exceptions to Liability and Burden of Proof" 26 (1976) *N L J.* 1032 at 1033.

¹² Hart, H. L. A., *Punishment and responsibility* (Clarendon Press, Oxford, 1968) p.153.

¹³ Blackstone, 1809, *op.cit.* Vol., IV, p.21.

It is the duty of the prosecution to prove every essential element of crime. In order to prove that it was the result of the voluntary conduct of the offender, it can be presumed that every man has sufficient mental capacity to be responsible for his conduct.¹⁵ The defence is entitled to displace this presumption by suitable evidence which may lead to the contrary, but it is not the duty of the defence to establish its innocence. It is sufficient for the accused to raise a reasonable doubt as to his guilt, and he will be entitled to the benefit of the doubt.¹⁶ If the defence has reasonably established that the case falls under anyone of the exceptions, the accused shall not be criminally liable or his liability shall be mitigated.¹⁷

5.3 Why are Defences Needed?

A person should only be held criminally liable when he has the capacity to understand the nature of his act and its consequences along with the capacity to control them. It is the irrefutable presumption of law that a minor under the age of ten years is incapable of committing any offence.¹⁸ There are certain other conditions that, if present, prevent the execution of punishment on the accused. These conditions operate to deny the defendant's capacity to conform to the rules of criminal law and to prove that he is unable to make a rational choice as to how he would like to act. In the absence of such capacity and rational choice, punishment is not only unfair but also unjust. It is as inappropriate as to make animals the subject of criminal prosecution. Moreover, the objects of criminal law cannot be achieved by inflicting punishment in such circumstances.

As another example of defence to a criminal charge we can take into account the instance of defence of self-defence. The state must provide general protection to all its subjects, but it cannot guarantee protection at the very moment when an individual is subject to a sudden attack and he requires the protection of law. It is, therefore, reasonable to allow an individual who is attacked or threatened with a serious physical assault to repel that assault, to preserve his basic right.

¹⁴ *Ibid.* p.20.

¹⁵ Per Lord Denning in *Bratty v. Attorney General for Northern Ireland* [1961] 3 All E. R. 523 at 532

¹⁶ *Woolmington v. D.P.P* [1935] AC. 462 at 481.

¹⁷ Greenawalt, Kent, "Distinguishing Justification from Excuses" 49 (1986) *Law and Contemporary Problems* 89 at 89.

¹⁸ Children and Young Persons Act 1963, Section 16 (1). It was eight years under section 50 of Children and Young Persons Act, 1933.

Logic requires that we must differentiate, between the liability of a person who deliberately and intentionally violated the rule of law, knowing the evil consequences of his conduct, and of a person who driven by necessity, neither craving nor transgressing, finds himself in such a condition where he has no other choice but to do the act under consideration. To treat equally one who has caused harm intentionally and the other who has done it without deliberation is to ignore a morally significant distinction between them.¹⁹ For example, if a fire broke out in a jail, the prisoners, without any intention to break the jail, escape from the jail to save their lives.²⁰ They ought not to be held criminally liable because their act can be justified under the circumstances. Only those offenders who violate the command of law voluntarily, and without any good reason are liable to punishment.

Reason also demands that we must draw a broad line of distinction between the persons who deliberately cause harm and those causing unavoidably and accidentally. A person has not committed a crime if he could not have restrained himself or if it is unreasonable to expect him to behave otherwise than he did. Intentional and unintentional behaviour are so different in moral quality and in the reaction which they cause in the victim and in the society that all the systems of civilized criminal laws are bound to take account of this distinction while determining the liability of the offenders.²¹ Edmund Plowden suggested that if the law is broken without intention to break it, under the circumstances beyond the control of the offender, he should not be held liable.²²

No right thinking person in society would expect a mentally handicapped, retarded, deranged, or insane, immature, sleep-walking or acting in self-defence, to suffer punishment for any act or omission. Such persons and their states of mind when they did a prohibited act are not blameworthy. Hence our need for defences to deal with such situations where the evil consequences flow from the unintentional, uncontrolled, justified or excused conduct of the accused.

5.4 Defence Defined

All civilized societies admit that there are certain conditions under which an accused may have violated the words of law, but yet not the law itself. Generally a defence may

¹⁹ Fletcher, George P., 1968, op.cit. p.890.

²⁰ Bacon, Francis, Sir, *Elements of Law of England* (J. More Esq., London, 1636) p.25.

²¹ Smith, J. C., "Intention in Criminal Law" 27 (1974) *CLP* 93 at 93.

Holmes, Oliver Wendell, *The Common Law* (Belknap Press of Harvard University Press, 1963) p.7.

be termed as evidence offered by the accused to defeat criminal charge against him or it is any set of identifiable conditions or circumstances which may prevent a conviction for an offence.²³ Such conditions, if existing, exempt the accused from punishment prescribed by the law. A defence may be taken as a fact, which defeats the case of the prosecution altogether, hence leading to the acquittal of the defendant, or diminishes his liability even in the presence of all the elements of a crime.²⁴ For any particular fact to be a defence it has to have some potential to defend the accused against allegations made by the prosecution.²⁵

English criminal law recognized a difference between deliberate intention and accident or mistake of the offender at the time of commission of the act and later on certain incapacities like infancy, insanity, coercion and self-defence became the grounds of exculpation.²⁶ This is because the moral standards of a society require exemption of some offenders from criminal liability under certain circumstances. It is a peculiar feature of criminal law that it is concerned not only with the punishments but also with highlighting and reinforcing societal values and moral basis for exemption from criminal liability.²⁷

Nowadays, a number of such conditions, termed as defences, are recognized by criminal law that may prevent a conviction for an offence, like immaturity, insanity, coercion, self-defence, necessity and mistake. These conditions may be pleaded during a trial for a crime; there are certain other conditions that may even bar the trial or prosecution of the defendant for the crime committed, like diplomatic, judicial, legislative and executive immunities.²⁸

5.5 Kinds of Defences

Defences to criminal liability may be either general or special. General defences may be raised for all crimes whereas, special defences have been provided for certain specific offences and cannot be applied to the others e.g. provocation is a defence to the offence of murder only.²⁹ Paul Robinson has divided defences into five kinds i.e. failure of

²² Plowden, Edmund, *Reports of Edmund Plowden*. (Catharine Lintot, & Samuel Richardson, 1761) p.19.

²³ Robinson, Paul H., 1982, op.cit. p.203.

²⁴ Dressler, Joshua, *Understanding Criminal Law* (Mathew Bender/IRWIN, U.S.A., 1995) p.182.

²⁵ Dennis, I. H., *Criminal Law and Justice* (Sweet & Maxwell, London, 1987) p.82.

²⁶ Hall, Jerome, *General Principles of Criminal Law* (2nd ed., Bobbs-Merrill, Indianapolis, 1960) p.79.

²⁷ Mousourakis, George, 1998, op.cit. p.13.

²⁸ Robinson, Paul H., *Criminal Law Defences* (West Publishing Co. St Paul, Minn., 1984) Vol. I, p.55.

²⁹ Fitzpatrick, B. & Reed, A., "Provocation: A Controlled Response" 12 (2000) *Transnational Lawyer* 393.

proof defences; where prosecution failed to prove all the required elements of a crime to the required standard, offences modification defences; the defences that are embodied in the definitions of specific crimes, non-exculpatory or public policy defences, like time bar and diplomatic immunity, which do not deal with the question of culpability of the offender but there are certain other reasons for not convicting him, excuse defences; where due to some lack of comprehension, capacity or opportunity the defendant failed to conform to the law, and justification defences; where some harm has been caused by the defendant but in order to protect a more general social interest.³⁰

If we carefully analyse the nature of failure of proof defences, offence modification defences, and non-exculpatory defences it shall be evident that all of them belong to excuse defences. By putting forward any of these defences the defendant claims that he is not morally blameworthy; lack of moral guilt is the basic unifying feature of all these defences.³¹ For example, intoxication and insanity are termed as failure of proof defences, because the accused due to intoxication or abnormal mental condition was not in a position to form criminal intent, so the basic element of all the crimes i.e. *mens rea* is missing. Both the defences are also termed as excuse defences because the mental condition excuses the defendant of his criminal liability. It is also admitted that failure of proof defence often overlaps with offence modifications and general defences.³² Similarly, one defence may have multiple characteristics and hence can be classified under more than one category. There is no need to discuss these kinds of defences, rather the general defences of justification and excuse shall be given due importance to clarify the idea of defences in criminal law. All these defences can be broadly classified into two kinds:³³

- a. Justification defences.
- b. Excuse defences.

Hart, H.L.A., *Prolegomenon to the Principles of Punishment* in Feinberg, Joel, Gross, Hyman, *Philosophy of Law* (ed) (Wadsworth, publishing, 1991) p.662.

³⁰ Robinson, Paul H., 1984, op.cit. Vol., I, p.70.

³¹ Brett, Peter, *An Inquiry into Criminal Guilt* (Sweet & Maxwell Ltd., 1963) p.145.

³² Robinson, Paul H., 1984, op.cit. Vol., I, p.72

³³ Smith, J. C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.193.

Jefferson, Michael, *Criminal Law* (3rd ed., Pitman Publishing, London, 1997) p.209.

Clarkson, C .M. V. & Keating, H. M., *Criminal Law: Text & Materials* (3rd ed., Sweet & Maxwell, London, 1994) p.272.

5.5.1 Justification Defences

A defence is justified whenever it denies the objective wrongfulness of the act.³⁴

Normally, those who raise justification defence contend that though their conduct fulfils material requirements of an offence yet it is socially approved and perhaps even desirable.³⁵ When the protection of a legitimate interest, from an imminent danger, is possible only by sacrificing another interest, approval by the society of the sacrifice of the interest of substantial lesser value gives rise to justification.³⁶

Criminal law sets minimum standards of acceptable conduct for its subjects, instead of promoting ideal behaviour.³⁷ Justification should not require morally best conduct from them; instead justified conduct is a conduct that is lawful by appropriate standard.³⁸

Where a defence operates as a justification the wrongfulness of the accused's conduct is negated as his conduct is considered to have been the appropriate course of action in the circumstances in which he found himself.³⁹ It is important that where any person raises a justification defence, he admits himself that he is accused of something but he was justified in doing that act.

5.5.1.1 Nature of Justification Defences

Justification defences are not an alteration of the statutory definition of the harm sought to be prevented or punished as an offence.⁴⁰ A justification defence can be pleaded only, where some form of conduct meets the external requirements of an offence.⁴¹ The harm caused remains a legally recognised harm to be avoided whenever possible; however this harm is outweighed by the need to avoid an even greater harm or further greater social interest.⁴² The defence will not be justified if there is an alternative reasonable means for avoiding the threatened harm even if the harm avoided is the greater interest.⁴³ When a conduct is declared as justified, implicitly it means that the principle of justifying such conduct will promote social utility.⁴⁴ To be justified, the conduct of the defendant must satisfy two conditions:

³⁴ *Ibid.* p.273.

³⁵ Williams, Glanville, "The Theory of Excuses" [1982] *Crim. LR.* 732 at 735.

³⁶ Gur-Arye, Miriam, "Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?" 102 [1986] *LQR* 71 at 71.

³⁷ Schopp, Robert F., *Justification Defences & Just Convictions* (Cambridge University Press, 1998) p.4.

³⁸ Funk, T. Markus, "Justifying Justifications" (1999) 19 *OJLS* 631 at 633.

³⁹ Schopp, Robert F., 1998, *op.cit.* p.3.

⁴⁰ Robinson, Paul H., 1982, *op.cit.* p.213.

⁴¹ Mousourakis, George, 1998, *op.cit.* p.8.

⁴² Robinson, Paul H., 1984, *op.cit.* Vol., I, p.83.

⁴³ Fletcher, George P., *Rethinking Criminal Law* (Little, Brown & Co, Boston, Toronto, 1978) p.755.

⁴⁴ Alldridge, Peter, "The Coherence of Defence" [1983] *Crim.L.R.* 665 at 666.

- a. The conduct must be necessary to protect or further the interest at stake, and
- b. It must cause only proportional or reasonable harm responding to the threat.

The defendant's conduct is justified when it is determined that he had an affirmative right to protect a socially recognized interest threatened by the assailant.⁴⁵ Private defence, discharge of public duty, consent, executing judgements of the courts, lesser evil and superior's orders are some of the instances that can be pleaded as justification defences.⁴⁶ In each of these cases there is some harm caused by the defendant but there is also a countervailing reason for his conduct.⁴⁷

5.5.2 Excuse Defences

Like justification defences, excuses are usually general in their nature and hence applicable to all the offences.⁴⁸ A defence is an excuse when a wrongful, unjustified act has been committed but because of the excusing circumstances, the wrong doer is not to be blamed for it.⁴⁹ Unlike justification, excuse does not affect the unlawfulness of the act; rather it removes the personal blameworthiness of the accused.⁵⁰ Excuses admit that the conduct is wrong and unlawful but the defendant is excused because the conditions of liability are not fulfilled.⁵¹ The harm caused is not outweighed by any greater societal interest furthered. The society will continue to denounce and seek to prevent such conduct even under objective conditions identical to the case under consideration.⁵² The defendant's excuse for causing the harm does not relate to the nature of act, rather to the excusing condition and the peculiar characteristics of the accused.⁵³

5.5.2.1 Characteristics of Excuse Defences

An excuse defence must have two characteristics.⁵⁴ Firstly, a disability or the abnormal condition of the offender at the time of commission of the offence, like insanity, immaturity, duress, mistake or intoxication.⁵⁵ It may be long term or even permanent such as sub-normality or temporary such as intoxication, automatism or hypnotism. Its causes may be internal, as insanity or external as duress. The disability distinguishes the defendant from other people and reduces the instances in which given condition will

⁴⁵ Clarkson, C. M. V., *Understanding Criminal Law* (2nd ed., Fontana Press, 1995) p.73.

⁴⁶ Fletcher, George P., 1978, op.cit. p.769.

⁴⁷ Dennis, I. H., 1987, op.cit. p.77.

⁴⁸ Robinson, Paul H., 1984, op.cit. Vol., I, p.91.

⁴⁹ Clarkson, C. M. V. & Keating, H. M., 1994, op.cit. p.277.

Moore, M., *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press, Oxford, 1997) p.482.

⁵⁰ Eser, Albin, "Justification and Excuse" 24 [1976] *AJCL* 621 at 635.

⁵¹ Robinson, Paul H., 1982, op.cit. p.221.

⁵² Clarkson, C. M. V., 1995, op.cit. p.74.

⁵³ *Ibid.*

⁵⁴ Robinson, Paul H., 1982, op.cit. p.221.

⁵⁵ Clarkson, C.M.V., 1995, op.cit. p.85; Jefferson, Michael, 1997, op.cit. p.209

excuse.⁵⁶ However, it should be kept in mind that all excuse defences do not always have disability element, like mistake is an excuse defence but without a disability.

Secondly, excusing condition i.e. effect of disability to create a condition that renders the defendant blameless for his conduct. Having the recognized disability at the time of the commission of the offence will not alone qualify for an excuse, for it is not the disability which exculpates the defendant; rather excusing condition resulted from disability. For example, a defendant is not excused because he is insane or intoxicated, but because the effect of these instances is to create a condition that renders the defendant blameless for his conduct constituting the offence. There were no reasons in favour of his doing what he did but because of some lack of comprehension, capacity or opportunity he failed to conform to the law and his conduct, though wrong, is not blameworthy.⁵⁷ In this way an excuse destroys the blame and bars the conviction because the voluntary act requirement necessary for the offences is not satisfied. An excuse is a denial of an essential element of crime like *mens rea*, knowledge or will. It suggests that a defence would be termed as excuse when it amounts to a denial of the proscribed state of mind or negligence or it affirms that the defendant was not fully free and responsible so as to be fairly held accountable.

5.5.2.2 Nature of Excuse Defences

Where a defence operates as an excuse, the culpability of the accused is negated and he is excused from the normal consequences of conviction and punishment. It is the nature of excuse that the accused's conduct is out of his control or a result of his defective perception or knowledge.⁵⁸ A person may be blamed for behaving in a certain way where either he was aware of his behaviour or he ought to have been aware.⁵⁹ Offenders suffering from a mental disorder or immaturity are not capable of knowing right from wrong. They cannot be blamed for being insane or immature; hence it is not reasonable to punish them.⁶⁰ The importance of the excuse defences is derived from the fundamental principle that for criminal responsibility there must be moral culpability which would not exist where the excusing conditions are present.

⁵⁶ Robinson, Paul H., 1984, Vol., I, p.98.

⁵⁷ Dennis, I. H., 1987, op.cit. p.77.

⁵⁸ Robinson, Paul H., 1984, op.cit. Vol., I, p.160.

⁵⁹ Brett, Peter, 1963, op.cit. p.147.

⁶⁰ Clarkson, C. M. V. & Keating, H. M., 1994, op.cit. p.277.

Excuses are the circumstances where it is useless to punish the offender. Generally, the exemption of the offenders is justified on the ground that they cannot bring themselves within the scope of exemption and hence not in a position to exploit it.⁶¹ Moreover, the exemption will not harm the society by reducing the efficacy of the law's threats for others. The provisions, specifically related to the liability of an intoxicated person, are debatable and will be discussed while dealing with the defence of intoxication.

5.6 Justification and Excuse Defences Distinguished

Justification and excuse are two distinct traditional defences providing a defence when all the elements of an offence have been proved. However, it is said that in the modern legal system such distinction is of no legal importance and in both the cases it shall be considered whether some required element in the definition of crime was lacking.⁶² They are erroneous and misleading when applied as notions of substantive penal policy⁶³ and the distinction between them involves no legal consequences.⁶⁴ The statements simply refer to the fact that so far as the criminal liability of a particular defendant is concerned, it made no difference whether he was justified in what he did or excused.⁶⁵ Though both of them render crimes into non-crimes yet for fundamentally different reasons, and criminal liability of the accused is excluded on different grounds.⁶⁶ Even those who termed them erroneous admit that the distinction is pertinent and useful in procedure and may be convenient to be employed in substantive law.⁶⁷

Conceptually, justification and excuse serve quite different functions. The distinction between them is important because it serves to point out some of the most interesting and difficult issues, which arise from the conceptual framework of criminal law doctrine. Historically such distinction was recognised by English law, in the cases of justified homicide the defendant was completely acquitted, whereas if the offender was excused, he was acquitted but had to forfeit his possession to the crown. The law of forfeiture was abolished in 1828 and since then the distinction has lost its importance.⁶⁸

⁶¹ Hart, H.L.A., *Punishment and Responsibility* (Clarendon Press, Oxford, 1970) p.42.

⁶² *Ibid.* p.13.

⁶³ Hall, Jerome, 1960, *op.cit.* p.233.

⁶⁴ Stephen, J. Fitzjames, Sir, *A History of the Criminal Law of England* (Macmillan, 1883) Vol. III, p.11.

⁶⁵ Hall, Jerome, "Comment on Justification and Excuse" 24 [1976] *AJCL* 638.

Lacey, N., & Wells, C., *Criminal Law Text & Materials* (2nd ed., Butterworths, London, 1998) p.50.

⁶⁶ Excuse defences focus on culpability of an accused while justification defences focus on justification of the act itself.

⁶⁷ Hall, Jerome, 1960, *op.cit.* p.233.

⁶⁸ For detail see 10.4.

The circumstances leading to an excuse may be altogether different from those of justification.⁶⁹ Excuse is an expression for one who has been caught in a maelstrom of circumstances, whereas a plea of justification is based upon the law's preference for one course of action rather than the other.⁷⁰ Excuse prevents the satisfaction of basic elements of a crime, whereas justification though admits the presence of the basic elements yet denies the liability on independent grounds.⁷¹ Excuses are based on compassionate grounds, for anyone in the defendant's shoes might have done likewise. Hence the insanity and immaturity defences depend on the feeling of compassion and not on consideration of deterrence.⁷² Allowing a defence of excuse is not to approve the conduct of the accused but only to declare that it does not merit condemnation and punishment.

The behaviour of society may be different towards the victims of excused and justified actions. It should feel sympathy for the victim of excused but not for the justified actions.⁷³ The distinction is also important for the moral judgement of the conduct of the offender.⁷⁴ A minor who deliberately kills someone is excused but no one would say he is justified.⁷⁵ A defendant of an excused action has a moral claim for forgiveness from the victim but a justified defendant would seem to have no need for forgiveness.⁷⁶ When the question of justification is clearly distinguishable from excuse, defence of justification has a natural priority over excuse because, if the harm caused is justified, there remains nothing to be excused.⁷⁷ It is pertinent to mention that the concepts of justification and excuse are not immutable; these concepts, unavoidably, keep on changing in a society with the change in social order and values. The details to follow will reveal the importance of the distinction; however the law commission of England and Wales has not adopted the proposal to include the distinction in the codification of criminal law.⁷⁸ Both these kinds of defences can be distinguished on certain grounds like:

⁶⁹ Allen, Michael J., *Cases & Materials on Criminal Law* (8th ed., Sweet & Maxwell, London, 2001) p.284.

⁷⁰ *Ibid.*

⁷¹ Greenawalt, Kent, 1986, *op.cit.* p.89

⁷² Williams, Glanville, 1982, *op. cit.* p.733.

⁷³ Horowitz, Donald L. "Justification and Excuse in the Programme of the Criminal Law" 49 (1986) *Law and Contemporary Problems* 109 at 122.

⁷⁴ Greenawalt, Kent, "The Perplexing Borders of Justification and Excuse" 84 (1984) *Columb LR* 1897at 1898.

⁷⁵ Smith, J.C., *Smith and Hogan Criminal Law* (10th ed., Butterworths, 2002) p.36.

⁷⁶ Horowitz, Donald L. "Justification and Excuse" 49 *Law and Contemporary Problems* (1986)109 at 122.

⁷⁷ Robinson, Paul H., 1984, *op.cit.* Vol. I, p.105.

⁷⁸ The Law Commission, *Codification of the Criminal Law*, Law Com. No.143, 1985 (HMSO, London, 1985) Para. 13.1, p.114.

1. Justification involves the claim that the action of the defendant was not wrong but was an acceptable or even the right thing to do.⁷⁹ On the other hand, excuse involves the claim that although the action of the defendant was wrong, but no blame attaches to him because of some excusing condition.⁸⁰

When an action is justified, any *prima facie* wrongfulness is eliminated by the other good attributes of the action; on the other hand when an action is excused it is still wrongful but the accused cannot be held responsible, for he is not culpable. As law does not punish people for committing harmless acts, it does not punish them for blamelessly causing harm because one who is not blameworthy ought not to receive the stigma of conviction. Thus an excuse operates as a shield to protect the accused from conviction and punishment.

2. The distinction is important to third parties aiding or abetting the accused.⁸¹ If an act is justified, a third party may assist the principal accused in accomplishing it, whereas in an excused act a third party will generally not be privileged to assist.⁸² If the principal offender is acquitted by reason of justification, there is no offence to aid or abet but if the principal offender is acquitted by reason of excuse, the abettor shall be liable.⁸³ The Principle has been affirmed in a number of cases.⁸⁴ It can be summarized that generally, justified acts may be aided and not prevented, whereas excused acts may be prevented but not aided.
3. A plea of justification, such as self-defence, goes to the *actus reus* in the sense that it renders the conduct of the accused lawful.⁸⁵ For instance, everyone has a right to defend, so anything done in legitimate, genuine and reasonable self-defence does not constitute a crime. Excuses on the other hand, go to the *mens rea*.⁸⁶ The defendant is either incapable of forming intention, like a minor or

⁷⁹ Clarkson, C.M.V., 1995, *op.cit.* p.73.

⁸⁰ Jefferson, Michael, 1997, *op.cit.* p.209.

⁸¹ Moor, M., 1997, *op.cit.* p.482.

Jefferson, Michael, 1997, *op.cit.* p.210.

Clarkson, C. M. V. & Keating, H. M., 1994, *op.cit.* p.280.

Smith, J.C., 1996, *op.cit.* F.N. 33, p.194.

George Fletcher P., 1978, *op.cit.* p.760.

⁸² Clarkson, C.M.V., 1995, *op.cit.* p.73.

⁸³ Allen, Michael J., *Textbook on Criminal Law* (6th ed., Oxford University press, 2001) p.169.

⁸⁴ *R. v. Bourne* (1952)36 Cr. App. R. 125; *DPP. v K & B* [1971] 1 Cr. App. R. 36; *R. v. Cogan*[1975] 2 All ER 1059; *R. v. Millward* (1994) 158 J.P. 1091; *DPP v. K & C* [1997] 1 Cr. App. R. 36.

⁸⁵ Clarkson, C.M.V., 1995, *op.cit.* p.73.

⁸⁶ Lacey, N., & Wells. C., 1998, *op.cit.* p.50.

Fletcher, George P., 1978, *op.cit.* p.760.

Robinson, Paul. H., 1982, *op.cit.* p.246.

insane, or to understand the rationale of his conduct because of a reasonable mistake.⁸⁷ It means justification arises out of the nature of the accused's situation, whereas excuse arises out of the accused's personal characteristics.⁸⁸

4. Justification defences are complete defences to any criminal charge because one cannot be partially justified in committing a crime; therefore, if one kills in the legitimate exercise of one's right of private defence one should be acquitted and not convicted of manslaughter.⁸⁹ However, in an excuse defence generally one may be excused from culpability for some offences but not for others, for example, provocation reduces the liability of murder to manslaughter but does not result in complete exemption from criminal liability.⁹⁰
5. The benefit of a justification defence outweighs the harm or evil caused by the offence committed and renders the conduct acceptable; whereas an excuse defence represents a legal conclusion that the conduct is wrong, undesirable, but criminal liability is inappropriate.⁹¹ In certain jurisdictions, if the defence was regarded as excusatory, a person harmed would have a strong claim for compensation, in contrast to a justification where the victim's claim for compensation would be significantly weaker.⁹²
6. A justification defence entitles others to act similarly in the like circumstances because they too will be justified. Whereas, an excuse defence cannot be generalised in this way but it is said to be a matter of individual justice to a particular actor.⁹³ It does not allow or encourage other people to behave similarly in the similar situation. It shows that while deciding whether the conduct of the offender is justified or excused generally we take into account the consequences of that conduct. If the consequences of the conduct are beneficial for the society the conduct is justified while in case of adverse effect, though the accused is acquitted, it is termed as excused.

⁸⁷ Hall, Jerome, 1960, op.cit. p.232.

⁸⁸ Greenawalt, K., 1984, op. cit. p.1899.

⁸⁹ Jefferson, Michael, 1997, op.cit. p.211.

⁹⁰ Clarkson, C. M. V., 1995, op.cit. p.73.

⁹¹ Robinson, Paul. H., 1982, op.cit. p.203.

Fletcher, George P., 1978, op.cit. p.760 and also at *Columb. L.R* 82 (1982) 199 at 229.

⁹² Mousourakis, George, 1998, op.cit. p.14.

Horowitz, Donald L., 1986, op.cit. p.122.

⁹³ Moor, M., 1997, op.cit. p.482.

Johnson, Conrad D., *Moral Legislation: A Legal Political Model for Indirect Consequentialist Reasoning* (Cambridge University Press Cambridge, 1991) p.95.

Clarkson, C. M. V. & Keating, H. M., 1994, op.cit. pp. 280-81.

7. An excusable conduct may lawfully be resisted by the victim but he has no right to resist if it is justified.⁹⁴ For example, right of self-defence is available against the acts of a minor or insane, but there is no such right against a person executing arrest in the exercise of his lawful power in discharge of his duty.⁹⁵ It is because the unlawful aggression of the assailant violates the legal order, which is maintained in public interest allowing resistance by the victim.⁹⁶
8. Another distinction may be that the accused has a justification defence only when he is aware of the facts, which give rise to the justification,⁹⁷ whereas in an excuse defence the accused is relieved of criminal liability even though he did not know the facts giving rise to the excuse.

There is an opinion in English criminal law that the circumstances giving rise to excuse do not excuse unless the defendant is aware of them. Whereas, in a justification defence he is relieved of criminal liability even though he did not know the facts which give rise to justification.⁹⁸ This view is incorrect in the light of section 28 (3) of Police and Criminal Evidence Act 1984 which makes an arrest lawful only if the arrestee is informed of the grounds of arrest; this is not possible unless the person making an arrest knows or at least suspects the existence of valid grounds for arrest.⁹⁹

This particular point can be better understood by taking into account the case of *R. v. Dadson*,¹⁰⁰ a police constable was charged for shooting at a person carrying stolen wood. Under the law it was permissible for a police officer to shoot an escaping felon. At the trial the constable sought to raise justification that he was shooting to arrest an escaping felon. Stealing wood was only a felony where the thief had two previous convictions of the same offence. In fact, the victim had several such convictions and was a felon but the constable did not know this. The court held the constable liable for causing grievous bodily harm with intention, as he was not justified in shooting because the victim committed no felony known to him at the time when he fired.

⁹⁴ Fletcher, George P., 1978, op.cit. p.760.

Jefferson, Michael, 1997, op. cit. p.210.

Smith, J.C., *Justification and Excuse in the Criminal Law* (Stevens & Sons, London, 1989) p.19.

⁹⁵ *R. v. Fennell* [1971] 1 QB. 428.

⁹⁶ Gur-Arye, Miriam, 1986, op.cit. p.82.

⁹⁷ Schopp, Robert F., 1998, op.cit. p.1.

⁹⁸ Smith, J.C., 2002, op. cit. F.N. 74, p.35.

Jefferson, Michael, 1997, op.cit. p.211.

⁹⁹ Smith, J.C., 1996, op.cit. F.N. 33, p.27.

The same rule was reaffirmed in the case of *Chapman v. D.P.P.*,¹⁰¹ pointing out that if a police constable is unaware of circumstances justifying an arrest, he cannot make a lawful arrest, as he will not be able to comply with the rule which requires that he is bound to inform the suspect of the grounds for arrest. Thus, if the arrest is unlawful any force used to affect it is likewise unlawful. An accused will be justified in inflicting grievous bodily harm or even death, but only if he is aware of the circumstances when he does the otherwise prohibited act. It might also be argued that providing a justification defence to a defendant, who is unaware of justifying circumstances, would be a wasteful gesture. These defences are meant to encourage and induce conduct that creates a net benefit and a justification here would not serve to encourage similarly situated persons to act in a justified manner in future. Such persons are, after all, unaware of the need for justification defence.¹⁰²

5.6 Defences to Criminal Liability & Shari'ah

5.6.1 Introduction

Like all other secular laws, *Shari'ah* does recognise certain conditions that extinguish or mitigate the liability of the offender. The offenders are responsible only for what they do of their free will; they should not be called to account for the acts done unintentionally or under duress. An act that would ordinarily constitute a punishable offence can be justified or excused under one of the several accepted conditions. It is the right of an accused to submit evidence to establish his defence.

Beside excuse and justification, *Shari'ah* classifies defences as pre-existing the commission of crimes, like immaturity, insanity, coercion, necessity, self-defence, mistake and the defences that originate after the commission of the offence, like waiver and compounding in the cases of *Qisas* and repentance of the offender before arrest, in cases of highway robbery. The basic condition for the application of law to the action of a person is his legal capacity or competency. No provision of *Shari'ah* shall be applicable to the actions of one who has either no legal capacity or has a defective one. Here is the brief description of legal capacity in *Shari'ah*.

5.6.2 Legal Capacity in Shari'ah

Shari'ah has a more developed concept of legal capacity as compared to the other legal systems. Taking into account its importance, Muslim jurists have discussed it in detail in separate chapters under the title of *Ahliyah*. By legal capacity or *Ahliyah* is meant the

¹⁰⁰ *R. v. Dadson* (1850) 4 Cox. CC 358. (1850) 2 Den.; 169 ER 407.

¹⁰¹ *Chapman v. Director of Public Prosecution* (1989) 89 Cr. App. R. 190.

fitness of a person for the application of law to his actions.¹⁰³ In the parlance of *Shari'ah* legal capacity represents the competence of a person for certain rights and obligations. It is the quality which makes an individual proper subject of the legal command.¹⁰⁴ A person who is devoid of reason and faculty of understanding cannot be addressed because one who cannot understand the command cannot obey or comply with it. A person will possess full legal responsibility only if he has attained the age of majority and is of sound mind. The capacity of a man for legal obligations is realised by the intelligence possessed by him, since the intelligence is the basis of understanding. A person cannot be competent for understanding without intelligence, like animals and inanimate objects. It suggests that intelligence proceeds capacity for legal obligations.

5.6.3 Kinds of Legal Capacity

As mentioned earlier, legal capacity of a man is realised by the intelligence possessed by him. The intelligence undergoes changes from his embryonic stage till his death. Legal capacity is vested in every man by virtue of his dignity as a human being and it has been divided into two major kinds i.e. Receptive and Active capacity.¹⁰⁵

5.6.3.1 Receptive Capacity or Capacity for Acquisition

It is the fitness of a person for the rights to which he is entitled and obligations to which he is subject as prescribed by *Shari'ah*.¹⁰⁶ Receptive capacity is ability of every individual, competent or otherwise, to receive rights from other individuals and society. A foetus in the womb of its mother, a minor, an insane, and all other persons possess legal receptive capacity by virtue of their dignity as human beings and it is inherited and inseparable.¹⁰⁷ Receptive capacity is either deficient or complete.¹⁰⁸ The capacity of a foetus in the womb, before birth, is deficient in the sense that it can receive only certain rights such as inheritance, parentage, and bequest, but cannot bear any obligation towards others,¹⁰⁹ for there is no question of their performance by the foetus.¹¹⁰ *Shari'ah* doctrine entitles an embryo to those rights only which require no

¹⁰² Robinson, Paul H., 1984, op.cit. Vol. II, p.15.

¹⁰³ Al-Bazdavi, Ali bin Muhammad, *Usul Al-Bazdavi* (Noor M. Karkhana Kutub, Karachi, 1966) p.324.
Amir Badshah, M. Amin, *Taysir al-Tahrir* (Mataba Mustafa al-Babi, Cairo, 1350 A.H) Vol. II, p.249.
Al-Bukhari, Abdul Aziz, *Kashaf al-Asrar* (Sadaf Publishers, Karachi, Pakistan) Vol. IV, p. 237.

¹⁰⁴ Al-Zarqa, Mustafa Ahmad, *Al-Fiqh al-Islami fi Thawbihi al-Jadid* (Maktab Jamiah Damascus, Damascus, 1963) Vol. II, p. 739.

¹⁰⁵ Al-Bazdavi, Ali bin Muhammad, 1966, op.cit. p.296.

Badran, Abu Al-Ainain, *Usul al-Fiqh al-Islami* (Moassasa Shabab al-Jamah, Alexandria, 1984) p.317.
Al-Barri, Zakeriya, *Usul al-Fiqh al-Islami* (Dar al-Nadha al-Arabia, Cairo, 1979) p.293.

¹⁰⁶ Al-Taftazani, *Al-Talwih ala al-Tawdih* (Dar al-Ahd al-Jadid Lil Tabah, Cairo, 1957).Vol. II, p.161.
Schacht, Joseph, *An Introduction to Islamic Law* (The Clarendon Press, Oxford, 1964) p.124.

¹⁰⁷ Khallaf, Abdul Wahab, *Ilm Usul al-Fiqh* (8th ed., Dar Al-Ilm, Kuwait) p.137

¹⁰⁸ Amir Badshah, M. Amin, 1350 A.H., op. cit. Vol. II, p.253.

¹⁰⁹ Schacht, Joseph, 1964, op. cit. p.124.

acceptance.¹¹¹ The receptive legal capacity is complete at the moment the child is born alive from its mother's womb and survives during his whole life; he possesses rights and bears obligations also.¹¹²

After his birth an individual passes through three stages of life. The first stage is prior to discretion where he cannot differentiate between good and bad, right and wrong. This stage starts from birth and continues till he attains age of seven years.¹¹³ At this stage the child is totally lacking active legal capacity. Since he is not endowed with intellect, no legal consequences accrue from his words or acts.¹¹⁴ It is the irrefutable presumption of law that at this stage a minor is incapable of committing any offence. However, he is entitled for all the rights and liable to only those obligations that can be discharged by his guardian on his behalf, like compensation for damages caused to other's property.¹¹⁵

5.6.3.2 Active Legal Capacity or Capacity for Execution

This kind of capacity begins when a child attains the age of seven years.¹¹⁶ This is the second stage of human life after his birth. The period between seven years and puberty is termed as the age of discretion.¹¹⁷ He possesses an immature and defective understanding resulting into a deficient, incomplete, and partial legal capacity. At this stage he is capable of concluding only those transactions, even without the permission of his guardian, that are beneficial to him such as accepting gifts and charity.¹¹⁸ However, if the transaction in question is totally disadvantageous, such as giving gift or making a will or pronouncing a divorce, it is void despite the guardian's approval.¹¹⁹ As far as transactions which partake in both benefit and loss, these are valid but only with the approval of the guardian.¹²⁰ A minor is not liable for *Hudood* and *Qisas* penalties at

¹¹⁰ Nyazee, Imran Ahsan Khan, *Theories of Islamic Law* (I.I.I.T. & I.R.I., Islamabad, 1994) p.79

¹¹¹ Hassan, H. Hamid, *An Introduction to the Study of Islamic law* (Shari'ah Academy, Islamabad, 1997)p.349.

¹¹² Badran, Abu Al-Ainain, 1984, op.cit. p.319.

Al-Barri, Zakeriya, 1979, op.cit. p.293.

Al-Zokhali, Wahba, *Usul al-Fiqh al-Islami* (1st ed., Dar Al-Fiker, Damascus, 1986) Vol. I, p.165.

Nyazee, Imran Ahsan Khan, 1994, op. cit. p.76.

¹¹³ Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed., I.R.I. Islamabad, Pakistan, 1993) p.303.

¹¹⁴ Al-Barri, Zakeriya, 1979, op.cit. p.294.

¹¹⁵ Al-Zokhali, Wahba, *Usul al-Fiqh al-Islami* (1st ed., Dar Al-Fiker, Damascus, 1986) Vol. I, p.166.

Badran, Abu Al-Ainain, 1984, op.cit. p.319.

¹¹⁶ Hassan, Ahmad, 1993, op. cit. p.303.

¹¹⁷ *Ibid.* p.302.

¹¹⁸ *Ibid.* p.306.

¹¹⁹ Hassan, H. Hamid, 1997, op.cit. p.355.

¹²⁰ Al-Barri, Zakeriya, 1979, op.cit. p.294.

Al-Zokhali, Wahba, 1986, op.cit. Vol. I, p.167.

Badran, Abu Al-Ainain, 1984, op.cit. p.321.

this stage; however a suitable *Tazir* punishment can be inflicted on him;¹²¹ depending upon the standard of maturity and understanding attained by him. It is the rebuttable presumption of fact whether he has attained sufficient maturity to understand the nature and consequences of his conduct.

The third stage is puberty, where the physical signs of maturity become visible, both in male and female. Active legal capacity completes upon attaining this stage and is presumed to exist unless contrary is proved. Only a person who rationally knows right and wrong and understands the nature and consequences of his conduct has this kind of capacity.¹²² Active legal capacity renders an individual liable to fulfil his duties and discharge obligations.¹²³ If it is proved that the intellect of a person did not become mature by his coming of age, he will not have the active legal capacity.¹²⁴ Since the intelligence and discernment are hidden qualities which are not readily apparent to the senses of human being, *Shari'ah* has linked personal liability with the attainment of puberty, which is a regular, sensible and an obvious phenomenon that can be established by factual evidence.¹²⁵

Shari'ah, generally, does not determine majority by age of the person rather it emphasises to determine it by signs of puberty. The signs of puberty in male are ejaculation, capacity to impregnate, growth of hair on face and pubic area, whereas in female menstruation, physical changes in the body and pregnancy are considered to be major signs.¹²⁶ In the absence of such signs the puberty shall be determined by age that is 18 years for male and 17 for female.¹²⁷ In another opinion it is 19 years for male.¹²⁸ However, no male shall be presumed to attain puberty before 12 and female before 9 years.¹²⁹

¹²¹ Nyazee, Imran Ahsan Khan, 1994, op. cit. p.79

¹²² Al-Zokhali, Wahba, 1986, op. cit. Vol. I, p.168.

Badran, Abu Al-Ainain, 1984, op. cit. p.322.

¹²³ Al-Barri, Zakeriya, 1979, op. cit. p.294.

¹²⁴ Hassan, H. Hamid, 1997, op. cit. pp.352-53.

¹²⁵ Kamali, M. Hashim, *Principles of Islamic Jurisprudence* (Islamic Text Society, Cambridge, 1991) p.351.

¹²⁶ Al-Trablisi, Ala ud din Abi al-Hassan Ali bin Khalil, *Moin al-Hukkam* (2nd ed., Maktab Mustafa al-Babi al-Halbi, Egypt, 1973) p.315.

Ibn Nujaym, *Al-Beher Al-Raiq* (Al-Maktaba al-Majidia, Quetta, Pakistan). Vol. VIII, pp.84-85.

¹²⁷ Ibn Nujaym, op. cit. F.N. 125. Vol. VIII, p.85.

¹²⁸ Al-Trablisi, Ala ud din Abi al-Hassan Ali bin Khalil, 1973, op. cit. p.315.

¹²⁹ *Ibid* p.315.

Ibn Nujaym, op. cit. F.N. 125. Vol. VIII, p.85.

A deep observation of the principle reveals that it is the intellectual power of the individual rather than age which determine his legal capacity. That is why an insane adult is not held responsible for his criminal conduct. By having complete active legal capacity a subject becomes competent to discharge his legal obligations and liable for their omission. As the presence of well developed intellect is the basic criterion to determine the legal capacity of a subject, hence an undeveloped intellect, in the case of a minor and a defective one in the case of an insane, provides defence in cases of delinquent behaviour. There are certain circumstances that destroy or impair the legal capacity of a man. There is an opinion in English criminal law admitting that "the age at which a person becomes competent to commit a crime must necessarily be fixed in an arbitrary manner. What constitutes maturity is a question of degree, and age at which it is reached differs from person to person and country to country."¹³⁰ Taking into account the person of the offender puberty is the most appropriate means to determine maturity.

5.6.4 Causes Affecting Legal Capacity of a Person

There are causes, which either totally extinguish the capacity or result in deficient legal capacity. Muslim jurists have divided such causes into two kinds; natural and acquired causes.¹³¹

5.6.4.1 Natural Causes

The causes, affecting legal capacity, and beyond the control of the subjects are called natural causes. They result from an act of God and the subject cannot avoid them. Examples are minority, insanity, idiocy, forgetfulness, sleep, fainting, and illness.¹³²

5.6.4.2 Acquired Causes

These are caused by the man himself and on his choice he can avoid them. These causes include intoxication, mistake, coercion, and ignorance,¹³³ the effect of minority on legal capacity has already been discussed. Out of the remaining, some of the important causes and their effect on capacity, criminal liability, of subject are discussed below.

5.6.5 Natural and Acquired Causes: How do they affect Legal Capacity?

As discussed earlier, in *Shari'ah*, criminal liability of an offender entirely depends upon volition and discretion. Any act done by mistake or without deliberate intention does not give rise to criminal liability. In the Holy *Qur'an* it has been ordained, "And there is no

¹³⁰ Stephen, J. F, Sir, *A History of the Criminal Law of England* (B. Franklin, N.York, 1973) Vol. II, p.97.

¹³¹ Al-Bazdavi, Ali bin Muhammad, 1966, op. cit. p.329.
Amir Badshah, M. Amin, 1350 A. H., op.cit. Vol. II, p.258.
Al-Bukhari, Abdul Aziz, op. cit. F.N. 102. Vol. IV, p. 263.

¹³² *Ibid.*
Hassan, Ahmad, 1993, op.cit. p.309.

Nyazee, Imran Ahsan Khan, 1994, op. cit. pp. 91&97.

¹³³ *Ibid.*

sin for you in mistakes that you make unintentionally, but what your hearts purpose (that will be a sin for you).”¹³⁴ The verse states that the accountability of a person rests upon the commission of acts which are intended by him. There is a tradition of the Holy Prophet negating the criminal liability of a person who does an act by mistake, forgetfulness or under coercion.¹³⁵ The similar provisions can be found in the contemporary secular laws either negating or mitigating the liability arising out of mistake and duress.

Another tradition states, “Liability has been lifted from three persons, a minor, unless he attains puberty, an insane, unless he recovers, and a sleeping person unless he awakes.”¹³⁶ These three conditions are universally accepted as valid defences to a criminal charge. The only point of difference is the age of a minor, which may be different in different jurisdictions. The tradition proves that no act can be called a crime if at the time of the commission the accused was suffering from mental derangement or a morbid impulse of really irresistible type that caused the loss of the mental or emotional equilibrium.

Criminal liability is based upon the deliberate intention and rational understanding of the criminal act as well as its consequences. A prohibited act done under dire necessity is exempted from criminal liability. It has been commanded in the Holy *Qur'an*, “Whosoever is driven by necessity, neither craving nor transgressing, it is no sin for him.”¹³⁷ There is a legal maxim in *Shari'ah* which states that necessity renders prohibited permissible.¹³⁸ If the act was done under dire necessity without an intention to transgress the doer shall not be liable. The maxim is governed by another principle that the person should not go beyond the limits of necessity.¹³⁹ If he exceeds the limits he shall be liable to the extent he exceeded.

¹³⁴ *Al-Qur'an* 33:5

¹³⁵ Ibn Majah, Muhammad bin Yazid, *Sunan ibn Majah*, (Cagri Yayinlari, Turkey, 1981) Vol. I, p.659.

¹³⁶ *Ibid.* p.658.

Al-Tirmidhi, Muhammad bin Isa, *Al-Jameh al Saih* (Cagri Yayinlari, Turkey, 1981) Vol. IV, p.32.

Al-Zokhali, Wahba, 198 6, op. cit. Vol. I, p.163.

¹³⁷ *Al-Qur'an* 2:173

¹³⁸ Ibn Nujaym, *Al-Ashbah Wa Al-Nazair* (Idara Al-Qur'an Wa Al-Uloom Al-Islamia, Karachi).Vol. I, p.86.

Al-Suyuti, *Al-Ashbah Wa Al-Nazair* (Dar al Kutub al Ilmia, Beirut, 1979) p.84.

¹³⁹ *Ibid.*

The *Hanfite* consider unreasonable delay in prosecution of *Hudood* offences as a defence to the criminal charge.¹⁴⁰ The provision is analogous to the limitation laws in secular jurisdictions which bar the conviction of the offender after a specific period of time because delayed prosecutions are less useful and these types of defences have been named as non-exculpatory defences.¹⁴¹ The study suggests that *Shari'ah* acknowledges all the defences available to the accused under modern statutes. If there is any doubt regarding the intention of the offender or there exist any legitimate condition that renders the offender incapable of forming intention required for the offence, the offender's liability shall be either extinguished or mitigated.

5.6.6 Some Defences not Acknowledged by other Legal Systems

Shari'ah provides certain defences which are not offered by the secular laws. Blood relations may be considered as a defence to a number of charges. Like, if a father has killed his son he shall not be liable for *Qisas*, according to the majority opinion of the Muslim jurists.¹⁴² The principle is based upon the tradition of the Holy Prophet which states, "A father should not be executed in *Qisas* for the death of his son."¹⁴³ This view is based upon the fact that the father is the cause for the existence of the son; logically it is not reasonable that the son should be a cause for the non-existence of his father.¹⁴⁴ Another argument may be that the natural love and affection between a father and son eradicate the possibility that the father has intended death of his son.¹⁴⁵ Where death was not intended the killing was not liable to *Qisas*. However, *Malkite* opined that where it was proved beyond any reasonable doubt that the father actually intended death of his son he shall be liable to *Qisas*, like the cases of cruel and brutish killing or slaughtering.¹⁴⁶ The exception also extends to the grandfather and mother of the victim. Likewise, *Hadd* punishment for theft¹⁴⁷ and false accusation of unlawful sexual

¹⁴⁰ Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.27.

Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen* (Dar Al Fiker, Beirut). Vol. IV, p.37.

Al-Sarakhsi, *Al-Mabsut* (Idara Al-Qur'an Wal Uloom Al-Islamia, Karachi) Vol. IX, p.69.

¹⁴¹ Robinson, Paul H., 1984, op.cit. Vol., I, p.102.

¹⁴² Al-Jassas, Abi Bakar Ahmad bin Ali Al-Razi, *Ahkam Al-Qur'an* (Dar al-Mushaf, Cairo) Vol. I, p.178

Al-Kasani, *Al-Badai wa Al-Sanai* (H. M. Saeed Co. Karachi, Pakistan, 1979) Vol. VII, p.235.

Al-Sherazi, Ibrahim Bin Ali, *Al-Mohazzib* (Matbah Isa Al-Babi Al-Halbi, Egypt) Vol. II, p.174.

Ibn Qadama, *Al-Mughni* (Maktaba Al-Mustafa Albabi al Halbi, Egypt) Vol. VII, p.667.

¹⁴³ Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.18.

¹⁴⁴ Ibn Qadama, op. cit. F.N. 141. Vol. VII, p.666.

Al-Khatib, *Al-Iqnah* (Dar Al-Marfa Litabbah wa Al-Nasher, Beirut, 1979). Vol. II, p.155.

¹⁴⁵ Al-Toori, *Takmila Al-Beher Al-Raiq* (Maktaba Majidia, Quetta) Vol. VIII, p.296.

¹⁴⁶ Al-Qartabi, *Al-Jamah Li Ahkam-al-Qur'an* (Dar Al-Kutab-al-Arabia, Cairo) Vol. II, p.250.

Malik Bin Ans, *Al-Mudawana Al-Kubra* (Dar Al-Fiker, Beirut) Vol. IV, p.484.

¹⁴⁷ Al-Kasani, 1979, op. cit. Vol. VII, p.68.

Al-Dasooqi, *Hashiat Al Dasooqi* (Dar al Ahya Al-Kutab al-Arabia, Egypt) Vol. IV, p.337.

Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.275.

intercourse¹⁴⁸ shall not be implemented upon the father. The above opinions regarding the *Hadd* punishment for theft are based upon the saying of the Holy Prophet, "You and your property are for your father."¹⁴⁹ Whereas, the opinion in the case of false accusation of unlawful sexual intercourse is based upon the analogy of punishment of *Qisas*; the father is not liable to *Qisas* being the right of man, the *Hadd* of false accusation of unlawful sexual intercourse is not implemented on him.

Matrimonial relations also provide a defence to the charge of theft against either of the spouses. It is because the property of husband and wife is considered to be their common property. A saying of the Holy Prophet reveals that if the wife living in the matrimonial arrangements takes the property of her husband, without his consent or knowledge, she shall not be liable for theft.¹⁵⁰ A similar provision existed there in English law that a wife shall not be liable for theft by stealing her husband's goods because a husband and wife were considered as one person in law.¹⁵¹ Repentance, before arrest, in cases of highway robbery, and waiver of the victim of the theft, to prosecute the offender, before an application for prosecution are some more instances that have not been provided by other legal systems. Similarly, pardon and amicable settlement between the parties, in offences of murder and bodily injuries is allowed.

There are certain other conditions that provide an effective shield against any criminal charge. For example, *Shari'ah* demands a very high standard of proof for each element of the offence for the infliction of *Hadd* punishment. Four male witnesses are required to prove the offence of unlawful sexual intercourse liable to *Hadd*. These witnesses must have observed the act of penetration themselves.¹⁵² The condition shows that it is almost impossible to prove the offence by evidence. In addition, there are certain conditions in the person of witnesses to be met before deciding the admissibility of their deposition.¹⁵³ The proof of the offence of *Hudood* has been made difficult as compared

¹⁴⁸ Al-Kasani, 1979, op. cit. p.92

¹⁴⁹ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.769.

¹⁵⁰ Al-Bukhari, Muhammad bin Ismail, *Saih al-Bukhari* (Cagri Yayinlari, Turkey, 1981) Vol. VI, p.193. (It is narrated that wife of Abu Sufyan came to the Holy Prophet and made a complaint about the stinginess of her husband that, despite his affluence, he did not give adequate maintenance to meet the needs of herself and her child and she stole from his property. The Holy Prophet permitted her to take that much which was sufficient to meet her appropriate requirements.)

¹⁵¹ Russell, W.O. Sir, *A Treatise on Crimes and Misdemeanours* (Butterworth, London, 1819) Vol. I, p.26.

¹⁵² Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.199.

Al-Rammali, *Nihayat al Muhtaj* (Al-Maktaba al Islamia) Vol. VII, p.430.

¹⁵³ Al-Trablisi, Ala ud din Abi al-Hassan Ali bin Khalil, 1973, op. cit. p.243.

to the other matters. High demands are made of the witnesses as regards their number, qualification, and contents of their statements.¹⁵⁴

Except the offence of unlawful sexual intercourse two male Muslim witnesses of high repute must testify to all the particulars of an offence. The witnesses must not be the near relatives of the victim nor must be the foe of the accused and their testimony must not conflict.¹⁵⁵ A voluntary confession made by the offender may be retracted at any time. The court will provide every opportunity of retraction to the offender. It is even recommended that the judge should suggest to the offender the possibility of retraction.¹⁵⁶ A retraction of the confession voids the probative value of the proof required for the infliction of *Hadd*.

5.6.7 Effect of these Defences on Criminal Liability

It should be noted here that most of the conditions mentioned above have a mitigating impact on the criminal liability of the offender¹⁵⁷ For example, the primary punishment for murder is *Qisas*; whereas, if the death was caused by mistake, either mistake of act or mistake of fact, the primary punishment shall be blood money (*Diyat*), similarly, a homicide committed by a minor or insane shall be treated alike. This seems to be a point where the criminal and tortious liability coincide. Here, though the offender is not liable criminally, yet to pay reasonable compensation to the family of the victim from his property will not harm him. It appears that in many cases of excuse the society may exercise its right to protect itself from further harmful but excused conduct of the offender by imposing civil liability. This may be helpful in controlling counterfeited claims for defences based upon certain kinds of disabilities.

A particular feature of *Shari'ah* is that it does not emphasise the infliction of punishments, especially the *Hudood*. The most important means of restricting *Hadd* punishment are their peculiar definitions, standard of proof and the role of doubt, which means and includes here the resemblance of an unlawful act done to another lawful one and, therefore, the possibility of its being done under the belief of its being lawful.¹⁵⁸ For instance, intercourse in a voidable marriage, which the husband might have

Ibn Qadama, op. cit. F.N. 141. Vol. VIII, pp.198-200

¹⁵⁴ Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.199.

Al-Rammali, op. cit. F.N. 151. Vol. VII, p. 430.

¹⁵⁵ Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.196.

¹⁵⁶ *Ibid.* 212.

¹⁵⁷ Oudah, Abdul Qadir, *Al-Tashrih al-Jinai al-Islami* (Dar al-Katib al-Arabi, Beirut) Vol. I, p.404.

considered valid; or during the waiting period (*iddat*) following the definite dissolution of marriage, which the husband might have thought similar to the waiting period after a revocable repudiation are the instances that provide a shield against criminal liability.¹⁵⁹ Similarly, if there is a difference of opinion among the Muslim jurists, regarding the permissibility or otherwise of an act, that also leads to a doubt sufficient to prevent the infliction of *Hadd* punishment.¹⁶⁰

The instance of restricting the implementation of *Hadd* punishment for theft shall make it clear how the infliction of these punishments has been restricted to the rare instances. It is not every theft that could incur the punishment of amputation; Muslim jurists have set up very rigid rules defining the particular kind of theft liable to amputation. Failure to meet any of these rules may lead to a doubt sufficient to prevent the execution of *Hadd*. Beside adulthood, sanity, competency, and intention to take away the property of others¹⁶¹ there are number of other requirements to be fulfilled. For example, the commission of theft from public treasury shall not be liable to *Hadd* because it is the theft from common property and the offender may have thought of his share therein.¹⁶² Applying the same principle of doubt of common property a theft by a son from the property of his father, a father from the property of his son, a beneficiary from the trust property, and a wife from the property of her husband shall not be liable to *Hadd*.¹⁶³

Another essential element of theft liable to *Hadd* is that the property must be in protective custody or place of safe-keeping (*Hirz*) at the time of theft.¹⁶⁴ The *Hirz* may be either by virtue of place or person, like where the property was kept in a safe place or a guard was appointed over it.¹⁶⁵ If the property stolen was not in *Hirz*, the offender shall not be liable for the *Hadd* notwithstanding its value. Generally *Shari'ah* maintains a rule that things subject matter of theft were taken from their place of ordinary safekeeping; like goods from a shop, personal possession from a house, jewellery from

¹⁵⁸ Schacht, Joseph, 1964, op. cit. p.176.

¹⁵⁹ Al-Sarakhsi, op. cit. F.N. 139. pp.88-89.

¹⁶⁰ Mehdi, Al-Syyed Sadiq, *Al-Aqoobat al-Shari'ah* (Al-zahra Lil I'lam al-Arabi, Cairo, 1987) p.54.

¹⁶¹ Al-Sherazi, Ibrahim Bin Ali, *Al-Mohazzib* (Dar-Al-Shamia, Beirut, 1996) Vol. V, p.418.

¹⁶² Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.55.

Ibn Qadama, *Al-Mughni* (1st ed., Dar-Al-Hadith, Cairo, 1996) Vol. XI, p.386.

Al-Sherazi, Ibrahim Bin Ali, 1996, op. cit. F.N. 160. Vol. V, p.436.

¹⁶³ Ibn Qadama, 1996, op. cit. F.N. 161. Vol. XII, pp.382-87.

Al-Sherazi, Ibrahim Bin Ali, 1996, op. cit. F.N. 160. Vol. V, p.438.

¹⁶⁴ Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.248.

Al-Sherazi, Ibrahim Bin Ali, 1996, op. cit. F.N. 160. Vol. V, p.422.

a safe, and an animal from a fold, a horse from a stable.¹⁶⁶ A theft committed by a guest in the house of his host shall not be liable to *Hadd* punishment because the permission of the host to enter the *Hirz* removed an element of theft i.e. plundering the sanctity of the private property.¹⁶⁷ A theft committed by a servant from the house of his master is covered under the same principle.¹⁶⁸ A reason for this may be that there has been some degree of negligence on the part of the employer or the owner to employ or allow such an untrustworthy person into *Hirz*.

Prescribed amount of stolen property (*Nisab*)¹⁶⁹ is another essential condition to impose *Hadd* for theft. If value of the stolen property, in one attempt, is less than *Nisab* the offender shall not be liable for *Hadd*.¹⁷⁰ If two thieves break into a house and take the property jointly, the stolen property will be equally divided between them and neither of them will be punished with amputation if the respective share of each is less than the required minimum of *Nisab*.¹⁷¹

Items available in abundance, in wild state, and having no owner, like wood and hay, un-harvested fruit, objects normally not subject to ownership, like fish and birds, perishable substances, like meat, eggs and food stuff, religious icons and texts, property deemed to be of no value in *Shari'ah*, like wine and musical instruments used for idle amusement, things subject to common ownership like water and salt, in all these cases the offender shall not be liable to *Hadd*.¹⁷² Surreptitious taking of property is another essential element; taking property openly by force may be treated as robbery, punishable by *Tazir*.¹⁷³ Similarly, other offences against property such as, criminal breach of trust or criminal misappropriation of property are liable to *Tazir* only.¹⁷⁴

¹⁶⁵ Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.50.

¹⁶⁶ Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.249.

¹⁶⁷ Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.50.

Al-Sherazi, Ibrahim Bin Ali, 1996, op. cit. F.N. 160. Vol. V, p.433.

Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.254.

¹⁶⁸ Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.57.

¹⁶⁹ *Nisab* is the minimum value of stolen goods for implementation of *Hadd* punishment. Unless the value of stolen goods equals or exceeds this minimum value, the *Hadd* punishment shall not be applied. (In Pakistan under Hudood Ordinance 1979, the amount has been fixed as 4.457 gms of gold or property of equivalent value) Al-Sherazi, Ibrahim Bin Ali, 1996, op. cit. F.N. 160. Vol. V, p.420

¹⁷⁰ Ibn Qadama, op. cit. F.N. 141. Vol. VIII, p.242.

¹⁷¹ Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.53.

¹⁷² *Ibid.* & Ibn Qadama, 1996, op. cit. F.N. 161. Vol. XII, p.380.

Schacht, Joseph, 1964, op. cit. p.180.

¹⁷³ Schacht, Joseph, 1964, op. cit. p.179.

¹⁷⁴ Lippman, Matthew, *Islamic Criminal Law and Procedure* (Praeger, New York, 1988) p.46.

Shari'ah emphasises avoiding infliction of *Hudood* to the maximum. A saying of the Holy Prophet states, "Avoid infliction of *Hudood* upon Muslims to the maximum extent, verily it is better for the judge to commit a mistake in acquittal rather than in punishing the accused."¹⁷⁵ The tradition enunciates the golden principle of criminal laws of all the civilised societies, that if there is any doubt in the mind of the judge regarding the criminality of the accused, its benefit must go to the accused. The English criminal law admits the rule that it is better to acquit five guilty men before conviction of an innocent.¹⁷⁶ As already mentioned that the principle of doubt also includes the doubt in the mind of the offender as to permissibility or otherwise of the act, its scope is wider than the scope of doubt in man-made laws. The conditions, mentioned above for the offence of theft, in all their manifestations prove the implementation of the saying of the Holy Prophet that the *Hadd* punishment should be avoided if at all possible, and strong tendency in *Shari'ah* to restrict the applicability of *Hadd* punishments to the maximum.

Though the punishments in *Shari'ah* are severe and exemplary yet the tough conditions of proof and presence of all the elements required in the crime itself place a limit on the instances of their infliction. Any reasonable doubt will lead to the suspension of *Hadd* and thereby a secondary punishment shall be applicable. Such conditions provide the accused with various shields against any unjust or arbitrary conviction, minimise the possibility of infliction of severe punishments and on the other hand ensure an efficient prosecution and conviction of the guilty. Hence, a fair balance between the interests of the accused and the society is achieved.¹⁷⁷

Conclusion

It has been suggested that *Shari'ah* punishments are inflicted as a last resort. *Shari'ah* seeks to prevent the commission of crimes by means of internal control of a firm belief in the Day of Judgement and the life hereafter along with certain external preventive measures; both these means give rise to an effective barrier against crimes.¹⁷⁸ In addition, severe punishments are provided for a wrongdoer who does not take into account the preventive measures and is not restricted by the fear of God. These punishments provide an effective general deterrence for all those having criminal intentions and tendencies.

Ibn Nujaym, op. cit. F.N. 125. Vol. V, p.50.

¹⁷⁵ Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.33.

¹⁷⁶ Fletcher, George P., 1968, op.cit. p.881.

¹⁷⁷ Lippman, Matthew, 1988, op. cit. p.63.

The concept of liability is based upon the capacity of the offender; rational and reliable means of determining legal capacity have been provided in *Shari'ah*. There is a well developed concept of defences available to an offender and a number of additional conditions, not recognised by English law, also exist that mitigate or extinguish the liability. An accused has been provided with various safeguards to minimise the possibility of unjust or arbitrary conviction. The burden of proof lies on the prosecution and any doubt is to be resolved in favour of the accused. All the mitigating and extenuating elements have been given due importance. The study discards the view of the orientalist that *Shari'ah* does not recognise defences and mitigating conditions in criminal proceedings.¹⁷⁹

The next chapter will focus on intoxication, its prevalence in English society and its effects on human beings.

¹⁷⁸ *Ibid.* p.86.

¹⁷⁹ Schacht, Joseph, 1964, *op. cit.* p.187.

Part-II

Chapter 6 Intoxication and English Society

6.1 Introduction

Alcohol is the oldest and the most widely used intoxicant in human history.¹ Man has been familiar to its use from very early period of recorded history.² Over-indulgence of men in alcoholic beverages and the resulting criminal behaviour have existed from time immemorial. Centuries of experience prove that a great deal of crime is committed by intoxicated persons.³

Determination of criminal liability of an intoxicated offender and rationale of defence of intoxication is one of the major aims of this part. In order to understand this, it is necessary to have knowledge of intoxication and its effects on human beings. This chapter will deal with a number of questions; *inter alia*, the meaning of intoxication, differentiation in English law between intoxication by alcohol vis-a-vis drugs, possible harmful effects of intoxication on the individual and society and seriousness of the problem of intoxication among the young. The chapter will also examine the steps taken by various English governments to control consumption of alcohol and resulting harm. It will also inquire the fundamental question as if there is any relationship between intoxication and crime. The answers to these questions would be provided in the light of the opinions of men of profession and the reports published by the Home Office. The chapter will also demonstrate the reactive nature of English criminal law.

6.2 Intoxication Defined

Intoxication may be defined as a condition, where by use of intoxicants a person loses normal use of his physical or mental faculties. It renders him incapable of acting in a manner an ordinary prudent man, in full possession of his faculties using reasonable care, would act under similar conditions.⁴ The condition is attributed to use of some substance, such as alcohol or drugs, which leads to impairment of the person's awareness, understanding or control.⁵ Intoxication has also been linked with temporary insanity that lasts till the person remains under the influence of the intoxicant.⁶ However,

¹ New Report of a Social Committee of the Royal College of Psychiatrists, *Alcohol: Our Favourite Drug* (Tavistock Publication Ltd., London, 1986) p.11.

² Hastings, James, Selbie, John A. & Gray, Louis H., *Encyclopaedia of Religion and Ethics* (T & T Clark, Edinburgh, 1908) Vol. I. p.299.

³ McCord, David, "The English and American History of Voluntary Intoxication" (1990) 11 *JIL* 372

⁴ Black, Henry Campbell, *Black's Law Dictionary* (6th ed., West Publishing Co., 1990) p.822.

⁵ Law Commission Report, *Legislating the Criminal Code: Intoxication and Criminal Liability* (Law Com.No.229, 1995) Para 1.1, p.1

⁶ Burrows, Ronald, *Words & Phrases Judicially Defined* (Butterworths, London, 1996) Vol. III, p.146.

logically the linkage is not reasonable because intoxication is self-induced condition for which an intoxicated person can be blamed whereas insanity is by the act of God and an insane person cannot be blamed for it.⁷

6.3 Is there any Difference between Alcohol and Drugs Consumption in English Law?

Intoxication may be caused by consumption of alcohol, drugs or any other substance or by the combination of these. Though alcohol is generally distinguished from drugs yet scientifically it is a drug.⁸ Being a chemical substance it possesses all the characteristics of a drug to effect human mind and bodily systems.⁹ In English law, use of alcohol is permissible in contrast to the drugs but so far as the general principles of liability of the intoxicated offender are concerned, there is no difference between the two.¹⁰ This principle is really very strange because as a matter of law there is an enormous difference between alcohol and other drugs. Although the law regulates, where, when, by whom, and to whom alcohol may be sold, yet generally its sale, possession or consumption is no offence.¹¹ On the other hand it is unlawful to import, export, manufacture, sell, possess or distribute dangerous drugs, their extracts and all other derivatives.¹²

If both, intoxication by alcohol and dangerous drugs, were to be dealt similarly it makes no sense, at all, for all the legislation on the issue to control misuse of drugs. A person intoxicated by lawful means (alcohol) and the other who has committed an offence in bringing about that condition (use of dangerous drugs) cannot be logically treated on the same grounds. This view also contradicts the recognised principle in all jurisdictions that no one should be allowed to privilege one crime by another.¹³ It will be quite reasonable to deal with intoxication by drugs differently from one by alcohol.

⁷ Jefferson, Michael, *Criminal Law* (3rd ed., Pitman Publishing London, 1997) p.255.

⁸ Williams, Glanville, *Textbook of Criminal Law* (2nd ed., Stevens & Sons, London, 1983) p.464.

⁹ Royal Commission on Licensing (England & Wales) Cmd. 3988 (HMSO, London, 1932) Para. 67.
Rasool G. Hussein (ed) *Substance Use and Misuse: Nature, Context and Clinical Interventions* (Blackwell Science Ltd., London, 1998) p.13.

¹⁰ Section 6 (6) of Public Order Act 1986 provides: "In subsection (5) Intoxication means any intoxication whether caused by drink, drugs or other means or by a combination of means."

¹¹ Licensing Act 1872.

¹² Dangerous Drugs Act 1920.

¹³ Blackstone, *Commentaries on the Law of England* (15th ed. A. Starhan, London, 1809) Vol. IV, p.25.

6.4 Use of Alcohol and the English Society

Consumption of alcoholic beverages has a long history in the British Isles.¹⁴ Its use was considered not only a crime, rather a national master curse in England and Wales up to the first quarter of the 19th century and all the miseries of the peoples and the nation were ascribed to it.¹⁵ Now the situation is different, concepts regarding its use have been changed and, like other Western societies, alcohol has been incorporated in to the fabric of everyday life of the British people.¹⁶ It is an integral part of the most joyous and the most distressing of human occasions.¹⁷ In addition, it also has an essential role in many religious ceremonies.¹⁸ Alcohol has a multiple role in Western societies; it is a stimulant, a celebrant, an anaesthetic, a medicine, a tranquilliser, a food, a fuel, a social lubricant and a status and religious symbol.¹⁹ Research shows that its consumption, in UK, is now nearly double what it was fifty years ago.²⁰

If we take into account age groups using alcohol, its consumption is more common among the young. Children are born into a world where alcohol is seen as both a pleasure and danger.²¹ Studies show that young drinkers usually have parents who drink.²² They look upon their parents and elders as role models, count the cost for the future the least, and for most young people the feeling of belonging to the adult world and experiencing the pleasurable effects of alcohol far outweighs concerns for health.²³ They see glamorous advertisements, specifically designed to attract the young,²⁴ conveying a positive message.²⁵ All these factors increase the temptation for use of alcohol among teenagers.

¹⁴ Alcohol and the Public Health: A Study by a Working Party of the Faculty of Public Health Medicine of the Royal Colleges of Physicians on the Prevention of Harm Related to the use of Alcohol and other Drugs (Macmillan, London, 1991)p.11

¹⁵ Lecky, W.E. Hartpole, *History of England in the 18th Century* (Longman, Green, 1913) Vol. II, p.97.

¹⁶ Alcohol and the Young, Report of a Joint Working Party of the Royal Colleges of Physicians and the British Paediatric Association, (The Royal College of Physicians, 1995) p.23.

Hartz, Catherine, *Alcohol and Health* (The Medical Council on Alcoholism, London, 1990) p.5.

¹⁷ Alcohol and the Young, 1995, op. cit. p.1.

¹⁸ Saunders, W. M., "Alcohol Use in Britain: How Much is Too Much" 43 (1984) *Health Edu. J.* 66.

¹⁹ *Ibid*; Anderson, Peter, & Wallace, Paul, *Alcohol Problems* (Oxford University Press, 1988) p.1

²⁰ Alcohol and the Public Health, 1991, op. cit. p.2.

²¹ Alcohol and the Young, 1995, op. cit. p. 1.

²² British Medical Association, *Young People and Alcohol* (British Medical Association, 1986) p.13.

²³ Alcohol and the Young, 1995, op. cit. p.1.

²⁴ Royal Commission on Licensing (England & Wales) Cmd. 3988, 1932, op. cit. Para. 732.

²⁵ American Academy of Paediatrics, *Alcohol Advertising: Fiction vs. Fact* (<http://www.aap.org/advocacy>) 2002.

Surveys show that, by the age of 15 and 16, 98% of teenagers have tasted alcohol and from adults less than 5% are abstainers.²⁶ At 13 years of age 80% boys and 73% of girls have tasted alcohol. By 15 years 91% of boys and 90% of girls have consumed it. The average consumption of 13 and 15 year old boys is 8 and 15 units respectively²⁷ while the average consumption of girls in the same age group is 6 and 9 units per week.²⁸ This shows that males drink more than females and younger drink more than adults.²⁹ A survey shows that among teenagers (11-15 years old) 6% boys and 5% girls are believed to be drinking beyond recommended limits³⁰ and same is the case with 27% men and 12% women.³¹ The increasing trend of using alcohol and drugs among the young has resulted in a remarkable increase in rate of crimes in society. More than one third of house hold burglaries, theft and property crime are attributed to the young addicted to alcohol and drugs.³²

6.5 Effects of Intoxication on Human Conduct

Alcohol consumption has no uniform behavioural effects.³³ They vary from person to person and are also dependent upon the quantity, quality and element of alcohol concentration of the intoxicated substance consumed.³⁴ Individual consumers vary greatly in the manners they behave after intoxication. Some become sleepy and exhausted, others become joyous and cheery, still others become quarrelsome and aggressive.³⁵ In English society, release aggressiveness, inclinations to sexual demands, dominant behaviour, unruly and noisy conduct, petty thefts and criminal damages are all seen as part of drunkenness.³⁶ At this stage, it seems appropriate to take into account the opinions of some expert jurists and psychiatrists, regarding the effects of intoxication on human conduct, as they experienced and observed them. The knowledge of such effects is important to understand the principal social and legal issues involved in the problem.

²⁶ Hartz, Catherine, 1990, op. cit. p.5.

²⁷ (One unit =one half pint of beer, or one pub measure of spirit, or a one standard glass of table wine=10 millilitres of pure alcohol).

²⁸ Hartz, Catherine, 1990, op. cit. p.30.

²⁹ Alcohol and the Public Health, 1991, op. cit. pp.18-19.

³⁰ Alcohol and the Young, 1995, op. cit. p.30. {(The current recommended safe limit for adults is 21 units per week for men and 14 units for women) Whent, Hilary & Sayeres, Mary, *Health Update: Alcohol* (Health Education Authority, 1997) p.7}

³¹ National Statistics, *Statistics on Alcohol: England: 1978 Onwards* (<http://www.statistics.gov.uk>) Statistical Bulletin 2001/13 July 2001.

Pirmohamed, M., Brown C. "The Burden of Alcohol Misuse on an Inner City General Hospital" 93 (2000) *QJM* 291.

³² Law Com. No. 229, 1995, op. cit. Para 1.2, p.1

³³ Weiner, N. Alen, & Wolfgang, Marvin E., *Pathways to Criminal Violence* (Sage Publications, 1989) p.50.

³⁴ Royal Commission on Licensing (England & Wales) Cmd. 3988, 1932, op. cit. Para.65.

³⁵ Brett, Peter, *An Inquiry into Criminal Guilt* (Sweet & Maxwell, London, 1963) p.195.

³⁶ Alcohol and the Public Health, 1991, op. cit. p.34.

6.5.1 Jurist's View

It is well known that intoxicants weaken the restraint, which normally governs a person's conduct; an intoxicated person tends to say or do things that he would never say or do when sober.³⁷ He can develop a double personality, the sober self is forgotten when he is intoxicated and his intoxicated self is forgotten when sober though some time partly and not completely.³⁸ In fact, intoxication causes a number of conditions like aggressiveness, loosing inhibition and self-control, physical reaction and co-ordination, impairing reasoning and ability to foresee consequences, awareness and judgement, altered perception which may lead to inadvertence, oversight, and automatism providing opportunities for offensive conduct that would not otherwise occur.³⁹

It can be said that consumption of alcohol leads to uncivilised behaviour because of the malfunctioning of brain, the control unit of the body. Intoxicated person is incapable of knowing the nature of his conduct and the consequences that might follow such conduct. He has altered perceptions leading to inadvertence or mistake. Most probably his conduct will be harmful and offensive.

6.5.2 Psychiatrist's View

In human history, alcohol has never been considered useful for man. In the early history of civilised man it was considered a poison, in the 16th and the 17th century all the social problems were attributed to it and in the present century it is believed to stimulate obsession, depression, intense fear, epilepsy, a state of unconsciousness, morbid impulsiveness and mental deterioration.⁴⁰ It is, therefore, clear that alcohol stimulates negatively and is essentially a narcotic.⁴¹ Alcohol loosens all the higher inhibitory factors, allows the repressed instinctive ones to come into play so that man becomes primitive in his out look and habits.⁴² The drunk loses self-control and self-direction, his

³⁷ Smith, J.C., *Smith and Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.225.

³⁸ Devon, James, *The Criminal and the Community* (John Lane the Bodley Head, London, 1912) p.53.

³⁹ Gough, Stephen, "Intoxication and Criminal Liability: The Law Commission's Proposed Reforms" 112 (1996) *LQR* 335 at p.338.

Card, Richard, *Card, Cross and Jones Criminal Law* (14th ed., Butterworths, London, 1998) p.603.

Williams, Glanville, 1983, op. cit. p.464.

Allen, Michael J., *Textbook on criminal Law* (4th ed., Blackstone Press Ltd., 1997) p.138.

Smith, J.C., 1999, op. cit. p.144.

Murphy, Daniel, *Alcohol and Crime* (Home Office Research Bulletin No.15, 1983) p.8.

Ashworth, A.J., "Reason, Logic and Criminal Liability" 91 (1975) *LQR*.102 at 113.

⁴⁰ O' Connor, William A., *Psychiatry, a Short Treatise* (Joh Wright & Son, Bristol, 1948) p.281.

⁴¹ Reason, Will, *Drink and the Community* (Student Christian Movement, London, 1922) p. 31.

⁴² Henderson, D.K., *Psychopathic States* (W. W. Norton & Co., INC. New York, Reprint, 1947) p.60.

ideas are confused, the reasoning power disturbed, he sinks into a heavy sleep from which he cannot be roused; in short there are all symptoms of narcotic poisoning.⁴³

Alcoholism causes not only massive scale mental and physical diseases, it also has a humiliating effect on the social *niveau* of the intoxicated due to spending of undue proportion of their income on drunkenness.⁴⁴ Drinking brings misery and degradation on many either through their own indulgence or that of those on whom they depend. If it does not cause poverty, it often leads to its aggravation.⁴⁵ Excessive drinking may reduce social competence making it difficult to maintain employment, family life and increasing the risk of drifting into crime. Alternatively, a life of crime and participation in a criminal subculture may encourage excessive drinking.⁴⁶ Alcoholism represents both the escape of weak, unstable and ambitious men from predictable defeat and their result against the demand of society.⁴⁷

The opinions suggest that an intoxicated person takes himself, or tries to take, out of the domain of the community feeling, evades logic, reason and the feeling for truth, strives for a goal different from the usual and realistic one. The use of alcohol brings about a deviation from the accepted standard of normal behaviour; it is the cause for certain physical, mental and, probably financial, problems. Self-respect becomes impaired, selfishness, neglecting family, loosening self-control, want of truthfulness, loss of memory, irritability, lowering of mental tone and moral deterioration become characteristics of personality.⁴⁸ The ill effects of alcohol are not limited to the drunkard only but he entails mental disease on his children also.⁴⁹ Various effects of alcohol on human behaviour have been mentioned above but it should be remembered that all these phenomena vary according to the quantity of intoxicant consumed, its strength, the time occupied in consumption and the resisting power of the person consuming.⁵⁰

⁴³ Russell, A.G., *Drinking and Disease* (S. W. Partridge & Co., London, 1868) p.10.

Hastings, James, Selbie, John A. & Gray, Louis H., 1908, op. cit. Vol. I, p.300.

⁴⁴ Mayer, G. W., Slater, E., & Roth, M., *Clinical Psychiatry* (Cassell & Co., London, 1960) p.343.

⁴⁵ Devon, James, 1912, op. cit. p.52.

⁴⁶ Murphy, Daniel, 1983, op. cit. p.8.

⁴⁷ Adler, Alfred, *The Practice and Theory of Individual Psychology* (Translated by, P. Radin.) (Kegan Paul, Trench, Trubner & Co. Ltd., London, Reprint, 1946) pp.55-56.

⁴⁸ *Ibid.* p.300.

⁴⁹ Russell, A.G., 1868, op. cit. p.5.

⁵⁰ Hastings, James, Selbie, John A. & Gray, Louis H., 1908, op. cit. Vol. I, p.300.

6.6 Alcohol and Human Health

The study of alcohol's effects on human health is very important because it is the state's duty to protect health of its subjects and for this purpose to fix the approved standards for production and sale of edibles. A failure in this regard may result into deterioration of health of its subjects. The Food Safety Act 1990 declares that it is an offence to render any food injurious to health with intent to sell it for human consumption. Both, the person who rendered the food injurious and one who sells, are criminally liable.⁵¹ If it is proved that alcohol is injurious to human health then logically it is not reasonable to allow its production and sale.

Alcohol consumption is associated with a variety of physical disorders and a number of diseases are caused by its constant use. The list of diseases which can be caused by alcohol is long and cover virtually every medical speciality including cancer and stroke.⁵² Alcohol when taken into the system, and repeated from time to time, has a tendency to produce particular forms of disease in nervous system, alimentary canal, liver, kidney and disorder of nutrition.⁵³ Use of strong spirits produces frequently extravasations of blood, and inflammation of the lining membrane of the stomach, laying the foundation of future disease.⁵⁴ Heavy alcohol consumption sometimes brings adolescence.⁵⁵ The story does not end here, alcohol can and does affect fertility and increases the risk of spontaneous abortion. It can harm the foetus, which is most liable to be damaged in the very early stages of pregnancy.⁵⁶ It may increase the likelihood of engaging in unprotected sexual intercourse and sexual relations with a large number of partners affecting immune system and, therefore, augments the risk of AIDS.⁵⁷ Alcohol use causes cirrhosis, cancer of mouth, oesophagus, pharynx, larynx and breast cancer in women.⁵⁸

⁵¹ The Food Safety Act 1990, Sec.7 & 8.

⁵² Alcohol and the Public Health, 1991, op. cit. p. 24.

⁵³ Russell, A.G., 1868, op. cit. p.8.

⁵⁴ *Ibid.* p.9.

⁵⁵ Alcohol and the Young, 1995, op. cit. p.1.

Royal Commission on Licensing (England & Wales) Cmd. 3988, 1932, op. cit. Para. 69.

⁵⁶ Alcohol and the Young, 1995, op. cit. p.2.

⁵⁷ Alcohol and the Public Health, 1991, op. cit. p.33 {Surveys show that 20% men and 16% women admit to have unprotected sex after being drunk. (Alcohol Concern, *Alcohol and Teenage pregnancy* (<http://www.alcoholconcern.org.uk>) 2002.)

⁵⁸ Thun, Michael J., Peto, R., "Alcohol Consumption & Mortality among Middle-aged & Elderly U.S. Adults" *The New England Journal of Medicine* (1997)337(24)(<http://content.nejm.org/cgi>)2002.p.1705

Heavy drinkers have long been recognised to have an increased risk of dying prematurely.⁵⁹ The main causes of increased mortality among the intoxicated are suicide, accidents, and alcohol related diseases.⁶⁰ It has been noted that a large number of those attending casualty departments with accidental injuries were drunk.⁶¹ Alcohol can kill and among adults can cause very significant ill health and unhappiness, sometime destroying careers and wrecking family life.⁶² In UK, use of alcohol causes over 40,000 deaths per annum from over consumption; it is second to tobacco use as the cause of premature deaths.⁶³ The fact is established by abundance of evidence direct and indirect and instantaneous effects. There are a number of cases in which, after an excessive dose of a mixture containing a high percentage of alcohol, men have died.⁶⁴

The study suggests that alcohol causes from stimulant effects up to intoxication, coma, and death, it has every immediate variety of effects upon the brain, up to confirmed insanity showing that it acts as a poison which destroys protoplasm.⁶⁵ It is estimated that 15 to 20 percent insanity is caused through drink and this percentage has shown an increasing trend.⁶⁶ Men of relevant professions have established that it is a major cause of all the physical and mental diseases. However, some medical research suggests that a moderate consumption of alcohol reduces the risk of heart disease in people 40 or older and lowers the risk of diabetes.⁶⁷ On the other hand a slightly immoderate drinking may markedly increases the risk of heart disease.⁶⁸ Moderate alcohol consumption may also help in stress reduction, diminution in risk of coronary artery disease, increases appetite especially in the elderly⁶⁹ but the scale of moderate drinking must be customized by taking into account age, gender and medical history of the drinker.⁷⁰ Despite of this it

(The same source reveals that mortality from breast cancer is 30% higher among women reporting at least one drink daily than among non drinkers.)

⁵⁹ Alcohol and the Public Health, 1991, op. cit. p.27.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* p.34. (It has been estimated that in 2002, 6% of road accidents involved illegal alcohol level resulting in a total of 20,140 deaths. {Department of Health, *Statistics on Alcohol: England, 2003* (<http://www.statistics.gov.uk>) 2004})

⁶² Saunders, W. M., 1984, op. cit. pp.68-69.

⁶³ Cooper, David B. (Editor) *Alcohol Use* (Radcliff Medical Press, Abingdon, 2000) p.217.

⁶⁴ Russell, A.G., 1868, op. cit. p.5.

⁶⁵ Hastings, James, Selbie, John A. & Gray, Louis H., 1908, op. cit. Vol. I, p.299.
Russell, A. G., 1868, op. cit. p.12.

⁶⁶ Hastings, James, Selbie, John A. & Gray, Louis H., 1908, op. cit. Vol. I, p.301.

⁶⁷ Reaping alcohol's Benefits, Avoiding harms (<http://www.msnb.msn.com>) 2004.

⁶⁸ *Ibid.*

⁶⁹ But I heard Drinking was good for my Health!
(<http://www.med.unc.edu/alcohol/education/benefits.html>) 2004.

⁷⁰ Reaping alcohol's Benefits, Avoiding harms, op. cit. F.N. 67.

can be said that moderate drinking may have some benefits but it also carries increased health risks.⁷¹ The uncertainty in determining moderate drinking has led the Academy of Medical Sciences to urge the government that it should take unpopular decisions to reduce alcohol consumption.⁷² Another research suggests that even moderate alcohol consumption has no positive effect on health⁷³ and hence people who do not drink should not start for health reasons.

6.7 Intoxication and Criminal Tendency

Jurists and psychiatrists have observed that intoxication is a major cause for commission of crimes in a society. Intoxicants distort judgement, reduce an actor's ability to control his aggressive feelings, and anti social impulses.⁷⁴ Crime rate in a society rise and fall with the general level of alcohol consumption⁷⁵ and it is universally accepted that there is a close link between excessive drinking and breach of law.⁷⁶ Many people who commit crimes have taken drugs, whether dangerous ones or ones not classified in law as dangerous, e.g. alcohol.⁷⁷ A study of crime in a seaside resort showed that a very high percentage of those arrested for any criminal offence had been drinking prior to committing the offence.⁷⁸ Many of these offences would not have been committed if the offender had not been intoxicated.⁷⁹ A proof of direct relationship of alcohol consumption with crime is that during World War I the totality of alcohol related crime declined with the downturn in alcohol consumption.⁸⁰

Intoxication is an important factor leading towards homicide or serious injury to others.⁸¹ A study of murder in West Scotland found that 50% male and 30% female murderers were intoxicated at the time they committed the crime, as were 52% of male

⁷¹ But I heard Drinking was good for my Health! op. cit. F.N. 69.

⁷² The Academy of Medical Sciences, *Calling the Time* (www.acmedsci.ac.uk) 2004.

⁷³ Carole L Hart, Smith, D. J., "Alcohol Consumption and Mortality from all causes, coronary heart disease, and stroke: result from a prospective cohort study of Scottish men with 21 years of follow up" *BMJ* 318 (1999) p.1725.

⁷⁴ Dressler, Joshua, *Understanding Criminal Law* (West Publishing Co., ST. Paul, Minn., 1994) p.293

⁷⁵ Hartz, Catherine, 1990, op. cit. p.5.

⁷⁵ Saunders, W. M., 1984, op. cit. p.67.

Nash Parker, Robert & Cartmill, Randis, "Alcohol and Homicide in the United States 1934-1995-Or one Reason Why U.S. Rate of Violence May be Going Down" 88 (1988) *JCL*. 1369.

⁷⁶ Hastings, James, Selbie, John A. & Gray, Louis H., 1908, op. cit. Vol. I, p.301.

Plant, Martin, *Alcohol: Minimising the Harm* (Free Association Books, London, N. York, 1997) p.5.

⁷⁷ Jefferson, Michael, 1997, op. cit. p.252.

Ashworth, Andrew, *Principles of Criminal Law* (3rd ed., Oxford University Press, 1999) p.218.

⁷⁸ Alcohol and the Public Health, 1991, op. cit. p.43.

⁷⁹ Smith, J.C., 1999, op. cit. p.144.

⁸⁰ Saunders, W. M., 1984, op. cit. p.67.

⁸¹ Per Lord Birkenhead, L.C. in *D.P.P. v. Beard* [1920] All ER. 21 at 24.

and 32% of female victim.⁸² Alcohol is often consumed not only by the offenders but the victims as well prior to the offence being committed.⁸³ A survey of 588 murder cases showed that alcohol was present in, the victim, the offender, or both, in 64% of the offences, and in 34% of 646 rape cases that drastically increased to 72% within ten years.⁸⁴ Another study suggested that alcohol was present in 63% of 130 homicide victims.⁸⁵ It shows that those who drink have disproportional high risk of being victim of a crime.⁸⁶ Intoxication can be a trigger that releases impulses already established in the situation among the offenders and victims.⁸⁷ It is often asserted that the composition of alcohol is linked to crimes in general and to violent offences in particular.⁸⁸ A report of Home Office confirms that 40% of violent crimes; 78% of assaults and 88% of criminal damages cases are committed while the offender is under the influence of alcohol.⁸⁹ In many cases intoxication assists the professional criminals; for the intoxicated man is an easy prey to them than a sober one.⁹⁰

How the intoxication has led the society to the crimes? It is evident from another report. In 1984 just over 154,000 offences of personal violence were recorded by the police, of which some 112,000 were offences of wounding or assault, 25,000 were offences of robbery and 15,000 were sexual assault. A further 800 recorded offences were homicide or attempted murder and another 800 were threats or conspiracy to murder. The remaining category of significant size was 200 offences of causing death by reckless driving. These 154,000 offences represent just under 5% of all notifiable offences recorded by police in 1984.⁹¹ It has been further assessed that crime of personal violence recorded by the police rose by 72% between 1974 and 1984, an increase similar to that for all recorded crime 69%.⁹² In 1987, out of 251 cases of group violence

⁸² Alcohol and the Public Health, 1991, op. cit. p.43.

⁸³ Home Office, *Tackling Alcohol Related Crime: Building a Safe, Just and Tolerant Society* (<http://www.homeoffice.gov.uk/pcrg/aap0700.htm>) p.1.

⁸³ Saunders, W. M., 1984, op. cit. p.68.

⁸⁴ *Ibid.*

⁸⁵ Weiner, Neil Alan, & Wolfgang, Marvin E., 1989, op. cit. p.51.

⁸⁶ Walmsley, Roy, *Personal Violence* (Home Office Research Study No.89, 1986) p.37.

⁸⁷ Lindqvist, Per, "Criminal Homicide in Northern Sweden 1970-1981: Alcohol Intoxication, Alcohol abuse and Mental Disorder" 8 (1986) *Int. J. Law and Psychiatry*. 19 at p.34.

⁸⁸ Murphy, Daniel, 1983, op. cit. p.8.

⁸⁹ Deehan, Ann, *Alcohol and Crime: Taking Stock* (<http://www.homeoffice.gov.uk/rds/prgpdfs>) 2003.

⁹⁰ Devon, James, 1912, op. cit. p.61.

⁹¹ Walmsley, Roy, 1986, op. cit. p.3.

⁹² *Ibid.* {Alcohol consumption and resulting violence is constantly showing increasing trends. There were 271, 5000 incidents of violent crime recorded by police in England and Wales during Oct-Dec. 2003 (The Independent, 30 April 2004, p.10)}.

90% were found to be alcohol related. It has been officially acknowledged that alcohol is root cause of majority of crimes in the society.⁹³ Police officers are aware of the part drink plays in sex offences, child abuse, road accidents, damage and violence at public and private places.⁹⁴ To what extent intoxication is involved in the crimes of violence and public order the courts are also conscious of the fact. At the last but not the least is given the opinion of House of Lords as expressed in *D.P.P. v. Majewski*.⁹⁵ It states that the consumption of alcoholic beverages is the major cause of crimes in the society to which misuse of drugs has added more severity.⁹⁶ The evidence suggests that the link between alcohol and crime cannot be denied and many violent offenders commit offences after consuming alcohol.⁹⁷ The reports mentioned above either from the independent organisations or the official agencies reflect the severity of the problem faced by society.

6.8 A Brief History of Legislation to Control Intoxication in English Criminal Law

Traces of legislation to control import of liquor, its sale, consumption and resulting intoxication can be found as far back as the 14th century.⁹⁸ Though there are innumerable Acts dealing with the subject matter; we will deal only with some important ones. Up to the end of the 15th century there was neither any restriction on the number of alehouses and taverns in any area nor on the sale and consumption of alcohol.⁹⁹ In the middle of the 16th century drunkenness became a major cause of violence and disorder in society. The alehouses were centres of such violence; people caused trouble after becoming drunk at the premises. In order to check the situation it was considered that by restricting the opportunities to purchase and consume, the misuse of alcohol could be diminished.¹⁰⁰

6.8.1 Legislation in the 16th and the 17th Centuries

In 1552, justices of peace were authorised to control sale and use of alcoholic beverages and subsequent violence by taking guarantee from the sellers that their premises would not be used for unlawful games; they would maintain good order within the premises to

⁹³ The Law Commission, *Intoxication and Criminal Liability* (Consultation Paper No.127, 1993) Para 1.10.

⁹⁴ Payne G, Sergeant. "Why drugs must be made legal" *Police Review*, 28th Feb. 1992 p.388 at 389.

⁹⁵ *D.P.P. v. Majewski* [1976] 2 All ER 142; [1977] AC. 443.

⁹⁶ *Ibid* at p. 146 and at p. 4 69.

⁹⁷ Walmsley, Roy, 1986, op. cit. p.16.

⁹⁸ In 1318 an Act was passed to forbid the public officers to deal in the business of wine, 1318 (12 Edw-2) c.6 and later on a number of Acts to deals with the general matters pertaining to it, like, 1368 (42 Edw-3) c.8; 1369 (43 Edw-3) c. 2; 1369 (43 Edw-3) c.3; 1380 (4 Ric-2) c.1. 1444 (23 Hen.-6) c.17; 1562 (5 El.) c. 5, s. 11.

⁹⁹ Royal Commission on Licensing (England & Wales) Cmd. 3988, 1932, op. cit. Appendix 2, Para 9.

¹⁰⁰ Edwards, Griffith, *Alcoholism: New Knowledge and New Responses* (Croom Helm, London, 1977) p.78.

avoid trouble and violence.¹⁰¹ This step may be considered as the foundation of all the legislation concerning the control on sale and consumption of liquor.¹⁰² In 1553, it was enacted that there will be only two alehouses in a particular town or borough.¹⁰³ In 1604 an Act specifically reminded the owners of the inns, alehouses, and victual houses that these places are meant for travellers and not for entertainment of lewd and idle people to spend their money and time in drinking there.¹⁰⁴ It was declared an offence to allow any person, other than travellers, to remain drinking at such places. In 1606, distillers were prohibited from selling wine to unlicensed retailers.¹⁰⁵ All these administrative steps and preventive measures remained ineffective and ultimately a bold step was taken declaring drunkenness a crime punishable by imprisonment in stocks or a fine.¹⁰⁶

In 1609¹⁰⁷ and 1623¹⁰⁸ certain penalties were prescribed for the ale housekeepers, if found guilty of the breach of conditions for keeping such houses. However, with the change of the monarch, the policy was changed and a soft attitude towards sale and use of alcohol was adopted. In 1625, inn-keepers, alehouse-keepers or victuallers were exempted from punishment, if they had allowed someone to drink alcohol in their premises.¹⁰⁹ Two years later, sale of wine without a licence was made punishable with a fine of 20 shillings or whipping, whereas any subsequent conviction for the same offence was made liable to imprisonment.¹¹⁰ One of the measures taken to control the consumption of liquor was the imposition of excise duty in 1643.¹¹¹

Despite increase in prices of wine¹¹² and change in the procedure of issuing licences,¹¹³ the consumption of liquor continued to rise. In 1688, 12,400,000 barrels of alcohol were

¹⁰¹ 1552 (6 Edw-6) c. 25

¹⁰² Royal Commission on Licensing (England & Wales) Cmd., 3988, 1932, op. cit. Appendix 2, Para.13.

¹⁰³ 1553 (7 Edw-6) c.5

¹⁰⁴ 1604 (2 Jac-1) c.9.

¹⁰⁵ 1606 (4 Jac-1) c.4.

¹⁰⁶ Act for Repressing the Odious and Loathsome Sin of Drunkenness 1606. Section 1 of the Act states, "Where the loathsome and the odious sin of drunkenness is of late grown into common use within this realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery and such like, to the great dishonour of God and of our nation, the overthrow of many good arts and manual trades, the disability of divers workmen and the general impoverishing of many good subjects, abusively wasting the good creature of God."

¹⁰⁷ 1609 (7 Jac-1) c. 4.

¹⁰⁸ 1623 (21 Jac-1) c. 7., s. 3.,

¹⁰⁹ 1625 (1 Cha-1) c. 4.

¹¹⁰ 1627 (3 Cha-1) c. 3.

¹¹¹ Williams, G. Prys, *Drinks in the Great Britain 1900 to 1979* (Edsall, London, 1980) p.2.

¹¹² 1670 (30 Cha-2) c. 5.

¹¹³ 1670 (30 Cha-2) c. 6.

brewed for a population of little over 5,000,000.¹¹⁴ In the same year, a further duty of six shillings a barrel was imposed, exclusive of the excise duty already payable.¹¹⁵ To discourage excessive drinking and to preserve the state and church from these vices¹¹⁶ once again additional duties were imposed upon liquors in 1692¹¹⁷ and 1694.¹¹⁸ The heavy taxes proved effective to some extent and the production sank to 11,350,000 barrels in 1695, yet almost one third of the arable land of the kingdom was devoted to barley, used to brew alcohol.¹¹⁹ An important factor in diminishing alcohol use in the last years of the 17th century was introduction and wide spread use of coffee in England.¹²⁰

6.8.2 Legislation in the 18th Century

All the legislative attempts to end immoderate selling and drinking practices met with strong opposition from vested interests and victims alike.¹²¹ It has been suggested that by the 1720s gin was being sold in streets of London and Bristol by hawkers at a penny a pint.¹²² In 1722, production of malt for brewing beer attained the extraordinary figure of 33,000,000 bushels,¹²³ indicating consumption of a whole barrel of beer, in a year, for every member of population.¹²⁴ The passion of gin drinking affecting the majority of population rapidly spread in the society.¹²⁵ The situation became so bad that in 1725 it was estimated that in London, excluding the city and the Surrey side of river, there were over 6,000 places where gin was openly sold. In some areas every fifth house retailed it and in addition it could be obtained from anywhere.¹²⁶ The situation was so bad that cheap gin were given to the workpeople instead of their wages.¹²⁷ It is said that half of the population of the town was selling wine to the other half.¹²⁸

¹¹⁴ Lecky, W. E. Hartpole, 1913, op. cit. Vol. II, p.100.

¹¹⁵ 1688 (1 Will. & Mar.) c. 24.

¹¹⁶ Cobbett, William, *Cobbett's Parliamentary History of England* (Longman, Hurst, Orme, & Browne, London, 1811) Vol. II, p. 533.

¹¹⁷ 1692 (4 Will. & Mar.) c. 3.

¹¹⁸ 1694 (6 & 7 Will. & Mar.) c. 20.

¹¹⁹ Lecky, W. E. Hartpole, 1913, op. cit. Vol. II, p.100.

¹²⁰ *Ibid.* pp. 98-99.

¹²¹ *Ibid.* p.100.

¹²² New Report of a Social Committee of the Royal College of Psychiatrists, 1986, op. cit. p.21.

¹²³ A British unit of measure equal to 8 Imperial gallons. (Collins English Dictionary and Thesaurus).

¹²⁴ Sidney & Webb, Beatrice, *The History of Liquor Licensing* (Frank Cass & Co., London, 1963) p.21.

¹²⁵ Lecky, W.E. Hartpole., 1913, op. cit. Vol. II, p.101.

¹²⁶ Turberville, A. S. (Editor) *Johnson's England: An Account of the Life and Manners of his Age* (Clarendon Press Oxford, 1933) Vol. 1, p.312.

¹²⁷ Sidney & Webb, Beatrice, *The History of Liquor Licensing* (Special Edition, London, 1903) p.22.

¹²⁸ *Ibid.*

In 1726, the Royal College of Physicians submitted an appeal to the Parliament, drawing its attention to the fatal effects of liquor upon great number of both the sexes, rendering them diseased, degraded in behaviour, unfit for business, poor and a burden to themselves, to ban the use of such liquors.¹²⁹ However, instead of prohibition, the government thought it appropriate to discourage the sale and consumption by prescribing heavy licence fee.¹³⁰ In 1729, a licence costing £20 per year on distillers and retailers, and a further duty of 5 shillings per gallon on cheap spirits was imposed; the hawking on the streets was prohibited to protect the interests of the licensee.¹³¹ The Act met with much opposition from the traders and growers of the wheat¹³² and after four years, in 1733,¹³³ they obtained its repeal because it had discouraged the sale and affected their business.¹³⁴

The fatal passion for drink reached to such an extent that the average production of British spirits which, was only 527,000 gallons in 1684, and 2,000,000 in 1714, had risen in 1727 to 3,601,000 and in 1735 to 5,394,000 gallons.¹³⁵ The major problems of society, like poverty and crimes, were attributed to alcohol use.¹³⁶ In 1736, Parliament intended to regulate the supply and consumption of alcohol more strictly.¹³⁷ A new Act was passed which aimed at practical prohibition by raising the licence fee to £50 and the rate of tax to 20 shillings a gallon.¹³⁸ The preamble of the Act admitted that drinking of liquor had become very common, especially among the people of lower classes and its excessive use had greatly destroyed their health, corrupted their morals, and rendered them unfit for useful labour.¹³⁹ The Act rendered illegal to deliver spirits to workpeople in part payment of their wages and forbade its hawking in the streets. It was apprehended that a complete prohibition might give rise to great dissatisfaction of the population, perhaps leading to serious civil disturbance.¹⁴⁰ One might suggest that the ruling class was hesitant to completely ban alcohol for the sake of their own interests.

¹²⁹ New Report of a Social Committee of the Royal College of Psychiatrists, 1986, op. cit. p.21.

¹³⁰ Sidney & Webb, Beatrice, 1903, op. cit. p.25.

¹³¹ 1729 (2 Geo. 2) c. 17.

¹³² Royal Commission on Licensing (England & Wales) Cmd.3988, 1932, op. cit. Appendix 2, Para.25.

¹³³ 1733 (6 Geo. 2) c. 17.

¹³⁴ Turberville, A. S., 1933, op. cit. Vol. I, p. 313.

¹³⁵ Lecky, W. E. Hartpole, 1913, op. cit. Vol. II, p.101.

¹³⁶ *Ibid.*

¹³⁷ Turberville, A. S., 1933, op. cit. p.313.

¹³⁸ 1736 (9 Geo. 2) c.17.

¹³⁹ Preamble of the *Ibid.*

However, the duties were regarded as excessive and only a few licenses were taken out, but an underground retail trade soon sprang up, which was very popular and profitable, duty free spirits remained available cheaply which led to failure of effective enforcement of the law.¹⁴¹ Such a majority transgressed the law that it could not be executed.¹⁴² Drinking became a part of the lives of the people in such a way that they were not willing to leave it or to accept any restriction on their freedom. In a short time the people won over the legislators, and finally they were allowed to continue drinking without further legal interference.¹⁴³

Use of alcohol was considered to be the principal cause of poverty and pauperism in society.¹⁴⁴ What was earned by the workers went to the beer houses and as a result they were gone from poor to pauper.¹⁴⁵ The situation has not been changed even in this modern era.¹⁴⁶ In 1742, more than 7,000,000 gallons were distilled, showing a steady increase in the consumption.¹⁴⁷ According to another authority volume of liquor distilled was not less than 7,160,000 gallons as against 4,947,000 in 1734.¹⁴⁸ The picture of the society of this era sketched before House of Lords in 1743 is terrible.¹⁴⁹ Another

¹⁴⁰ *Ibid.* Vol. IX, p.1039.

¹⁴¹ Lecky, W.E.Hartpole, 1913, op. cit. Vol. II, p. 102.

¹⁴² Sidney & Webb, Beatrice, 1903, op. cit. p.25.

¹⁴³ Turberville, A. S., 1933, op. cit. Vol. 1, p. 313.

¹⁴⁴ Booth, Charles, *Pauperism a Picture and the Endowment of old age* (Macmillan, 1892) p.11.

¹⁴⁵ Marshal, Dorothy, *Eighteenth Century England* (Longman, London, 1962) p.35.

¹⁴⁶ English people spend more on alcohol than they do on other necessities of life. {The Royal College of Physicians, *A Great and Growing Evil* (Tavistock, London, 1987) p.7; Saunders, W. M., 1984, op. cit. p.66}. More than 7% of consumer expenditure goes on alcoholic drink, the amount that is supposed to be spent on better health, clothing and food of the consumer. {Crooks, Edmund, *Alcohol Consumption and Taxation* (The Institute of Fiscal Studies, London, 1989) p.7}. In 1982, British people consumed 1350 million gallons of beer equivalent to 30 million pints a day, 35 million proof gallons of spirits and 106 million gallons of wine. This costs Britain £ 33 million a day. {Saunders, W. M., 1984, op. cit. p.66}. Reports show that, in 1987, population of England and Wales spent £ 17 billion on alcohol equivalent to £370 for every adult in Britain. (Alcohol and the Public Health, 1991, op. cit. p.2). Expenditure on misuse of drugs further aggravates the situation. A report of the Home Office shows that the average weekly expenditure, among all arrestees who had consumed at least one illegal drug in the last 12 months was £129 approaching the highest of £192, whereas the arrestees using both heroin and cocaine reported the highest levels of expenditure amounting to £308 per week. {Bennett, Trevor, *Drug and Crime* (Home Office Study No.205, 2000) p. vii.}

¹⁴⁷ Lecky, W.E.Hartpole, 1913, op. cit. Vol. II, p.102.

¹⁴⁸ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.31.

¹⁴⁹ It was stated that, " If one million of gallons out of the seven distilled be employed in good uses, the remaining six, at a ½ pint each, will make 96 millions drunk at once, and one tenth part of it, 9,600,000. And if each drunkenness loses the labour of one day at a shilling, it is £480,000 lost. Six million of gallons will give 10 gallons a year, which is near a quatern a day, to 600,000 persons. If one in thirty of these are killed, it is 20,000 persons a year: if one in thirty more disabled it is 20,000 more: if one in six is a woman, and one in twenty of these with child, there will probably be 5,000 children destroyed thus: if one in twenty of them has the care of young children and gives them this liquor, here will be 5,000 more destroyed." {Cobbett, William, 1812, op. cit. Vol. XII, p.1368} In some

attempt was made in 1743 to suppress the clandestine trade¹⁵⁰ and at the same time to increase the public revenue by lowering the duty.¹⁵¹ This may be seen as an effort to check the evil rather than to prohibit it. It is claimed that the Act of 1736 was repealed to protect the home distillery and discourage import.¹⁵² However, the actual reason was that the government by 1743 needed more revenue and it did not wish to dispense with any existing source.¹⁵³ Alcoholic drinks provided an easy and plentiful source of revenue.¹⁵⁴ Reduction of the duties is also attributed to the fact that the government was keen to take care of people whose livelihoods depended upon the alcohol trade.¹⁵⁵ The duty of 20 shillings was reduced to a few pence a gallon and the licence to retail was reduced from £50 to £1.¹⁵⁶ The act was calculated for raising money and nothing else.¹⁵⁷ Under the new Act it was proposed to issue 50,000 licences to retail liquor¹⁵⁸ and an unlicensed retailer was liable to a fine of £10.¹⁵⁹

It was admitted openly that "If this evil cannot be prevented, avail yourselves of the money arising from it."¹⁶⁰ This suggests that raising money was preferred over the health and prosperity of the nation. The government received revenue both from excise duty and licensing but at the cost of enormous increase in the consumption of alcohol. It was very common to see poor, mad, drunk committing outrages in the streets of London or deadly asleep at the doors of empty alehouses throughout the day.¹⁶¹

By another Act, a licensee was not allowed to carry on the trade of distiller, grocer or chandler or to keep a brandy shop and he had to dwell in the same house.¹⁶² This Act had good effects, but it hit the distillers hard,¹⁶³ and they obtained an amending Act

other authorities consumption in 1743 has been estimated to 20,000,000 as against 11,000,000 gallons in 1734. (Williams, G. Prys, 1980, op. cit. p.5)

¹⁵⁰ 1743 (16 Geo-2) c. 8.

¹⁵¹ Lecky, W.E.Hartpole, 1913, op. cit. Vol. II, p.102.

¹⁵² Cobbett, William, 1812, op. cit. Vol. XII, p.1379.

¹⁵³ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.33.

¹⁵⁴ *Ibid.* p.35.

¹⁵⁵ Cobbett, William, 1811, op. cit. Vol. IX, p.1038.

¹⁵⁶ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.33.

¹⁵⁷ Cobbett, William, 1811, op. cit. Vol. XII, p.1368.

¹⁵⁸ *Ibid.* Vol. XII, p.1440.

¹⁵⁹ 1743 (16 Geo-2) c.39.

¹⁶⁰ Cobbett, William, 1811, op. cit. Vol. XII, p.1369.

¹⁶¹ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.32.

¹⁶² 1744 (17 Geo-2) c.17.

¹⁶³ Turberville A. S., 1933, op. cit. p.313.

allowing the London distillers to sell by retail on payment of £5 for a licence.¹⁶⁴ Despite the fact that there were 17,000 licensed shops, in 1749 more than 4,000 persons were convicted of selling without licence.¹⁶⁵ The widespread use of liquor affected the health of people badly.¹⁶⁶ Brewing of alcohol reached such a scale that in 1750, 7000 out of 12000 quarters of wheat sold weekly in London were converted into spirits.¹⁶⁷ In this period annual consumption of spirits rose approximately from 500,000 gallons in 1684 to 11 million gallons in 1751.¹⁶⁸ The annual consumption in London was said to have reached 64 liters per capita.¹⁶⁹

Alcohol consumption reached to such a high level that many counties requested the Parliament to ban the excessive drinking, which caused a great decay of piety, and virtue amongst the common people, and tended to the destruction of the commerce and industry of the Kingdom.¹⁷⁰ As a result of these requests, an Act, strengthening the provisions of the Act of 1743, was passed that slightly increased the duties on liquors and prohibited the distillers, grocers and keepers of jails and workhouse keepers to retail spirits.¹⁷¹ The Act was followed by the rapid decline in consumption of alcohol.¹⁷² In 1753, certain additional conditions were imposed on public houses and licensees, it was suggested that no licence would be granted to any person for retail sale of liquor except on the fulfilment of these conditions.¹⁷³ The restrictive legislation and coercive measures led to the reduction in consumption of alcohol under two million gallons by 1758 but soon it increased again.¹⁷⁴ The sale of alcoholic beverages was so common that despite an un-repealed order of 1585, which ordained only 100 common alehouses for London, there were about 2000 such houses selling alcohol.¹⁷⁵

6.8.3 The Industrial Revolution and After

In the 19th century consumption of alcohol began to rise again, particularly in the rapidly developing industrial towns, attributed partly to the country's growing prosperity and partly to the deprived conditions in which industrial workers were forced

¹⁶⁴ 1747 (21 Geo-2) c.39.

¹⁶⁵ Lecky, W.E.Hartpole, 1913, op. cit. Vol. II, p.103.

¹⁶⁶ *Ibid.*

¹⁶⁷ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.43.

¹⁶⁸ Lecky, W. E. Hartpole, 1913, op. cit. Vol. II, p.103.

¹⁶⁹ Crooks, Edmund, *Alcohol Consumption and Taxation* (The Institute of Fiscal Studies, London, 1989) p.14

¹⁷⁰ Turberville, A. S., 1933, op. cit. p.313.

¹⁷¹ 1751 (24 Geo-2) c. 40.

¹⁷² New Report of a Social Committee of the Royal College of Psychiatrists, 1986, op. cit. p.21.

¹⁷³ 1753 (26 Geo-2) c. 13.

¹⁷⁴ Office of the Health Economics, *Alcohol Abuse* (Office of the Health Economics, London, 1970) p.6

¹⁷⁵ Sidney & Webb, Beatrice, 1963, op. cit. F.N. 117, p.44.

to live.¹⁷⁶ This increased alcohol use trend resulted into many social problems, like neglect of children, wife beating, debt, loss of trade and accidents.¹⁷⁷ From 1824 to 1869 a number of Acts regulated the policy for issuing licences for brewing and retailing liquors, adjusting licence fee, duties and taxes on their sale and regulating the hours of sale.¹⁷⁸ Despite such restrictions, sale and consumption of beer and spirits rose steadily.¹⁷⁹ In 1872, The Licensing Act was passed that governed the activities of selling, drinking alcohol and drunken behaviour. Under this Act, retail of liquor without a licence was prohibited; to be drunk in any highway or public place was declared to be an offence; and similarly sale of liquor to any person under the age of sixteen years of age was prohibited.

Excessive drunkenness caused numerous social and health problems. Awareness of these problems, and failure to control drunkenness, led the government to consider the rehabilitation of drunk. In 1879, the Habitual Drunkard's Act was passed to facilitate the control and cure of habitual drunk. Alcohol consumption was boosted further in 1880 by Gladstone's free mash tun system, which allowed brewers to use carbohydrate sources other than malt and so to lower the price of liquors.¹⁸⁰ The era of heavy use of alcohol is characterised by its cheapness and easy availability.¹⁸¹ Towards the end of the 19th century, consumption had risen to nearly 11 litres of pure alcohol a year for every man, woman and child, and over 40% of all Exchequer funds were derived from the excise duty on alcoholic beverages.¹⁸²

The 20th century witnessed a turn in the governmental policy towards alcohol consumption. The Licensing Act 1902 allowed the apprehension of any person found drunk in any highway or other public place, who appeared to be incapable of taking care of himself or had charge of a child under the age of seven years. In 1910, all the legislation on the subject was consolidated and certain conditions were imposed on persons and premises relating to the issue of licences for sale of liquor. Sale of liquor

¹⁷⁶ *Ibid.* p. 21.

¹⁷⁷ Alcohol and the Public Health, 1991, op. cit. p.14.

¹⁷⁸ 1824 (5 Geo.-4) c.54; 1825 (6 Geo-4) c.94; 1828 (9 Geo-4, c.61, s.35; 1828 (9. Geo-4) c. 61, s. 14; 1828 (9. Geo-4) c. 68; 1830 (11. Geo-4) c. 48; 1830 (11. Geo-4 & 1 Gul-4) c. 51; 1830 (11.Geo-4 & 1 Gul.-4) c. 64; 1840 (3 & 4 Vic.) c. 61; 1860 (23 Vic.) c.118; Wine and Beer Houses Act 1869.

¹⁷⁹ New Report of a Social Committee of the Royal College of Psychiatrists, 1986, op. cit. p.21.

¹⁸⁰ *Ibid.*

¹⁸¹ Saunders, W. M., 1984, op. cit. p.67.

¹⁸² *Ibid.*

was prohibited on Sunday, Good Friday, and Christmas Day.¹⁸³ However, the situation did not seem to improve. In 1911, there were 115,362 licensed places for the sale of intoxicating liquor in England and Wales, while the total population was a little over 36,000,000.¹⁸⁴ The figure suggests that, on average, one sale point was available for every 312 persons or 208 adults; in the same year 21.5 million gallons of spirits were consumed besides wine and beer.¹⁸⁵

6.8.4 Impact of World War-I on Consumption of Alcohol

Due to the First World War, the first quarter of the 20th century observed a sharp decline in drinking trend which can be attributed to the imposition of heavy taxes, stricter licensing regulations, reduction of alcohol content and the death of a substantial number of the country's youth.¹⁸⁶ Between 1916 and 1918, beer and alcohol consumption fell by 50%, a figure which persisted until the mid 1930s.¹⁸⁷ The trend of declination in alcohol consumption also resulted in reducing the alcohol related offences from 60/10,000 population in 1912 to 10/10,000 population in 1932.¹⁸⁸ In 1950's, once again, the trend of drinking started rising at a steady rate until it reached to the current levels.¹⁸⁹

In 1953, entrance of any person under the age of 14 years in the bar of licensed premises during the permitted hours and sale of liquor to under the age of 18 years was declared prohibited.¹⁹⁰ The Act reflected a desire to take serious steps to discourage use of intoxicants among the young, but the statistics, given in 6.4, shows that all these steps failed to have any impact at all on the consumption of liquor in the society in general and among the young in particular. In 1985, taking into account the disturbance caused by intoxicated spectators, possession and use of intoxicating liquor at sporting events was declared prohibited.¹⁹¹ The Licensing Act 1988, increased the permitted hours for the sale of liquors and trading hours on Sunday and Christmas Day were fixed.¹⁹²

The sequence of legislation spread over a period of almost 700 years, sought to regulate the use of alcohol in England and Wales has addressed the way in which alcohol may be

¹⁸³ Licensing (Consolidation) Act 1910.

¹⁸⁴ Reason, Will, 1922, op. cit. p.9.

¹⁸⁵ *Ibid.*

¹⁸⁶ Crooks, Edmund, 1989, op. cit. p.15.

¹⁸⁷ Saunders, W. M., 1984, op. cit. p.67.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Licensing Act 1953.

¹⁹¹ Sporting Events (Control of Alcohol etc.) Act 1985.

¹⁹² Licensing (Sunday Hours) Act 1995.

sold or supplied; who can sell; where; when; and to whom it may be sold.¹⁹³ Despite of all this legislation, and other attempts to control the use of intoxicants, their use is gradually increasing.

6.9 The Efforts of the Home Office to Control Intoxication

The major problem in eyes of the government is not the consumption of alcohol rather the growing trend of violence as a result of intoxication. A Home Office action plan aims to reduce the problems arising from under-age drinking, to reduce public drunkenness, and to prevent alcohol related violence. Under the Licensing (Young Persons) Bill, presently under progress in Parliament, if passed, it will become an offence for any person working in licensed premises in a capacity which gave him authority to prevent a sale, to permit knowingly a sale to an under 18 by any other person (previously this offence was restricted to the licensee). It would also become an offence for an adult to purchase alcohol on behalf of a person under 18. The Bill also demands wide use of the provisions of section 1(1) of the Confiscation of Alcohol (Young Persons) Act 1997, allowing police to confiscate alcohol from under-age drinkers at any public place.¹⁹⁴

In order to reduce public drunkenness the action plan suggests allowing the licensees and managers of the pubs and clubs to refuse admission to known troublemakers and sale of alcohol to those who are already intoxicated. They shall also be liable for the design and management of their premises to avoid factors, like overcrowding, poor bar layout, a permissive environment which, research has suggested, contribute to alcohol-related aggression. The plan also proposes to give extra new powers to police to close premises which have become the focus of violent and disorderly behaviour.¹⁹⁵ The plan emphasises the widespread use of toughened plastic drinking glasses in pubs and bars, and refusal to sell beer in glass bottles in order to avoid their use as weapons of violence.¹⁹⁶

The plan indicates the underlying will of the authority to regulate use of alcohol more strictly. The major obstacle in this step is the public opinion that would never accept

¹⁹³ Lacey, N., Wells, C., *Reconstructing Criminal Law* (Weidenfeld & Nicolson, London, 1990) p.189.

¹⁹⁴ Home Office, *Tackling Alcohol Related Crime: Disorder and Nuisance*, Action plan. pp.2-3 (<http://www.homeoffice.gov.uk/pcrg/aap0700.htm>) 2002.

¹⁹⁵ *Ibid.* p.4.

¹⁹⁶ *Ibid.* p.6.

any law restraining use of alcohol.¹⁹⁷ Another reason may be that alcohol is the chosen, familiar intoxicant and perhaps also because many people's livelihoods and important economic interests are involved. So its ill-effects, the damage it inflicts on individuals, on families and on the fabric of society are ignored.¹⁹⁸

6.9.1 Are these Proposals Workable?

All these proposals, as thought by the Home Office, may lead to control the three major problems as pointed out, under-age drinking, public drunkenness, and alcohol related violence. But the rationale of the proposals is quite obvious. As far as the sale to a person under 18 years is concerned, the action plan has presented nothing new. It has already been declared an offence under the provisions of the Licensing Act 1953 and the efficacy of the law can be observed by taking into account the statistics issued by the Home Office regarding the use of intoxicants among teenagers.

Though the action plan proposes a new offence of buying alcohol on behalf of an under-18 but this will lead to another problem of proof that the accused has bought for such a person. Confiscation of alcohol from young people in public places may lead to further public violence and perhaps it is the main reason for not implementing the law on the point.¹⁹⁹ Refusing admission to troublemakers and not selling alcohol to those who are already intoxicated will not necessarily serve the desired purpose but may in fact augment the problem. Allowing consumption of alcohol and controlling trouble are inconsistent because one who drinks becomes intoxicated and hence troublemaker. Moreover, there is no standard available to bar staff to assess whether their customer is already intoxicated. Is this not a matter of common sense that to allow the consumption of alcohol and to control violence is like to set free a savage dog and to tie the stones and ensure the safety of the people?

If it is supposed for a while that excessive drinking, in hotels and bars, may be checked by this way but how to control the sale of alcohol at off licence premises? In my opinion the only plausible solution that may operate in the circumstances is to issue drink cards to all drinkers specifying the quantity the card holder is authorised to purchase a day. The seller should be made bound to make entries of the quantity of alcohol sold to him. The sale and purchase of liquor without this card be declared as an offence.

¹⁹⁷ New Report of a Social Committee of the Royal College of Psychiatrists, 1986, op. cit. p.18.

¹⁹⁸ *Ibid.* (For the details of economic benefits of alcohol see 9.7.2.1).

¹⁹⁹ *Ibid.* p. 23.

The prohibition impulse has never died though it emerges in different forms at different times. A report reveals that 70% people agree that UK would be a healthier, peaceful and better place if alcohol use was reduced.²⁰⁰ The opinion may further be promoted if the non-governmental organisations and official authorities, sincerely, join together to eradicate consumption of alcohol from society, by boosting public alcohol education and preventive measures. It should be made known to the masses that alcohol is in no way necessary to physical and mental well being. Its food value is negligible and its excessive amount may act as a poison.²⁰¹ Its use leads to a greater likelihood of physical and social mischief.²⁰² Taking into account the opinions of right thinking members of the society, alcohol must no longer be treated as a stimulant, but as a narcotic.²⁰³

It is the just need of the time to prohibit use of alcohol, because “Drink has drained more blood, hung more crepe, sold more houses, plunged more people in to bankruptcy, armed more villains, slain more children, snapped more wedding rings, defiled more innocence, blinded more eyes, twisted more limbs, dethroned more reason, wrecked more manhood, dishonoured more womanhood, broken more hearts, blasted more lives, driven more to suicide, and dug more graves than any other poisoned scourge that ever swept its death dealing waves across the world.”²⁰⁴ Though the prevailing conditions do not allow the government to prohibit the use of alcohol, yet strictly regulated use will be an effective step towards the right goal.

Conclusion

Alcohol consumption is associated with a variety of physical disorders and diseases. Its harmful effects on individual and society have been highlighted by governmental and private organisations.²⁰⁵ One of the statements most frequently made is that the great majority of crime is due to drink. In a more cultured way we may say that most persons were under the influence of drink at the time they committed a crime.²⁰⁶ Despite some efforts from private and public organisations, alcohol use is showing an increasing trend. A recent report states that two fifth of men and one fifth of women drink above the

²⁰⁰ Alcohol Concern, *Public Ready for Action on Alcohol: New Report* (www.alcoholconcern.org.uk) 2002.

²⁰¹ Medical Research Council, *Alcohol: Its Action on the Human Organism* (2nd ed., HMSO, London, 1924) pp.2-10.

²⁰² Wilson, George B., *Alcohol and the Nation* (Nicholson & Watson Ltd., London, 1940) p.307.

²⁰³ Royal Commission on Licensing (England & Wales) Cmd. 3988, 1932, op. cit. Para. 81.

²⁰⁴ Alcohol Abuse, *Alcohol Problems and Solution Site* (<http://www2.potsdam.edu>) 2002.

²⁰⁵ Pirmohamed, M., Brown, C. “The Burden of Alcohol Misuse on an inner-City general Hospital” 93 (2000) *Q J Med.* 292.

²⁰⁶ Devon, James, 1912, op. cit. p.52.

recommended daily level of alcohol.²⁰⁷ Similarly, average weekly consumption of alcohol in the young has doubled from 1990-2000, from 5.3 units to 10.4 units.²⁰⁸

Social reforms that would strike at the root causes of heavy drinking and violence cannot reasonably be anticipated in foreseeable future. General health education in respect of alcohol abuse has its place but likewise cannot be expected to make significant inroads into the problem.²⁰⁹ As a consequence it is suggested that such measures in some ways are half-hearted and insufficient, and do not address the root cause of the problem. The truth of the proposition can be proved by the contents of a letter alleged to be written by the Home secretary to the Prime minister showing his concerns about binge drinking and alcohol fuelled crime that risks spiralling out of control.²¹⁰ The harmful consequences suffered by the individual and society required that more effective and rational steps, to control alcohol use, should be taken. Accordingly the adoption of effective strategies to control alcohol and its adverse consequences should receive high priority.

To determine the criminal liability of an intoxicated accused, intoxication has been divided into two kinds; involuntary and voluntary intoxication. The following chapter shall deal with the criminal liability of an involuntarily intoxicated offender.

²⁰⁷ Department of Health, *Statistics on Alcohol: England, 1978 Onwards* (<http://www.dh.gov.uk>) 2001.

²⁰⁸ Department of Health, Press Release 2001/0582. (<http://www.dh.gov.uk>).

²⁰⁹ Walmsley, Roy, 1986, op. cit. p.18.

²¹⁰ (<http://news.bbc.co.uk>) 14 March 2004.

Chapter-7 Involuntary Intoxication and Criminal Liability

7.1 Introduction

Voluntary and involuntary intoxication are to be distinguished, for the latter condition is less blameworthy as compared to the former. In this chapter we shall ascertain the conditions under which intoxication may be designated as involuntary and how this condition affects the liability of an accused? The principles applied by the English courts in the cases of involuntary intoxication shall be discussed along with the possibility of counterfeiting the defence. Before dealing with the questions it seems appropriate to know how the concept of criminal liability of the intoxicated offender developed in English criminal law.

7.2 Development in the Concept of Liability of an Intoxicated Offender in English Criminal Law

As discussed in chapter-1, criminal liability of an offender depends upon his intention and volition. Now the question arises if an offender commits an offence in state of intoxication, incapable of forming intention, is he liable for the offence committed or he is entitled for the defence? The answer to this question differs from jurisdiction to jurisdiction. Generally speaking, in English law, intoxication is not, and never has been a defence.¹ It is never a defence for defendant to say, however convincingly, he would not have behaved as he did but for the drink.² Indeed, the fact that a defendant was intoxicated at the time he committed a crime has classically been rejected as a defence. According to Hale, a perfect but temporary insanity caused by the intoxicant shall offer no defence to a defendant.³ In the 19th century Stephen J. stated that, "no body must suppose and I hope no one will be led for one moment to suppose that drunkenness is any kind of excuse for crime."⁴ The opinions were based upon the principle that a man who voluntarily destroys his will power and awareness shall be no better situated in regard to criminal acts than a sober man.⁵

In the modern times the defence of intoxication has caused courts, lawyers and the drafters of criminal codes much distress.⁶ The basic reason for this distress is that the defence seems to bring the principle of culpability into conflict with the principle of prevention of crime. It is the fundamental principle of criminal liability that a person

¹ Austin, John, *Lectures on Jurisprudence* (5th ed., John Murray, London, 1885) Vol. I, p.496.

² Smith, J.C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.225.

³ Hale, Mathew, Sir, *The History of the Pleas of the Crown* (T. Pyne, P. Uriel, London, 1778) Ch. IV, p.32.

⁴ As per Stephen J. in *R. v. Davis* (1881) 14 Cox. C.C. 563 at 564.

⁵ *D.P.P. v. Beard* [1920] All. ER. 21 at 24.

should only be convicted for his voluntary and intentional criminal conduct.⁷ If he is too intoxicated to have the required mental element for an offence, the principle of culpability implies that he should not be convicted. Yet violent criminal behaviour while drunk creates much social harm and insecurity, which the law seeks to prevent.⁸ The Common law settled the principle that though the intoxicated offender committed the offence in a state having neither understanding nor memory yet his liability rests upon the condition occasioned by himself what he could avoid.⁹

7.2.1 Intoxication Aggravates the Offence

Initially, in English law, the principle of culpability of an intoxicated offender was very simple. Intoxication was not regarded as a defence; rather it was an aggravation of the offence.¹⁰ The early ecclesiastical law approved the doctrine of aggravation¹¹ and the classic distinguished authorities broadly asserted that voluntary drunkenness must be considered an aggravation rather than a defence.¹² The principle was confirmed in *R. v. Feogossa*,¹³ the first reported case dealing with the liability of an intoxicated offender,¹⁴ and *Beverley's case*.¹⁵ The reason behind this concept was that the offender has voluntarily brought about a condition which is wrong both morally and legally so it was not acceptable as a defence to a crime of which it was the predisposing cause.¹⁶ This concept is in line with the general legal principle that no one should be allowed to take advantage of the crime he committed, in this case the crime of being intoxicated.

7.2.2 How does it aggravate?

Aggravation of an offence means to inflict a more severe punishment than in the ordinary case. Now the question arises, how does intoxication aggravate the guilt of the offender and we know that a court cannot sentence the offender beyond the maximum

⁶ Gough, Stephen, "Intoxication and Criminal Liability: The Law Commission's Proposed Reforms" 112 (1996) *LQR* 335 at 335.

⁷ Law Commission Report, *Legislating the Criminal Code: Intoxication and Criminal Liability* (Law Com. No.229, 1995) Para. 1.15.

⁸ Bayles, Michael D, *Principles of Law: A Normative Analysis* (D. Reided Publishing, 1987) p.324.

⁹ *R. v. Feogossa* (1551) 1 Plowden 1 at 19; 75 ER 1 at 31.

¹⁰ Holdsworth, W. S., *History of English Law* (Mathew & Co. Ltd., London, 1932) p.442.

¹¹ McCord, David, "The English & American History of Voluntary Intoxication" 11(1990) *JHL* 372 at 373.

Singh, R. U., "History of the Defence of Drunkenness in English Criminal Law" 49 (1933) *LQR*. 528 at 528.

¹² Blackstone, *Commentaries* (15th ed., A. Starhan, London, 1809) Vol. IV, p.25.

Russell, W.O., *A Treatise on Crimes and Misdemeanour* (J. Butterworth, London, 1819) Vol. I, p.11.

Stewart, J. A., *Notes on the Nicomachean Ethics of Aristotle* (Clarendon Press, Oxford, 1892) Vol. I, Book III, Ch.5, p.272.

¹³ *R. v. Feogossa* (1551) 1 Plowden 1 at 19; 75 ER 1 at 31.

¹⁴ Singh, R. U., 1933, op. cit. p.530.

McCord, David, 1990, op. cit. p.374.

¹⁵ *Beverley's case* (1603) 4 Co. Rep.123 at 125; 76 ER 1118 at 1123.

¹⁶ Turner, J. W. Cecil, *Kenny's Outlines of Criminal Law* (19th ed., Cambridge University Press, 1966) p.62.

Fitzgerald, P. J., *Criminal Law and Punishment* (Clarendon Press, Oxford, 1962) pp.143-44.

punishment provided for the offence he has committed whether intoxicated or sober?¹⁷ The question may be answered by taking into account the decision of the court in *R. v. Feogossa*.¹⁸ The court held that the offender is liable for double punishment, one for intoxication and the other for the offence committed by him. Moreover, there are certain offences created by statutes in which liability of the intoxicated offender has been aggravated,¹⁹ and there are many other statutory provisions under which intoxication is itself part of the offence created.²⁰

Under certain circumstances intoxication makes the crime more serious than it otherwise would have been.²¹ For example, under section 6(1) of Road Traffic Act 1960, it is an indictable offence to drive when unfit through drink or drugs. Under section 4(6) a constable may arrest a person without warrant if he has reasonable cause to suspect that the person is unfit to drive through drink or drugs. In addition, in societies, like Britain, where intoxication itself is not an offence and hence not liable to punishment, the court may disregard any mitigating factor which is to be taken into account had the offender been sober and sentence the intoxicated offender the maximum provided under the law to deter such offenders and by way of aggravating their guilt. Even those who deny the concept of aggravating²² admit that intoxication of the offender might lead the judge to inflict a heavier sentence than he otherwise would have inflicted.²³

In the second phase of development of the concept, the idea that intoxication can aggravate the offence lost its place. The offender was treated like a sober man and his intoxicated condition could not provide him any defence.²⁴ The opinions of a number of distinguished English writers published in the 17th and the 18th century discarded the concept of aggravation. According to Bacon,²⁵ Hale,²⁶ and Hawkins²⁷ drunkenness does

¹⁷ Singh, R. U., 1933, op. cit. p.531.

¹⁸ *R. v. Feogossa* (1551)1 Plowden 1; 75 ER 1.

¹⁹ Stewart, S. W., *A Modern View of the Criminal Law* (Pergamon Press, London, 1969) p.117.

For example, an offence under section 2(1) of Licensing Act 1902, being in charge of a child under the age of seven years or of a fire arm whilst under the influence of drink and a number of such instances have been mentioned under Section 12 of Licensing Act 1872.

²⁰ Turner, J. W. Cecil, 1966, op. cit. p.65.

²¹ Jefferson, Michael, *Criminal Law* (3rd ed., Pitman Publishing, London, 1997) p.253.

²² Singh, R. U., 1933, op. cit. p.531.

²³ *Ibid.* p.532.

²⁴ McCord, David, 1990, op. cit. p.373.

²⁵ Bacon, Francis, Sir, *Elements of Law of England* (J. Moore, London, 1636) p.25.

²⁶ Hale, Mathew, Sir, *The History of the Pleas of the Crown* (E. & R. Nutt, London, 1736) Vol.1, p.32.

²⁷ Hawkins, W., *Hawkins's Pleas of the crown* (E. and R. Nutt, London, 1728) vol. 1, Ch.1, s.6.

deprive men of reason and puts them into perfect but temporary insanity during which they may commit crimes, but such a person shall have no privilege by his voluntary contracted madness and he shall have the same judgement as if he were in his right senses. However, it was recognised that involuntary intoxication or permanent insanity caused by habitual drinking could be taken as an excuse.²⁸

The late 18th century seems to be era of conflict between two views; whether intoxication aggravates culpability or it does not affect it.²⁹ The latter survived in this conflict and the former died out. In *R. v. Henry Crisp*³⁰ Channell J. said that the court does not view with favour the imposition of a sentence on an intoxicated offender severer than is usually passed for the given offence. This statement buried the concept that intoxication can aggravate the liability and at the same time a new view that intoxication can excuse the culpability emerged and a new struggle started.³¹

7.2.3 From Aggravation to Defence

The plea of intoxication as a common law defence to a crime is a comparatively recent one. Until early in the 19th century the common law rule was that intoxication is never a defence,³² but thereafter as a result of judicial decisions it has been allowed as a defence in certain cases.³³ This view can be supported by the evidence that there was no lenient provision regarding liability of intoxicated offender in English criminal law.³⁴ The recognition of intoxication as a defence developed slowly over a number of centuries. Hale appears to be the first to qualify the general principle that intoxication could not excuse the offender.³⁵ He exempted, from the general principle, involuntary intoxication and permanent insanity caused even by the voluntary consumption of intoxicants.³⁶

7.2.4 Defence of Intoxication in the 19th century

The early 19th century witnessed a gradual relaxation in the severity of common law principle to refuse intoxication as a defence to a criminal charge.³⁷ *R. v. Grindley* seems

²⁸ Hale, Mathew, Sir, 1736, op. cit. F.N. 26, Vol.1, p.32.

²⁹ McCord, David, 1990, op. cit. p.373.

³⁰ *R. v. Henry Crisp* (1912) 7 Cr. App. R. 173.

³¹ McCord, David, 1990, op. cit. p.373.

³² Per Lord Birkenhead in *DPP v. Beard* [1920] AC 479 at 495.

³³ Singh, R. U., 1933, op. cit. p.528.

Per Lord Birkenhead in *D.P.P. v. Beard* [1920] All. ER 21 (Rep).

³⁴ Singh, R. U., 1933, op. cit. p.530

³⁵ *Ibid.* at p.534.

³⁶ Hale, Mathew, Sir, 1736, op. cit. F.N. 26, Vol.1, p.32.

³⁷ Singh, R. U., 1933, op. cit. p.536.

Per Lord Birkenhead L.C. in *D.P.P. v. Beard* (1920) AC 479 at 495.

to be the first reported judicial decision in which intoxication was put forward as a defence.³⁸ Holroyd J. held, evidence that the offender was intoxicated at the time of commission of the offence is an appropriate fact to be taken into consideration.³⁹ Being concerned about the mental condition of the intoxicated offender and his incapacity to form an intention, the courts adopted a lenient and favourable view towards his criminal liability. The present day principle of an intoxicated offender is based upon the same grounds.⁴⁰ In the second quarter of the 19th century the English courts were of the opinion that intoxication could provide a defence to a criminal charge only where it resulted into permanent insanity of the accused.⁴¹

In the same period a new turn in the policy of English courts, while dealing with the cases of intoxicated offenders, may be witnessed. In *Marshall's* case, Park J. directed the jury that they might take into account the defendant's intoxication when considering whether he acted under a bona fide apprehension that his person or property was about to be attacked.⁴² The direction shows that intoxication may have some relevance to the intention of the accused, even if limited to the cases of self-defence.⁴³ In *Pearson's* case, Park J. held that though the voluntary intoxication is no excuse for crimes, however it may be taken into account to explain the intention of the accused in case of violence committed on sudden provocation.⁴⁴

The cases mentioned above imply that the courts have indirectly taken intoxication leading to mitigation of punishment. The danger hidden in the principle was realised by the courts very soon. The principle was overruled by Park J., in *R. v. Carroll*. He said that intoxication could not be taken into account while determining the intention of the offender. Criticising the decision of *R. v. Grindley* he remarked that "there would be no safety to human life if it were to be considered as law."⁴⁵ Comparison of the cases of *Marshall* and *Carroll* reveals that Park J treated both the cases inconsistently. It suggests

³⁸ Per Lord Birkenhead L.C. in *D.P.P. v. Beard* (1920) AC 479 at 495.

³⁹ Referred to in *R. v. Carroll* (1835) 7C&P 145; 173 ER 64. Cited by Singh, R. U., 1933, op. cit. p.537.

⁴⁰ McCord, David, 1990, op. cit. p.376.

⁴¹ Per Holroyd J in *Burrow's Case* (1823) 1 Lewin 75; 168 ER 965 and *Rennie's Case* (1825) 1 Lewin 76; 168 ER 965. Also Per Lord Birkenhead L.C. in *D.P.P. v. Beard* (1920) AC 479 at 496.

⁴² *Marshall's Case* (1830) 1 Lewin 76; 168 ER 965.

⁴³ Beck, Stanley M., & Parker, Graham E. "The Intoxicated Offender: A Problem of Responsibility" 44 (1966) *Can. Bar. Rev.* 563 at 576.

⁴⁴ *Pearson's Case* (1835) 2 Lewin 145; 168 ER 108.

⁴⁵ *R. v. Carroll* (1835) 7 C&P. 145; 173 ER. 64.

that there was no fixed law on the point and judges were groping for a fair and firm principle to deal with the problem of the intoxicated offender.⁴⁶

In 1837, it was held that drunkenness is no excuse for any crime but it may be considered towards the fact that the passion of an intoxicated person was more easily excitable than that of a sober person.⁴⁷ There are a number of other cases dealing with intoxication, intention of the offender in such state and his criminal liability. Among these cases are *R. v. Meakin*,⁴⁸ *R. v. Cruse*,⁴⁹ and *R. v. Monkhouse*⁵⁰ where intoxication was considered an important factor to determine the capacity to form intention. The jury was directed that though intoxication did not constitute a defence, they must consider whether the defendant was so intoxicated that he was unable to form the required intention. In *R. v. Meakin*, Anderson B. directed the jury that if the defendant used a deadly weapon in the commission of homicide the fact that he was intoxicated has no effect on his intention.⁵¹ It seems that the law during this period was uncertain as it is impossible to reconcile the directions.⁵²

In the middle of the 19th century, English courts started considering intoxication a substantial element affecting the intention of the accused. In *R v. Moor*,⁵³ the defendant was charged for attempting to commit suicide. She jumped into a well, and was rescued. Jervis, C. J. directed the jury that if the defendant was so drunk as not to know what she was doing, how could she have intended to destroy herself. It shows that in this period only gross intoxication which rendered the accused incapable of forming an intention or acting voluntarily was admissible as a defence.⁵⁴

In *R. v. Davis*,⁵⁵ admitting that intoxication is no excuse to crimes, it was held that intoxication amounting to temporary insanity could be treated as defence to a crime. This particular view stood in contrast to the cases of *Burrows*,⁵⁶ and *Rennie*,⁵⁷ where

⁴⁶ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.576.

⁴⁷ Per Baron Park, *R. v. John Thomas* (1837) 7 C&P 817 at 818; 173 ER 356 at 358.

⁴⁸ *R. v. Meakin* (1836) 7 C&P 297; 173 ER 131.

⁴⁹ *R. v. Cruse* (1838) 8 C&P 541; 173 ER 610.

⁵⁰ *R. v. Monkhouse* (1849) 4 Cox. CC 55.

⁵¹ *R. v. Meakin* (1836) 7 C&P 297; 173 ER 131.

⁵² Beck, Stanley M., "The Intoxicated Offender" 44 (1966) *Can. Bar. Rev.* 563 at 575.

⁵³ *R. v. Moor* (1852) 3 Car. & K 319; 175 ER 571.

⁵⁴ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.577.

⁵⁵ Per Stephen J. in *R. v. Davis* (1881) 14 Cox CC 563.

⁵⁶ *Burrow's Case* (1823) 1 Lewin 75; 168 ER 965.

intoxication was recognised as a defence only where it caused permanent insanity. It appears that there was no fixed governing principle concerning voluntary intoxication and resulting criminal liability and the policy on the point remained in a state of flux. In *R. v. Stopford*⁵⁸ the rule was further relaxed and merely incapacity to form intention, in intoxicated state, was declared sufficient for defence. In *R. v. Doherty* it was held that although drunkenness cannot be taken as an excuse for a crime, yet when the intention of the offender is one of constituent elements of the crime, the fact that he was drunk may be taken into account while considering whether he formed intention necessary to constitute the crime.⁵⁹ This particular decision is related to the concept of dividing offences into basic and specific intent. This distinction and its impact on the criminal liability of the offender shall be discussed in the next chapter.

7.2.5 Defence of intoxication in the 20th century

The first important case, in the 20th century dealing with intoxication and criminal liability is *R. v. Mead*,⁶⁰ where the accused, in intoxicated condition, caused death of the victim. The trial court found him guilty of murder; the Court of Appeal upheld the verdict by declaring that every person is presumed to intend the natural consequences of his act provided that such presumption can be rebutted by proving that the accused was so intoxicated that he was incapable of knowing the nature and consequences of his act.⁶¹ This was a much broader principle than that which was laid down by Stephen J. in *R. v. Doherty* because its application is more general and not restricted to the offences only where the intention is an essential element of the crime committed. The case remained a leading authority until 1920 when the House of Lords decided *D.P.P. v. Beard*.⁶² The major development in the concept of liability of an intoxicated offender in the 20th century is the division of offences into the offences of specific/basic intent, with intoxication being allowed to negate specific intent but not the basic.

It has been observed that in the early 19th century judicial decisions have relaxed the rule gradually and adopted a more sympathetic attitude towards intoxicated offenders.⁶³ Initially voluntary intoxication was considered as no excuse to a crime then it was taken as an excuse only in the cases where it resulted into permanent insanity. The third step

⁵⁷ *Rennie's Case* (1825) 1 Lewin 76; 168 ER 965.

⁵⁸ Per Brett J. in *R. v. Stopford* (1870) 11 Cox. C.C. 643.

⁵⁹ Per Stephen J. *R. v. Doherty* (1887) 16 Cox. CC 306.

⁶⁰ *R. v. Mead* [1909] 1KB 895.

⁶¹ *Ibid.* at p.899.

⁶² *D.P.P. v. Beard* [1920] All. ER. (Rep.) 21

admits it as a defence in the cases of temporary insanity and finally the intoxication rendering the accused incapable of forming specific intention was declared as a defence to criminal charges.

The basic reason for such relaxation and allowing intoxication as a defence against criminal liability in the view of Sayre is the change of the moral values of English society.⁶⁴ The laws of a society are mirror of the moral standards prevailing in a society at a specific time. When getting drunk was considered morally blameworthy, the absence of intention caused by intoxication was not allowed as a defence to a criminal charge. The bifurcation of legal principles from moral delinquency has led the law to recognise intoxication as a possible defence. Criminality has lost its strong flavour of moral delinquency and intoxication has been allowed as an indirect and limited defence to the offences of specific intent. The theory of change of moral standard is supported by some other writers as well.⁶⁵

By contrast, R.U. Singh does not agree with this theory. He stated that early English law was indifferent to the defence of intoxication because the theory of criminal liability was then too crude and underdeveloped to admit this exception. Later on this defence was not allowed because of the danger to society involved in it. Refinement in the theory and modifications in the law as to insanity, in the 19th century were responsible for the changes in the rigid old rule.⁶⁶ The earlier policy of excluding evidence of voluntary intoxication gave way to the logic of doctrine of *mens rea*, which demands admission of any evidence tending to show that the required knowledge, belief or intention was absent. The result of this approach is that a completely intoxicated person should be acquitted of any crime requiring *mens rea*.⁶⁷ Comparison of both the views concludes that the view of Sayre is more realistic because there is no further development in the basic principles of the criminal liability i.e. criminal liability requires a physical act accompanied by the state of mind of the accused. It is the change in the moral standards which has rendered intoxication an innocent act and allowed the accused to take its benefit.⁶⁸

⁶³ *DPP v. Beard* [1920] AC 479 at 485.

⁶⁴ Sayre, Francis Bowes, "Mens Rea" 45 (1931-32) *Harv. LR.* 974 at p.1013.

⁶⁵ McCord, David, 1990, *op. cit.* p.378.

⁶⁶ Singh, R. U., 1933, *op. cit.* p.537.

⁶⁷ Ashworth A.J., "Reason, Logic and Criminal Liability" 91 (1975) *LQR.* 102 at 113.

⁶⁸ Keiter, M., "Just say no Excuse; The Rise and Fall of Intoxication Defence" 87 (1997) *JCL* 482 at 484.

The courts began to admit the evidence of intoxication relevant to ascertain the mental element for criminal liability. Whatever the reason for the absence of this knowledge or belief, the law was not concerned with it. These changes in the criminal liability of an intoxicated offender reflect the major cultural trends and social values of the society.⁶⁹ At present voluntary intoxication, which negates *mens rea*, can provide a defence to the crimes of specific intent only and if it was involuntary it can provide a defence to all the crimes.⁷⁰ The view that intoxication does not affect culpability, and that it can decrease culpability struggled for supremacy for quite a long time.⁷¹ The ultimate compromise between these two views was provided by *Majewski*⁷² that intoxication could decrease culpability by negating specific intent but it could not affect culpability when the crime required only a basic intent.

7.3 What is meant by involuntary intoxication?

Intoxication may be termed involuntary where the accused consumed intoxicating substance, or it was administered to him without his intention, knowledge or against his will.⁷³ It may be said that two situations result into involuntary intoxication. Firstly, if a person consumes alcohol or drugs, and is unaware of their nature, the consumption is involuntary in the sense that it is not a conscious decision on his part to use intoxicant.⁷⁴ Secondly, where he becomes intoxicated through taking drugs in accordance with medical prescription.⁷⁵ Intoxication resulting from an overdose or use of drugs inconsistent to the directions of the physician may be treated as voluntary.⁷⁶ A person requiring medical treatment with a certain drug has little choice but to follow the doctor's prescription. Another situation may be treated as involuntary intoxication where the accused took a non-dangerous drug, provided he was not reckless in taking it.⁷⁷

The classic case of involuntary intoxication may be where intoxication is brought by a third party, as where the accused was forced to consume intoxicant, or he was deceived

⁶⁹ *Ibid.*

⁷⁰ Smith, J. C., *Smith and Hogan Criminal Law* (10th ed., Butterworths, 2002) pp.241-42.

⁷¹ McCord, David, 1990, op. cit. p.373.

⁷² *R. v. Majewski* [1977] AC.443

⁷³ Law Com. No. 229, 1995, op. cit. Para 1.31.

Seago, Peter, *Criminal Law* (4th ed., Sweet & Maxwell, London, 1994) p.183.

⁷⁴ Mewtte, Alan W. & Manning, Morris, *Criminal Law* (2nd ed., Butterworths, Toronto, 1985) p.203.

⁷⁵ Smith, J. C., 2002, op. cit. p.240.

Turner, J.W. Cecil, 1966, op. cit. p.62

Allen, Michael J., *Textbook on Criminal Law* (6th ed., Blackstone Press Ltd., 2001) p.162.

⁷⁶ Card, Richard, *Card, Cross, and Jones Criminal Law* (15th ed., Butterworths, 2001) p.619 & 634.

⁷⁷ Allen, Michael J., *Textbook on Criminal Law* (4th ed., Blackstone Press Ltd., 1997) p.146.

by his friends or enemies.⁷⁸ What prevents the intoxication from being voluntary in the cases of fraud is not the tricking of the other person but the innocent mistake of fact by one made drunk.⁷⁹ However, if the accused has the knowledge of likelihood that his drink might be spiked by his friends and is negligent in not taking steps to ensure that it did not contain alcohol or drugs the intoxication should not be treated as involuntary.⁸⁰ Involuntary intoxication includes all instances in which, as a result of a genuine mistake as to the nature or character of the liquor or drug, it resulted from taking something not known to be capable of producing such a result.⁸¹ However, it should be remembered that a person who knows that he is taking intoxicant is not entitled to claim that the resulting intoxication is involuntary merely because he does not know the precise nature or strength of the intoxicant.⁸² Simply, intoxication will be involuntary if the accused cannot be held liable for it.

7.4 Involuntary Intoxication as a Defence to Criminal Liability

Intoxication is one of the excuse defences that operates as a denial of existence of an element of a crime such as intent or voluntary conduct.⁸³ The defence of involuntary intoxication is analogous to insanity; however the defendant has to establish that the use of intoxicant created a state of mind where he was unable to control his physical movements and to use his intellect or to form necessary *mens rea*.⁸⁴ Involuntary intoxication which merely impairs the defendant inhibitions cannot provide a defence to a criminal charge.⁸⁵

Peter Seago stated that, "involuntary intoxication could be raised as a defence to any crime of basic or specific intent, as evidence that the accused did not, in fact, form the necessary *mens rea* of the offence."⁸⁶ It can only be considered as a defence if it negates the intent and to ascertain that fact the evidence of the nature of the intoxication is to be taken into account. In *D.P.P. v. Beard*,⁸⁷ the court held that "The evidence of drunkenness which renders the accused incapable of forming the specific intent

⁷⁸ Card, Richard, *Card, Cross and Jones Criminal Law* (14th ed., Butterworths, London, 1998) p.618. Jefferson, Michael, 1997, op. cit. p.252.

⁷⁹ Perkins, R. M. & Boyce, R. N., *Criminal Law* (3rd ed., The Foundation Press, N.York, 1982) p.1002.

⁸⁰ Mewtte, Alan W. & Manning, Morris, 1985, op. cit. p.203.

⁸¹ Perkins, R. M. & Boyce, R. N., 1982, op. cit. p.1002.

⁸² *R. v. Allen* [1988] Crim. LR. 698.

⁸³ Mewtte, Alan W. & Manning, Morris, 1985, op. cit. p.193.

⁸⁴ Moore, Michael, *Placing Blame* (Clarendon Press, Oxford, 1997) p.485.

⁸⁵ Spencer, J.R., "Involuntary Intoxication as a Defence" 53 [1994] *CLJ* 6 at 6.

⁸⁶ Seago, Peter, 1994, op. cit. pp.183-84.

⁸⁷ *D.P.P. v. Beard* [1920] AC.479

essential to constitute the crime should be taken into consideration with other facts proved in order to determine whether or not he had this intention.”⁸⁸ However, the condition, even if negates *mens rea*, is not a defence to the crimes of negligence and strict liability.⁸⁹

It is claimed that merely loss of inhibition caused by involuntary intoxication does not constitute a defence though it may be a matter for mitigation of punishment imposed.⁹⁰ However, it is important to note that involuntary intoxication cannot be considered a mitigating factor in general, because in certain cases it is binding on the court to sentence the offender the mandatory punishment. For example, homicide committed under excused circumstances may be treated as manslaughter instead of murder but the punishment of manslaughter on conviction (where the offender had already been convicted of a serious offence) is mandatory life imprisonment, the court has no jurisdiction to mitigate it.⁹¹ If the court sentences him with mandatory life imprisonment, his intoxication has not been taken into account even for an offence of specific intent. This discards the *Majewski* rule as laid down by the House of Lords. On the other hand, if the court takes into account his intoxication and resulting mental condition, to ascertain his liability, it will be contrary to the express statutory provision.

Normally, involuntary intoxication could not provide a defence if it has not rendered the accused incapable of forming intent required for the offence.⁹² However, English courts are inclined to consider his actual intention at the time of commission of the offence. In *R. v. Sheehan*,⁹³ it was held that in cases where drunkenness and its possible effects upon the defendant's *mens rea* is an issue, the jury should not be asked to decide whether a defendant through drunkenness was incapable of forming a specific intention; they should be warned that a drunken intention is nevertheless an intention and subject to that, having regard to all the evidence, they should be asked whether they are satisfied that the defendant, at the material time, in fact had the requisite intent.⁹⁴ It has also been suggested that a drunken offender has intention similar to a sober man,

⁸⁸ *Ibid.* at pp.501-502.

⁸⁹ Wilson, William, *Criminal Law Doctrine and Theory* (Longman, London, 1998) p.253.

⁹⁰ Spencer, J.R., 1994, *op. cit.* p.6.

⁹¹ Crime (Sentences) Act 1997, Section 2.

⁹² Robinson, Paul H., *Criminal Law Defences* (West Publishing Co., 1984) Vol. II, p.341.

⁹³ *R. v. Sheehan* [1975] 1 WLR. 739.

⁹⁴ *Ibid.* at p.744.

intoxication has only removed his inhibitions and freed his repressed desires and intentions thus his intention while drunk is real intention.⁹⁵ His inhibited and self-controlled desires are converted into actions. It would not be a defence to a criminal charge if the defendant had the necessary intent when the offence was committed, even though the intent arose out of circumstances for which he was not to be blamed.⁹⁶

There may, however, be cases in which defendant's intoxication give rise to doubts as to whether he possessed the mental element of the offence charged. These cases are dealt with in different ways according to the offence involved. Some time, the defendant's intoxicated state is taken into account, with the other circumstances, in determining whether he had the relevant state of mind; but in other crimes the defendant's mental state, and hence his liability, are determined as though he had not been intoxicated.⁹⁷

7.5 Use of Non-Dangerous Drugs and Criminal Liability

How does self-induced intoxication by reason of taking a soporific or sedative drug that generally is not likely to cause unpredictability or aggressiveness affect the liability of the offender? This particular question has been discussed in *R. v. Hardie*,⁹⁸ 'D' took a number of Valium tablets to calm himself when the woman with whom he had been living in a flat told him to leave the flat. The woman to whom the tablets belong told him that he could take as many as he liked, as it would do him no harm. 'D' later returned to the flat in an intoxicated state apparently caused by the tablets he had taken and set the flat on fire.

He was charged with criminal damage with intent to endanger life under section 1(2) and 1(3) of the Criminal Damage Act, 1971. In his defence he pleaded that he did not have necessary *mens rea* due to intoxication arising from taking Valium. The defence was that Valium was taken for the purpose of calming the nerves only, it was an old stock and that the appellant was told it would do him no harm. Neither was it known generally nor to the accused that taking of Valium in the quantity taken would render a

⁹⁵ Comments, "Intoxication as a Criminal Law Defence" 55 (1955) *Columb. L. Rev.* 1210 at 1211.

⁹⁶ *R. v. Kingston* [1994] Crim. LR. 846.

⁹⁷ The Law Commission, *Intoxication and Criminal Liability* (Consultation Paper No.127, 1993) Para.2.2.

⁹⁸ *R. v. Hardie* [1985]1 WLR. 64.

person aggressive or incapable of appreciating risk to others or have the side effects such that its self administration would itself have element of recklessness.⁹⁹

The trial court convicted the offender for the offences but the Court of Appeal quashed the conviction and held that "it is true that Valium is a drug and it was taken deliberately and not taken on medical prescription, but the drug is in our view, wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness." The decision suggests that where the accused was drunk, or was under any other excusing condition without his fault, he shall not be held criminally liable even recklessly. The decision may be criticised on a number of grounds:

Firstly, it is a case where the accused has taken a drug without a doctor's prescription relying on the statement of the woman. An offender should be held voluntarily intoxicated where he has taken the drug without a doctor's prescription or exceeded the prescribed dosage. Section 6 (5) of Public Order Act, 1986 provides a defence only where intoxication was caused solely by taking drugs in the course of medical treatment. The phrase 'in course of medical treatment' clearly shows that a medical practitioner must have prescribed the medicine and it was taken following his directions. Where the accused has recklessly ignored or violated the doctor's instruction, as if he exceeds the prescribed dosage or thereafter taken alcohol or some other drug contrary to medical advice, his intoxication will be voluntary.¹⁰⁰ In *R. v. Majewski*, Lord Elwyn-Jones L.C. opined that deliberately taking drugs without medical prescription or wilful consumption of alcohol cannot excuse the offender from criminal liability, even if at the time of the act under question he was intoxicated.¹⁰¹

Secondly, there is no specific criterion to divide drugs into dangerous and others because drugs may have different effects on the conduct of different human beings, if taken without medical prescription. Moreover, drugs can be dangerous even if used on prescription to cure a disease.¹⁰² The line between sedative and aggressive drugs is not necessarily a clear-cut one. Indeed Valium, held to be non dangerous, causes aggressive

⁹⁹ *Ibid.* at pp. 69-70.

¹⁰⁰ Card, Richard, 1998, op. cit. F.N. 78. p.619.

¹⁰¹ *R. v. Majewski* [1977] AC 443 at 474

¹⁰² Bayer, R. & Oppenheimer, G.M., (eds) *Confronting Drug Policy* (Cambridge University Press, 1993)p.79.

behaviour in some people.¹⁰³ In addition, it is strange that the determination whether a drug is dangerous or not is left to the discretion of a judge, without the benefit of advice of the specialists in this field, the pharmacists.¹⁰⁴ It is becoming more and more complicated to differentiate between dangerous and non dangerous drugs. In a case in Edinburgh a woman killed her five years old daughter with a claw hammer after an overdose of paracetamol.¹⁰⁵ The only plausible solution is that the jury should have been left to consider whether the defendant was reckless in taking the drug.¹⁰⁶

Another case on the same point of law, recklessness, has been decided in a different way. *Elliott v. C (a minor)*,¹⁰⁷ is a case, where the respondent, a school girl of 14 years of age, not sleeping the whole night, entered a garden shed, found white spirit, poured it on to carpet of the shed and ignited it. She was charged under section 1(1) of Criminal Damage Act 1971. The trial magistrate found her not guilty on the grounds of her age, immature understanding, lack of experience of dealing with inflammable spirit and the fact that she must have been tired and exhausted at that time. The Court of Appeal held her liable for criminal damage on the basis of her recklessness. The House of Lords also refused a petition for leave to appeal.¹⁰⁸ The court did not take into account the defendant's age and personal characteristics in determining the obviousness of risk. The decision has created an anomaly, *Hardie* could have been held liable for his reckless behaviour if the court had taken into account the principle laid down in the *Elliott* case and applied the provisions of the relevant section of the Criminal Damage Act,¹⁰⁹ because recklessness has the same meaning through out the section.¹¹⁰

However, we must now note the significant decision of the House of Lords in *R. v G*,¹¹¹ a case of similar nature where two boys aged 11 and 12 respectively went camping without their parent's permission. In the middle of night they entered the back yard of a shop, set fire to some news papers and threw them under a large plastic dustbin and left

¹⁰³ Law Com. No.229, 1995, op. cit. Para 1.38.

¹⁰⁴ Jefferson, Michael, 1997, op. cit. p.256.

¹⁰⁵ (<http://news.bbc.uk>) 16 October, 2003.

¹⁰⁶ *R. v. Hardie* (1985) 80 Cr. App. R. 157.

¹⁰⁷ *Elliott v. C (a minor)* [1983] 2 All. ER. 1005.

¹⁰⁸ [1983] 1 WLR. 951.

¹⁰⁹ Section 1(1) of the Act states that any person who without lawful excuse destroys or damages any property with an intention to destroy or damage or being reckless as to whether any such property would be destroyed or damaged, intending by such destruction to endanger the life of another, shall be guilty of an offence.

¹¹⁰ Per Lord Diplock in *R. v. Caldwell* [1981] 1 All. ER. 961 at 964.

without putting out the fire. They did not realise the risk that the fire would spread. The fire spread and the shop was burnt causing £1 million worth of damage. The boys were charged under section 1(1) and 1(3) of Criminal Damage Act 1971. They were convicted on trial and their appeals to the Court of Appeal were dismissed on the principle of *Caldwell* and *Elliott* that where there was an obvious risk of damage, it was immaterial that the defendant themselves had not foreseen the risk. The question whether there was an obvious risk of property being destroyed or damaged was to be determined by reference to a reasonable person and not by reference to person endowed with the defendant's characteristics. Allowing their appeal the House of Lords overruled the principle laid down in the above mentioned cases and held that foresight of consequences is a necessary ingredient of recklessness in the context of section 1 of the Act.¹¹² In order to convict the offender under the section it must be proved that he acted recklessly where he was aware of the risk and it was unreasonable to take that risk. If the defendant due to his age and personal characteristics genuinely did not foresee the risk involved, he could not be held liable under the section. The case adopted a subjective approach instead of objective one and now it is necessary to look at the matter in the light of how it would have appeared to the defendant. The subjective approach may cause certain problems particularly in cases of voluntary intoxication where the defendant is deprived of ability to foresee the risks involved in his conduct. However, the problem can be solved by applying the *Majewski* approach that voluntary intoxication is generally no defence to crimes of basic intent.¹¹³ (as to which, see Chapter-8 below).

7.6 Capacity to form Intent in Intoxicated Condition and Criminal Liability.

In criminal proceedings, if it is proved that the necessary intent was present when the offence was committed, a defendant does not have open to him a defence of involuntary intoxication. The principle has been set in *R. v. Kingston*,¹¹⁴ the defendant raised the defence of involuntary intoxication but there was no suggestion that he lacked *mens rea* for the offence in question. The trial judge directed the jury that if they thought that the accused had the necessary *mens rea*, then they should convict, since an intoxicated intent was still an intent. The Court of Appeal quashed his conviction on the ground that

¹¹¹ *R. v G* [2004] 1 AC 1034.

¹¹² *Ibid.*

¹¹³ Per Lord Elwyn-Jones L.C. in *R. v. Majewski* [1977] AC 443 at p.471.

¹¹⁴ *R. v. Kingston* [1994] 3 All. ER. 353.

he had formed an intention to indecent assault after being involuntarily intoxicated which he would not have formed had he been sober.¹¹⁵

The decision of the Court of Appeal led to the conclusion that the accused would have a defence even if he knew what he was doing, and understood the circumstances making it an offence provided that he would not have behaved in such a way had he been sober. This particular decision is contrary to the established principle of *mens rea* and the rule laid down in *R. v. Sheehan*.¹¹⁶ Where the defendant is capable of forming intention to commit a crime, it is not reasonable to presume that he has not formed; rather more reasonable is to presume that he has formed the required intention.

The ruling of the Court of Appeal that intent to commit an indecent assault is not criminal if formed in circumstances of loss of self control induced by a spiked drink was criticised on a large scale.¹¹⁷ The House of Lords reversed the Court of Appeal's decision reaffirming the rule that involuntary intoxication would amount to defence only if it negates *mens rea*.¹¹⁸ The decision retains the principle that in the presence of *mens rea* the defendant shall be convicted of an offence notwithstanding that it was brought about by the surreptitious administration to him of drink or drug.

It can be summed up that involuntary intoxication could only affect criminal liability if it either gave rise to temporary insanity or rendered the accused incapable of having necessary *mens rea*.¹¹⁹ Where intoxicating substance merely reduces or eliminates inhibitions, courts are unanimous in holding that no defence is created. This rule has been criticised in that punishing a man for doing while drunk what he would not have done while sober is in effect punishing him for getting drunk.¹²⁰ In the defence of the rule, however, it can be argued that intoxicated person usually causes harm that can be reduced effectively by punishing him for causing it and it is not punishing him for getting drunk.¹²¹ Further, one who releases a furious dog on a helpless person is responsible not because he controlled the animal's actions in causing harm but because

¹¹⁵ *Ibid.* p.377.

¹¹⁶ *R. v. Sheehan* [1975] 1WLR 739.

¹¹⁷ For Example See: Spencer, J. R., "Involuntary Intoxication as a Defence" 54 [1995] *CLJ*. 12 and Sullivan, G.R. "Involuntary Intoxication and Beyond" [1994] *Crim .LR*. 272.

¹¹⁸ [1994] 3 *WLR*. 519.

¹¹⁹ Perkins, R. M. & Boyce, R. N., 1982, *op. cit.* p.999.

¹²⁰ Loewy, Arnold H., *Criminal Law* (West Publishing Co. ST. Paul, Minn., 1975) p.240.

¹²¹ Cross, Rupert, "Blackstone v. Bentham" (1976) 92 *LQR*. 516. at 526.

he voluntarily forfeited his control over the dog.¹²² The liability of an intoxicated offender can be supported on the same ground.

7.7 Is it Possible to Counterfeit the Defence of Involuntary intoxication?

The defence of involuntary intoxication is an easy defence, which would be open to abuse.¹²³ Because burden of introducing a defence for consideration is comparable to a 'burden of pleading' in a civil trial; it means simply that if a party wants to raise an issue it must say so. The party bearing the burden of pleading on a matter is a party who will benefit from raising the issue. In context of criminal law defences, that party is generally the defendant.¹²⁴ The burden of pleading is not exactly a burden and certainly not a true burden of proof. There is no significant quantum of evidence that the defendant must produce to discharge the burden. Any evidence, even a bare claim will be sufficient to raise the issue of defence.¹²⁵

The burden of proving requisite intention is always on the prosecution notwithstanding the fact that the defence is using evidence of intoxication to establish a lack of intent.¹²⁶ It is not for the defence to prove the innocence of the accused rather the creation of a reasonable doubt either by the evidence of the prosecution or the defence as to his guilt will be sufficient for the acquittal.¹²⁷ So in this particular case it will be the duty of the prosecution to prove the capacity of the accused to form intention and not the defence to prove his incapacity.

The idea that the defence of intoxication is an easy defence to be counterfeited and variation of intoxication's effects on human behaviour is not a new one, earlier jurists were well aware of it. Blackstone apprehended this possibility and emphasised that the law should not take it into account while determining the criminal liability of the offender. He said, "but the law of England, considering how easy it is to counterfeit this excuse and how weak an excuse it is, (though real) will not suffer any man thus to privilege one crime by another."¹²⁸ Hale stated that to prove the guilt of the intoxicated is a matter of great difficulty, partly because the condition can easily be fabricated and partly from the variety of its degrees, whereof some are sufficient, and some are insufficient to excuse the offender.¹²⁹

¹²² Keiter, M., 1997, op. cit. p.499.

¹²³ Spencer, J.R., 1994, op. cit. p.9.

¹²⁴ Robinson, Paul H., 1984, op. cit. Vol. II, p.12.

¹²⁵ *Ibid.* p.13.

¹²⁶ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.597.

¹²⁷ Per Lord Sankey L. C. in *Woolmington v. D.P.P.* [1935] AC 462 at 481.

¹²⁸ Blackstone, 1809, op. cit. Vol. IV, p.25.

¹²⁹ Hale, Mathew, Sir, 1778, op. cit. F.N. 3, Ch. IV, pp.32-33.

The effects of intoxicants differ from person to person; a person may counterfeit the condition of intoxication even if he were sober at the time of commission of the offence. A regular user of alcohol may develop a high tolerance for alcohol and while never appearing grossly intoxicated may use excessive amount of alcohol.¹³⁰ Moreover, the liability of the defendant is just to introduce the defence of intoxication, the burden of rebutting the defence lies on the prosecution, which is comparatively a difficult task.¹³¹

It is very easy for the defendant to assert that his drink has been spiked and it is a hard task for the prosecution to disprove it; and unless disproved it would usually lead to an acquittal, because court could never be certain beyond reasonable doubt that even without involuntary intoxication the defendant would still have acted as he did.¹³² J. R. Spencer mentioning the example of such abuse in the cases of prosecution of drunk drivers who use the tale of spiked drink in their defence says that up to now it has been put forward as a special reason for not disqualifying the drivers on conviction and even in this limited context the higher courts have found it necessary to hedge it about with limitations to prevent abuse.¹³³

Conclusion

It can be concluded that involuntary intoxication *per se* should not constitute a defence where the defendant remains able to control his action and appreciate the wrongfulness of his conduct. This is the rule that has been approved by 'Halsbury's Laws of England' that involuntary intoxication is a defence, even in the crimes of basic intent, provided that it negatives *mens rea* if it does not, it cannot be a defence.¹³⁴ However, it should be kept in mind that the defence of intoxication should not be allowed to be misused by the offenders due to the probability of its easiness to be counterfeited. The only problem while dealing with an intoxicated offender is to ascertain whether intoxication was involuntary.

The next chapter will deal with a more complicated form of intoxication defence in English criminal law i.e. defence of voluntary intoxication.

¹³⁰ Saunders, W. M., "Alcohol Use in Britain: How Much is Too Much?" 43 (1984) *Health Edu. J.* 66 at 68.

¹³¹ *R. v. Stripp* (1969) 69 Cr. App. R. 318.

¹³² Spencer, J. R., "Involuntary Intoxication as Defence" 54 [1995] *CLJ* 12.

¹³³ Spencer, J. R., 1994, *op. cit.* p.6.

¹³⁴ Hailsham, Lord of St. Marylebone, *Halsbury's Laws of England* (4th ed., Butterworths, London, 1990) Vol. 11(I) Para 29, p.35.

CHAPTER 8 Voluntary Intoxication and Criminal Liability

8.1 Introduction

The focus of inquiry into criminal liability of an offender is ordinarily his state of mind at the time of commission of an offence.¹ Intoxication poses problems because it can result in an inability of the accused to form required state of mind and hence allowing him to escape punishment for an act otherwise a crime. Requirement for the mental element of the act leans in favour of an intoxicated offender, whereas balance of practical and utilitarian concerns is tilted towards protection of society from such harm. The criminal law has to reconcile the two competing demands of the social protection and justice to the accused.² This chapter presents a fundamental analysis of key concepts of English legal doctrine in this area. It will be examined how English law entertains the complex situation where intoxication was brought about by the offender willingly. It will also be ascertained whether the rules applied in such cases are consistent, logical, reasonable and uniform.

8.2 Voluntary Intoxication Defined

Voluntary intoxication is caused by any substance which the defendant knows, or ought to know, have tendency to cause intoxication and which he knowingly consumed or allowed to be introduced into his body regardless of the fact that whilst taking it he was ignorant of its precise strength.³ Voluntary intoxication is not limited to those instances in which intoxication was desired or intended but includes all the instances where a person can be blamed for it;⁴ even though the effect of the amount of intoxicant taken is much greater than would have been expected by him.⁵ Intoxication will be presumed to be voluntary unless some special circumstances are proved to render it involuntary.⁶

8.3 Voluntary Intoxication as a Defence to Criminal Liability

The modern maxim "voluntary intoxication is no defence" is so universally accepted as not to require the citation of cases.⁷ This legal rule reflects the belief that morally a drunken offender is at least as bad as, if not worse than, a sober one and thus should be treated as harshly or more so.⁸ In contemporary English law where the existence of

¹ Colvin, Eric, "A Theory of the Intoxication Defence" 59 (1981) *Can. Bar. Rev.* 750 at 753.

² Wells, Celia, "Swatting the Subjective Bug" [1982] *Crim. LR.* 209 at 211.

³ *R. v. Allen* [1988] *Crim. LR.* 698.

⁴ Perkins, Rollin M. & Boyce, Ronald N., *Criminal Law* (3rd ed., The Foundation Press, 1982) p.1001.

⁵ Card, Richard, *Card, Cross and Jones Criminal Law* (14th ed., Butterworths, London, 1998) p.604.

⁶ Perkins, Rollin M. & Boyce, Ronald N., 1982, *op. cit.* p.1001.

⁷ Fingarette, Herbert & Hasse, Ann Fingarette, *Mental Disabilities and Criminal Responsibility* (University of California Press, 1979) p.77.

Perkins, Rollin M. & Boyce, Ronald N., 1982, *op. cit.* p.1005.

⁸ McCord, David, "The English and American History of Voluntary Drunkenness to Negate Mens rea" 11(1990) *JLH.* 372 at 375.

specific intent is necessary to constitute an offence, voluntary intoxication may be taken into account while determining that intent.⁹ It will provide no defence to criminal acts unless it negates the existence of specific intent. Similarly, it will be no defence in crime of basic intent and Dutch courage cases.¹⁰

8.3.1 Classical View of English Courts

There are number of cases, as discussed in 7.2.4, of the 19th century suggesting that voluntary intoxication was not a defence to any type of criminal charge. The decisions are based upon the principle that the law should not disregard an accused's culpability in causing the condition he offers as a defence.¹¹ As the defendant is liable for his own intoxication so he should not be permitted to benefit from it.¹² Even in the last quarter of the 20th century the courts retained the principle. Lord Salmon, in *Majewski*, stated that a man, who by voluntary intoxication gets himself into an aggressive state, cannot claim immunity from the provisions of criminal law on the ground of intoxication.¹³ The accused might have known before he got drunk, that he was likely when drunk to commit acts inconsistent with the law.¹⁴ It implies that as a matter of principle English courts reject voluntary intoxication as a defence.

8.3.2 Why should Voluntary Intoxication not be a Defence?

Where the defendant's intoxication is voluntary it is unjust that he should escape punishment for the harm he has caused.¹⁵ Allowing the offender benefit of voluntary intoxication is to ignore the critical fact that he may have culpably caused his own intoxication for the commission of the offence.¹⁶ It is potentially dangerous that he should avoid the control imposed by criminal law and would be unreasonable to leave the citizens legally unprotected from unprovoked violence resulting from voluntary intoxication.¹⁷ It is admitted that voluntary intoxication should not be considered as a defence because it is "wholly inconsistent with the concept of reasonable man."¹⁸

⁹ Perkins, Rollin M. & Boyce, Ronald N., 1982, op. cit. p.1008.

¹⁰ Intending to commit a crime and subsequently voluntarily consumption of intoxicating substance, to acquire courage, for commission of the intended crime is called Dutch courage (Per Lord Denning in *Attorney General for Northern Ireland v. Gallagher* [1961] All. ER. 299 at 314.

¹¹ Robinson, Paul H., *Criminal Law Defences* (West Publishing Co., 1984) Vol.1, p.295.

¹² Parker, Graham, "Criminal Law-Mens rea-General Principles-Intoxication as a Defence" 55 (1977) *Can. Bar. Rev.* 691 at 699.

Tuckman, Alan J., "Involuntary Intoxication and Criminal Liability" *Psychiatry & the Law*, July-August 2001, p.2.

¹³ *R. v. Majewski* [1977] AC. 443 at 482

¹⁴ Austin, John, *Lectures on Jurisprudence* (5th ed., John Murray, London, 1885) Vol. I, p.496.

¹⁵ The Law Commission, *Intoxication and Criminal Liability* (The Law Commission Consultation Paper No. 127, 1993) Para.1.3 p. 2.

¹⁶ Robinson, Paul H., 1984, op. cit. Vol. I, p.295.

¹⁷ Per Lord Simon., *R. v. Majewski* [1977] AC. 443 at 476.

¹⁸ Per Lord Taylor CJ in *R. v. Morhall* [1993] 4 All. ER 888 at 893.

Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community.¹⁹ Many members of society would find it abhorrent that a person who has caused the *actus reus* of a crime should escape liability because he has got himself into such a state that he did not know what he was doing.²⁰ The act of voluntary intoxication is itself judged irresponsible and the consequences must be paid for.²¹ Moreover, the threat of punishment may cause a person either to abstain or to moderate his intake of intoxicants and to self control.²²

8.3.3 Logic behind the Principle

Alcohol use is so intimately woven into the fabric of English society that it is very difficult to determine what is and what is not alcohol related.²³ If the intoxicated offenders were to be exempted from criminal liability then there is no need to establish a criminal judicial system.²⁴ Intoxication does not afford any defence to a criminal charge because its dangerous effects on human behaviour are commonly known.²⁵ The general principle of English law is that subject to very limited exceptions self-induced drunkenness is no defence to a criminal charge.²⁶ However, the statement can be justified only if we take into account certain categories of crimes, as far as the number of crimes is concerned these are too numerous to constitute "very limited" exceptions.²⁷

8.3.4 Exceptions to the General Principle

There are two situations where voluntary intoxication may serve to acquit an accused.²⁸ Firstly, where alcohol reduces him to a condition in which he is wholly unable to judge his actions; if excessive drinking causes actual insanity, such as delirium tremens, then

¹⁹ Per Sopinke J., *Daviault v. R* (1975) 118 DLR (4th) 469 at 471

²⁰ Seago, Peter, *Criminal Law* (4th ed., Sweet & Maxwell London, 1994) p.172.

²¹ Beck, Stanley, M., & Parker, Graham E. "The Intoxicated Offender: A Problem of Responsibility" 44 (1966) *Can. Bar Rev.* 563 at 573.

²² Williams, Glanville, *Textbook of Criminal Law* (2nd ed., Stevens & Sons, London, 1983) p.466.

²³ Alcohol and the Public Health: A Study by a Working Party of the Faculty of Public Health Medicine of the Royal Colleges of Physicians on the Prevention of Harm Related to the use of Alcohol and other Drugs (Macmillan, London, 1991) p.23.

²⁴ *R. v. Doherty* (1887) 16 Cox. C.C. 306 at 308.

²⁵ Atkinson, Charles Milner (Translated from French to English) *Bentham's Theory of Legislation: Principles of the Penal Code* (Oxford University Press, 1914) Vol. II, p.35.

²⁶ As per Lord Denning in *Attorney General of Northern Ireland v. Gallagher* [1963] AC 349 at 380. Mclean, Ian & Morrish, Peter, *Harris's Criminal Law* (22nd ed. Sweet & Maxwell, 1973) p.94.

²⁷ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.596.

²⁸ Per Lord Denning in *Attorney General for N. Ireland v. Gallagher* (1961) 45 Cr. App. R. 316 at pp.342-43.

*M' Naghten*²⁹ rule will be applied in exactly the same way as insanity raises from any other cause.³⁰

Secondly, where insanity is shown not to exist, intoxication can be a defence only if it destroys specific intention or renders the accused incapable of forming such intention.³¹ This exception is controversial, there are certain authorities mentioning that it is not the incapacity of the defendant to form specific intention rather actual absence of intention at the time of commission of the offence affords him a defence. *R. v. Garlick*³² clearly proves that when intoxication is raised as a defence to a crime of specific intent, the question in issue is not the defendant's capacity to form the necessary intent but simply whether he did form such intent.³³ As intoxication would seem to negate the necessary element of an offence, requisite intent, the prosecution shall be liable to prove it.

It is important to emphasise that intoxication itself does not negative *mens rea* and hence does not affect criminal liability. Stephen J. in *R. v. Doherty*³⁴ held that, "A drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober."³⁵ The statement suggests that a drunken intention is as dangerous and wicked as a sober one.³⁶

Another exception may be added to these two that where any statute expressly provides that a particular belief shall be a defence to the offence charged; the accused is entitled to take the benefit of his voluntary intoxication if he committed the offence with this

²⁹ *M' Naghten* rule can simply be stated as that an insane person is guilty of the offence committed, unless the disease was so severe that he did not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. Robertson, Geoffrey, *Freedom. The Individual and the Law* (Penguin Books, London, 1993) p.434.

³⁰ Smith, J.C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.235.
Lord Hailsham of ST. Marylebone, *Halsbury's Law of England* (4th ed., Butterworths, London, 1991) Vol. 11 (1) Para. 30, p.35

³¹ Stewart, S. W. *A Modern View of the Criminal Law* (Pergamon Press, Oxford, London, 1969) p.121.
Fitzgerald, P. J, *Criminal Law and Punishment* (Clarendon Press, Oxford, 1962) p.144.
R. D. Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon Press, Oxford, 1995) p.150.

³² *R. v. Garlick* [1981] Crim. L.R. 178; (1981) 72 Cr. App. R. 291.

³³ Elliott, D. W. & Allen, Michael J., *Elliott & Wood's Casebook on Criminal Law* (6th ed., Sweet & Maxwell, London, 1993) p.255.

³⁴ *R. v. Doherty* (1887) 16 Cox. C.C. 306.

³⁵ *Ibid.* at p.308.

³⁶ Perkins, Rollin M. & Boyce, Ronald N., 1982, op. cit. p.1012.

belief.³⁷ For example, the Criminal Damage Act 1971, section 5(2) provides that a person has a defence or a lawful excuse as per section 1(1) to a charge of criminal damages if he believed that he had the consent of the person entitled to give consent and section 5 (3) provides that "it is immaterial whether a belief is justified or not if it is honestly held." The exception was applied in *Jaggard's case*.³⁸

8.3.5 Is the Quantity of Intoxicant Consumed Related to the Defence of Intoxication?

In order to establish the defence of intoxication it is not sufficient to prove that the accused had been drinking heavily, for the effect of alcohol varies significantly from person to person.³⁹ There is no standard concerning what level of alcohol consumption causes intoxication sufficient for legal purposes.⁴⁰ Many people reach a level which may be regarded by others as intoxication, nevertheless they are still fully aware of what they are doing; alcohol has simply made them more aggressive or less inhibited.⁴¹

This fact has been proved in *R. v. Tandy*,⁴² the appellant's blood at the time of the offence in question contained approximately 300 to 400 mgs of alcohol per 100 ml of blood, a lethal intake for a normal person. Nevertheless, evidence showed that her movements were co-ordinated, her speech was all right and she displayed no clinical evidence of intoxication. It can be argued that the criterion fixed by some experts that an intoxicated state is readily observable through slurred speech, impaired and abnormal co-ordination, relaxation of inhibition and rowdiness⁴³ is not reliable under certain circumstances. Intoxication may show that an accused has no intention of committing the offence under question yet he may have sufficient control of his senses to be able to contemplate it and so to be guilty.⁴⁴

8.3.6 Degree of Voluntary Intoxication that may Provide Defence

As mentioned above that in certain cases voluntary intoxication may provide a defence to a criminal charge. Now the question arises whether an ordinary state of intoxication will suffice or there should be a certain level or degree of it? Voluntary intoxication at

³⁷ Card, Richard, 1998, op. cit. F.N. 5, p.604.

³⁸ *Jaggard v. Dickson* [1981] QB 527; [1980] 3 All ER 716.

³⁹ Jefferson, Michael, *Criminal Law* (3rd ed. Pitman Publishing, London, 1997) p.253.

Mitchell, Chester N, "The Intoxicated Offender: Refuting the Legal and Medical Myths 11 (1988) *Int. J. Law and Psychiatry* 77 at 86.

⁴⁰ Simester, A P. & Sullivan, G R., *Criminal Law: Theory & Doctrine* (Hart Publishing, 2000) p.555.

⁴¹ Reed, Alan & Seago, Peter, *Criminal Law* (Sweet & Maxwell, London, 1999) p.195.

⁴² *R. v. Tandy* (1988) 87 Cr. App. Rep. 45.

⁴³ Robinson, Paul H., 1984, op. cit. Vol. II, pp.342-43.

Anderson, Peter, *The British Medical Association Guide to Alcohol and Accidents* (B. M. A., 1989) p.11.

⁴⁴ Turner, J. W. Cecil, *Kenny's Outlines of Criminal Law* (19th ed., University Press, Cambridge, 1966) p.64.

best affords a defence only if it creates mental confusion excluding the possibility of forming specific intent;⁴⁵ simple removal of inhibitions cannot be relevant.⁴⁶ The capacity to form intention leads to presumption of its existence and the accused will be criminally liable even if he did not have the intention at the material time.⁴⁷ It may amount to a defence only where the state of intoxication is akin to insanity or reaches blind intoxication. The proposition has been confirmed not only by English criminal law but also by certain other common law jurisdictions.

In *Stubbs's* case O'Conner L.J. held that defence of intoxication requires that drunkenness be very extreme before it shall be allowed to influence the prosecution's case.⁴⁸ In New Zealand, in *Kamipeli*,⁴⁹ the trial judge directed the jury that for the negation of intention necessary to constitute an offence the degree of intoxication must be very marked, the accused must be so drunk that he could be described as blind drunk.⁵⁰ In a Canadian case, the Supreme Court of Canada held that only drunkenness of the extreme degree, approaching the boundaries of insanity, or akin to automatism, is relevant in criminal proceeding.⁵¹

The above opinions suggest that intoxication can be considered as a defence only where it is extreme and approaches the boundaries of insanity, rendering the accused incapable of forming requisite *mens rea*.⁵² But still a question remains unanswered that how in such a blind condition of intoxication can the drunkard control his body movements to commit the offences without being able to form intention? The answer is simple that since the degree of intoxication which would render the accused incapable of forming the requisite intent is unlikely to be short of unconsciousness, if the jury were directed in such a way intoxication could hardly be a defence.⁵³ An offender having a slightly less degree of intoxication might be capable of forming intent to commit a crime.⁵⁴ Though it cannot be decided with certainty as to how much a person can be affected by an intoxicant and still be capable of forming an intoxicated intent yet he must be

⁴⁵ Perkins, Rollin M. & Boyce, Ronald N., 1982, op. cit. p.1013.

⁴⁶ Reed, Alan & Seago, Peter, 1999, op. cit. p.192.

⁴⁷ Card, Richard, 1998, op. cit. F.N. 5, p.605.

⁴⁸ *Stubbs* (1989) Cr. App. R. 53.

⁴⁹ *Kamipeli* [1975] 2 NZLR 610.

⁵⁰ *Ibid.* at p. 612.

⁵¹ *Daviault v. R* (1975) 118 DLR (4th) 469 at 479.

⁵² Colvin, Eric, 1981, op. cit. p.774.

⁵³ Note, "Intoxication as a Criminal Defence"⁵⁵ (1955) *Colum. L.Rev.* 1210 at p.1214.

sufficiently intoxicated as to be lacking full mental capacities rendering it questionable whether he would be physically capable of performing the criminal act.

8.3.7 Nature of Voluntary Intoxication Defence in English Criminal Law

There is, perhaps, no other legal issue except defence of voluntary intoxication, on which courts have so widely differed or so often changed their views.⁵⁵ Voluntary intoxication and the manner in which it affects criminal liability of an accused have continued to be the subject of extensive criticism. The reason for this criticism is closely related to the fact that the law on the point is based upon policy considerations,⁵⁶ contradictory to the basic principles underlying criminal liability, with the result that the law has developed in a haphazard and unsatisfactory manner.⁵⁷

The policy as described by Lord Salmon states that it would shock the public and would rightly bring the law into contempt, if the drunkard were allowed to go free; moreover, it would certainly increase one of the really serious dangers facing society today.⁵⁸ The public will be annoyed at the proposition that a person could escape criminal liability on the basis of his drunkenness.⁵⁹ In addition, one of the main functions of the criminal law is to exercise a general deterrent so as to protect major social interests. Any legal system that allows intoxication to negative *mens rea* would lead offenders down an easy route to exemption from the punishment they deserve. Indeed, the more intoxicated they become, the less likely they would be to be held criminally liable for any harm caused in that condition.⁶⁰ This may be the reason that current public opinion is probably moving even more towards the condemnation of intoxication as a defence.⁶¹

The rationale for this is quite straight forward; the consumption of alcohol lessens inhibition and self control, frequently causing ill-considered and stupid behaviour. The issue presents the choice of whether the magnitude of an offence should be measured from the objective viewpoint of the community or the subjective perspective of the

⁵⁴ Perkins, R. M. & Boyce, Ronald N., 1982, op. cit. p.1001.

⁵⁵ Keiter, Mitchell, "Just Say No Excuse: The Rise and Fall of Intoxication Defence" 87 [1977] *JCL* 482 at 482.

⁵⁶ Horder, J., "Sobering up? The Law Commission on Criminal Intoxication" 58 (1995) *MLR* 534 at 535.

⁵⁷ Mackay, R.D., 1995, op. cit. p.148.

⁵⁸ *R. v. Majewski* [1977] AC. 443 at 484 and Per Lord Edmund-Davies at 495.

⁵⁹ The Law Commission Report, *Legislating the Criminal Code* (Law Com. No.229, 1995) Para 5.23.

⁶⁰ Ashworth, Andrew, *Principles of Criminal Law* (3rd ed., Oxford University Press, 1999) p.221.

⁶¹ Seago, Peter, 1994, op. cit. p.174.

Keiter, Mitchell, 1977, op. cit. p.482.

offender.⁶² From objective view point, the maintenance of public security, peace and order, demands that an intoxicated person should be held strictly liable for all his acts, whereas subjectively it is unjust to blame a person for an offence which due to his intoxication he was incapable of intending.⁶³

No one would appreciate that the breach of criminal law should result in acquittal. Merely the fact that the defendant acted in an intoxicated condition, in a way he would not have acted had he been sober does not assist him at all provided that the necessary intent was there. A drunken intent is nevertheless intent.⁶⁴ There seems little doubt that the vast majority of drunken offenders fall within this category and do in fact have the required *mens rea* at the time of commission of the offence.⁶⁵ There are, however, rare cases in which the defendant lacked the requisite *mens rea* due to intoxication.⁶⁶

8.3.7 Intoxication and Abnormality of Mind under Section 2(1) of the Homicide Act 1957

Normal human beings frequently drink to excess and when drunk do not suffer from abnormality of mind, within the meaning of section 2(1) of the Homicide Act 1957. The section provides that a person shall not be convicted of murder if suffering from such abnormality of mind induced due to inherent causes or by disease or injury which substantially impairs mental responsibility for his acts or omissions. It suggests that the section does not recognise intoxication as a disease of mind or abnormality. The view has further been strengthened by the opinion of the Law Commission which expressly excluded intoxication from mental abnormality.⁶⁷ Abnormality of mind within section 2 (1) of the Homicide Act 1957 is so obvious that a reasonable man would term it abnormal.⁶⁸ A transitory malfunctioning of mind caused by some external factor, such as alcohol or a blow to the head or failure to take food to neutralise the effect of insulin, is not a disease of mind.⁶⁹ However, a permanent damage to brain caused by drink would be a disease of mind within the section⁷⁰ and similarly such an abnormality so as to impair mental responsibility of the offender.⁷¹

⁶² Notes, "Constructive Murder- Drunkenness in Relation to Mens Rea" 34 (1920-21) *Har. L. Rev.* 78 at 80.

⁶³ Keiter, Mitchell, 1977, op. cit. p.488.

⁶⁴ *R. v. Sheehan* [1975] 2 All.ER. 960.

⁶⁵ Mackay, R.D., 1995, op. cit. pp.148-49.

⁶⁶ Mitchell, Chester N., 1988, op. cit. p.79.

⁶⁷ The Law Commission, *A Criminal Code for England and Wales* (Law Com. No. 177, 1977) Clause 56.

⁶⁸ Per Lord Parker C.J., in *R. v. Byrne* [1960] 2 QB 396 at 403.

⁶⁹ *R v. Bailey* [1983] 2 All ER 503; *R v. Quick* [1973] QB 910.

⁷⁰ Smith, J.C., *Smith & Hogan Criminal Law* (10th ed., Butterworths, LexisNexis, 2002) p.249.

⁷¹ *R v. Spriggs* [1958] 1 QB 270; [1958] 2 WLR 162; [1958] 1 All. ER 300.

Considering this statutory provision in *R. v. Fenton*,⁷² the trial judge ruled that the effect of alcohol consumed by the defendant was to be ignored since it did not amount to abnormality of mind due to inherent cause. Accordingly he directed the jury that they must convict of murder if satisfied that the combined effect of the factors other than alcohol was substantially insufficient to impair the mental responsibility of the defendant. The Court of Appeal upheld the direction.⁷³ The same principle was maintained in *R. v. Gittens*.⁷⁴ However, in *R. v. Turnbull*,⁷⁵ the issue left for the jury was whether intoxication or the abnormality of mind was the main factor in killing. In this case Court of Appeal also held that the jury had been correctly directed.⁷⁶ This is an entirely different direction to that by trial judge in *R. v. Fenton*, but strangely enough, the Court of Appeal went on to hold that the defendant must show that his abnormality of mind substantially impaired his mental responsibility for his acts notwithstanding the effect of alcohol, which is the direction that was given in *Fenton's* case.

These authorities suggest that abnormality of mind caused by intoxication is immaterial and not a relevant evidence to be considered by the jury under section 8 of the Criminal Justice Act 1967. The decisions of the cases and the interpretation of the relevant provision of section 2(1) of the Homicide Act 1957 by the courts seems contrary to the law as confirmed by the House of Lords in *R. v. Majewski*⁷⁷ which states that the intoxication may be considered altogether with all other evidence in deciding whether an accused possessed the *mens rea* of an offence of specific intent.⁷⁸

It can be concluded that taking intoxication as defence is a problematic issue for exculpation of the offenders or mitigation of their punishment. Intoxication *per se* will not substantially impair responsibility within the terms of section 2(1) of Homicide Act 1957, however broadly its terms are interpreted. Nonetheless the courts have recognised that alcoholism is a disease which falls within the section.⁷⁹

⁷² *R. v. Fenton* (1975) 61 Cr. App. R. 261.

⁷³ *Ibid.* p.263

⁷⁴ *R. v. Gittens* (1984) 79 Cr. App. R. 272.

⁷⁵ *R. v. Turnbull* (1977) 65 Cr. App. R. 242.

⁷⁶ *Ibid.* p.243.

⁷⁷ *R. v. Majewski* [1976] 2 All.ER. 142.

⁷⁸ Boland, Fay, "Intoxication and Criminal Liability" 60 (1996) *JCL*. 100.

⁷⁹ Sullivan, G. R., "Intoxicants and Diminished Responsibility" [1994] *Crim.LR*. 156 at 156.

8.3.9 Voluntary Intoxication and Insanity

Many serious crimes are committed under the influence of intoxication. Although in this particular condition mental illness is not involved, nevertheless the defendant may wish to claim that because of his voluntary ingestion of drug or alcohol, he experienced something like temporary insanity.⁸⁰ Could he raise the defence of insanity? Is this claim admissible? Logically, it might be argued that the intoxication defence should, like insanity, preclude criminal liability. The accused in the acute intoxication condition may have lost power of self-control, his ability to make judgments may be impaired and he may be incapable of foreseeing the consequences of his acts, yet both the situations are quite distinct and cannot be treated alike.

Intoxication itself is not regarded as disease affecting mind: but disease caused by it, so far as it affects the mind.⁸¹ If the accused's voluntary intoxication does not amount to insanity but only reduces his capacity to resist temptation, it will be no defence.⁸² The distinction between temporary insanity and mere intoxication is still upheld by the academic authorities on criminal law.⁸³ Logically it is quite reasonable to distinguish between a mad and a bad man. Though sometime it is opined that the distinction between the two is far from clear-cut,⁸⁴ yet the opinion can be discarded on the ground that if we take into account the cause and not the effect both the conditions can easily be distinguished.⁸⁵

It is not reasonable to annex disturbance of mind caused due to voluntary intoxication with insanity. A person who is insane will be acquitted because he is not responsible for his condition and hence not liable for the acts done in that condition in contrast to a voluntary intoxicated person.⁸⁶ Treating voluntary intoxication differently from insanity may also be justified on the basis that conviction and punishment may deter the

⁸⁰ Dressler, Joshua, *Understanding Criminal Law* (2nd ed., Matthew Bender, USA, 1995) pp.203-204.

⁸¹ Stephen, J. F., Sir, *A Digest of the Criminal Law* (9th ed., Sweet & Maxwell London, 1950) Article.8, p.7. Per Stephen J., in *R. v. Davis* (1881) 14 Cox. C.C. 563 at 564.

⁸² Crispin, W. L., *Stephen's Commentaries on the Law of England* (21st ed., Butterworths, 1950) Vol. IV, p.19.

⁸³ Smith, J.C., 1996, op. cit. F.N. 30, p.235.

⁸⁴ *Ibid.*

⁸⁵ It is worth mentioning here that initially common law rejected the defence of temporary insanity caused by voluntary intoxication. See Hale, Sir Mathew, *Pleas of the Crown* (London, 1778) Ch. IV., p.32. The same view has been confirmed by the judges of the 19th and the 20th century as Per Holroyd J in *William Rannie's Case* (1825) 1 Lewin 76, 168 ER 965 and Per Lawton L.J. in *R. v. Quick* [1973] 1 QB 910 at 922. C.L.R.C. also admitted that voluntary intoxication short of insanity is no defence even if it negates the mental element of the crime. C.L.R.C. *Offences Against the Person*, 14th Report, 1980 (Cmnd.7844) Para.257, p.111.

⁸⁶ Williams, Glanville, 1983, op. cit. p.466.

offender, in future from becoming intoxicated and re-offending.⁸⁷ Moreover, it may be argued that insanity is not a defence to the crimes of specific intent only; rather it affords a valid defence to the crimes of basic intent as well.⁸⁸ Whereas, voluntary intoxication is no defence to the crime of basic intent unless it results into legal insanity of a more than transitory nature.⁸⁹ In this case it will be a defence of insanity and not intoxication. It can further be said that alcohol and other drugs being external causes only in very rare cases will lead to insanity.⁹⁰ However, continuous use of intoxicants, after a period of time, so debilitate the mind that the mental faculties of the person are destroyed and in this condition the appropriate defence is insanity and not intoxication.

Insanity can be distinguished from intoxication on another ground that a person who successfully sets up a defence of insanity is not released; he goes to a psychiatric hospital for as long as he is thought to be a danger to the public.⁹¹ On the other hand, an alcoholic or drug addict who is convicted of crime need not to be punished, the court may put him on probation for treatment.⁹² The comparison suggests that it is not reasonable to link intoxication with insanity.

8.3.10 Voluntary Intoxication and Duress

Defence of duress is one of the excuse defences; it arises where the accused commits the *actus reus* of an offence with the relevant *mens rea* but under a threat of harm to him or to another person.⁹³ In English law there is almost consensus of opinion that the defence of duress is not available to an accused who voluntarily and with knowledge as to its nature joined a criminal gang, knowing that members of the gang might bring pressure on him to commit offences.⁹⁴ The view has been confirmed by the Court of

⁸⁷ Allen, Michael J., *Textbook on Criminal Law* (4th ed., Blackstone Press Ltd., 1997) p.138.

⁸⁸ Card, Richard, *Card, Cross and Jones Criminal Law* (15th ed., Butterworths, London, 2001) p.631.

⁸⁹ Seago, Peter, 1994, op. cit. p.181.

⁹⁰ Jefferson, Michael, 1997, op. cit. p.255.

⁹¹ Smith, J.C., 2002, op. cit. F.N. 70, p.217.

⁹² Williams, Glanville, 1983, op. cit. p.466.

Fingarette, Herbert, & Hasse, Ann Fingarette, 1979, op. cit. p.5.

⁹³ Card, Richard, 1998, op. cit. F.N. 5, p.632.

⁹⁴ *R. v. Shepherd* (1988) 86 Cr. App. R. 47; [1987] Crim. LR. 686.

Card, Richard, 1998, op. cit. F.N. 5, p.637.

Reed, Allan, & Seago Peter, 1999, op. cit. pp.223-24.

Smith, J. C., 1996, op. cit. F.N. 30, p.248.

Jefferson, Michael, 1997, op. cit. p.219.

Simester, AP. & Sullivan, GR., 2000, op. cit. F.N. 40, p.592.

Elliott, Catherine & Quinn, Frances, *Criminal Law* (4th ed., Longman, London, 2002) p.294.

Seago, Peter, 1994, op. cit. p.200.

Scanlan, G. & Ryan, C., *An Introduction to Criminal Law* (Financial Training Publications, 1985) p.184.

Appeal in the *Sharp*⁹⁵ and *Fitzpatrick*⁹⁶ cases. The principle is universally recognised and embodied in the criminal laws of almost all the civilised nations of the world like Canada,⁹⁷ New Zealand,⁹⁸ U.S.A.,⁹⁹ Australia,¹⁰⁰ Pakistan,¹⁰¹ and India.¹⁰² The logic behind the principle is that the accused voluntarily exposes and submits himself to illegal duress to which he was subjected; he cannot claim it as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with the gang.

8.3.10.1 *Similarity between the two Situations*

How does this condition resemble voluntary intoxication? The question can simply be answered that physiological and psychological effects of intoxicants are generally known even to moderate drinkers.¹⁰³ In cases of voluntary intoxication the accused knows the tendencies of intoxicant and its effects, he knows that intoxicants can cause disinhibitions and he may lose control of his body and mind which may lead to an offensive conduct that would not otherwise occur. He should not be entitled to any exemption from criminal liability, like the case of joining a gang of criminals. That is the most appropriate and logical principle to bring uniformity in the realm of criminal liability. As already mentioned English law of intoxication is based upon policy rather than principle,¹⁰⁴ such contradictions and inconsistencies are not unusual.

8.3.11 Voluntary Intoxication and Mistake

Apart from intoxication, a defendant's mistaken belief as to fact may operate to prevent a conviction¹⁰⁵ provided that the mistake causes a condition of lack of *mens rea* or affords a legally recognised excuse.¹⁰⁶ A genuine even unreasonable mistake will exempt the defendant if it negates the definitional element of the offence or generate a belief that elements of a valid defence are present.¹⁰⁷ It would not be justified to punish an accused when owing to a genuine mistake of fact he acts without any criminal intention or believes that he is acting lawfully.¹⁰⁸

⁹⁵ *R. v. Sharp* [1987] 1QB 853; [1987] 3 All ER 103.

⁹⁶ *R. v. Fitzpatrick* [1977] NILR 20.

⁹⁷ Canadian Criminal Code, s.17.

⁹⁸ New Zealand Crimes Act 1961, s. 24.

⁹⁹ The New York Penal Code 1967, s 35.35.

¹⁰⁰ The Tasmanian Criminal Code, s. 20.

¹⁰¹ Pakistan Penal Code 1861, s. 94.

¹⁰² Indian Penal Code 1861, s. 94.

¹⁰³ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.607.

¹⁰⁴ Allen, Michael J., *Textbook on Criminal Law* (6th ed., Blackstone Press Ltd., 2001) p.153.

¹⁰⁵ The Law Commission Consultation Paper No. 127, 1993 op. cit. Para.2.24.

¹⁰⁶ Simester, A P., & Sullivan G R., 2000, op. cit. F.N. 40, p.543.

¹⁰⁷ *Ibid.* p. 560; J.C. Smith, 2002, op. cit. F.N. 70, p.237.

¹⁰⁸ *Beckford v. The Queen* [1988] 1 AC 130 at p.142; *R. v. Fennell* [1971] 1 QB 428 at 431.

Intoxicated mistake falls under the ordinary rules of mistake; intoxication is merely a circumstantial evidence to prove it.¹⁰⁹ There is no logical distinction between a mistake resulting from voluntary intoxication and the mistake that do not.¹¹⁰ A man may commit a mistake whether he is drunk or sober.¹¹¹ Should a person who, because he is drunk, under a mistaken belief does certain criminal acts be allowed to use that mistake as a defence against a criminal charge? Does the English criminal law treat both the mistakes under the same principles? To answer the questions we will take into account some decided cases.

In *Jaggard v. Dickson*,¹¹² the defendant, in voluntary intoxicated condition, caused damage to the property of another which she mistakenly believed to be her friend's. She was charged under section 1(1) of the Criminal Damage Act 1971 but relied on the defence afforded by section 5(2) (a) and (3) of the same Act which provides a defence to a charge of criminal damages if the defendant believes that the owner of the property would have consented to such damages. The Court of Appeal held that since the defendant had honestly believed that she would have had permission to cause the damage, she had a defence to the charge albeit her belief was founded on self-induced intoxication.

This decision creates very abnormal results and it is very hard to follow the statutory interpretation adopted by the court. The decision implies that a person who because of his intoxication does not intend to damage property, or mistakenly believes it to be his own, will be guilty.¹¹³ However, if he damages another's property believing that it belongs to a third party consenting to the damage, he is not guilty.¹¹⁴ May it not leave the public unprotected against alcoholics and junkies who are social danger? Suppose a man sets fire to a building, and in his defence he says that he was intoxicated and believed that he had been allowed by the owner to burn it down. Assuming that he is believed, or not disbelieved, would he still has a concrete defence? A court will

¹⁰⁹ Smith, J.C., 2002, op. cit. F.N. 70, p.241.

R. v. Gamlen (1858) 1 F & F 90; 175 ER 639.

¹¹⁰ Milgate, H.P., "Intoxication, Mistake and the Public Interest" [1987] *CLJ* 381 at 382.

¹¹¹ Keiter, Mitchell, 1997, op. cit. p.498.

¹¹² *Jaggard v. Dickson* [1981] QB 527; [1980] 3 All ER. 716.

¹¹³ Seago, Peter, 1994, op. cit. pp.178-79.

¹¹⁴ Jefferson, Michael, 1997, op. cit. p.265.

obviously wish very strongly to convict on such facts but no distinction can be found between this hypothetical and the facts in *Jaggard* case.¹¹⁵

In *R. v. O'Grady*,¹¹⁶ Lord Lane C. J. held that a mistaken belief in the existence of right of self-defence, caused by voluntary intoxication, is no defence.¹¹⁷ The decision introduced a further anomaly into the intoxication law that is already rife with difficulty. For example, if an intoxicated offender commits homicide; he will be charged with murder, a crime of specific intent. Applying *Majewski* rule, if the jury are in any doubt as to his *mens rea*; he will be convicted of manslaughter only. However, in the same condition if he mistakenly believed that he was acting in self-defence, O'Grady rule does not allow him to rely on the defence and he will be convicted of murder.¹¹⁸ It suggests that intoxication was relevant to intent but not to self-defence.¹¹⁹ It is hard to justify such a distinction or to keep the issue of mistake and intent apart since they are merely different ways of looking at the same issue.¹²⁰ The distinction leads to the result that a mistaken belief of a sober man in existence of the circumstances of right of self-defence will provide a defence while a similar mistake in drunken state will not.¹²¹

The case suggests that if a defendant mistakenly acts in self-defence and is drunk, the mistake will be ignored even if it is not attributable to drunkenness, and perhaps even if it is a perfectly reasonable mistake. This is surely absurd. If a person makes the kind of mistake that he would have made when sober, i.e. a reasonable mistake, he should be entitled to a defence even if he is intoxicated because in such circumstances the intoxication is irrelevant.¹²² Lord Lane's judgement in this case is unsupportable in terms of principle rather it was a policy decision. He considered that where an innocent

¹¹⁵ Williams, Glanville, "Two Nocturnal Blunders" 140 (1990) *NLJ* 1564 at 1565.

The proposition that an intoxicated mistake of fact entitles an accused to be treated as if his belief were true appears strange for two reasons. Firstly, the courts have been manifestly reluctant to allow intoxication to operate as defence. Secondly, the courts have often insisted that mistakes must be reasonable if they are to excuse (See, Ashworth, A.J., "Reason, Logic and Criminal Liability" (1975) 91 *LQR*.102 at 119 and *Rose* (1884) 15 Cox. C.C. 540; *Chisham* [1963] 47 Cr. App. R.130). Whereas intoxicated mistake could be unreasonable. (Simester, A P., & Sullivan G R., 2000, op. cit. F.N. 40, p.560). Since, a fortiori, an intoxicated mistake cannot be reasonable it would seem that a mistake as to matter of excuse cannot excuse.

¹¹⁶ *R. v. O'Grady* [1987] QB 995; [1987] 3 WLR 321.

¹¹⁷ Per Lord Lane *R v. O'Grady* [1987] 3 WLR 321 at 326.

¹¹⁸ *Ibid.* p.384.

¹¹⁹ Jefferson, Michael, 1997, op. cit. p.265.

¹²⁰ Seago, Peter, 1994, op. cit. p.178.

¹²¹ Milgate, H.P., 1987, op. cit. p.382.

victim has been killed because of a drunken mistake, it is not acceptable that the defendant should leave the court without blame. In fact, a defendant would not leave the court without a conviction as he could be convicted of an offence of basic intent.¹²³ This judgement is contradictory to his own judgement in *Williams's*¹²⁴ case that was confirmed by Privy Council in *Beckford*.¹²⁵ *O'Grady* creates an exception to the principle, confirmed in the two cases mentioned above that a mistake of fact, however unreasonable is relevant to the jury's consideration of self-defence.¹²⁶

The Law Commission rejected the dictum in *O'Grady's* case by saying that conviction for murder would not be justifiable if the accused thought, for whatever reason, that he was acting in self-defence and who would have been acting reasonably if he had been sober.¹²⁷ The C.L.R.C. also held that there should be no difference between the evidence of voluntary intoxication adduced in relation to a defence and to negate the intent.¹²⁸

Now we take into account the effect of mistake in the offence of rape. Section 1(1) of Sexual Offences (Amendment) Act 1976 states that a man commits rape if he has unlawful sexual intercourse with a woman without her consent knowing or being reckless that she does not consent. It means that if the defendant mistakenly believes in the consent of the woman, he is not guilty of rape, because lack of belief in her consent is an ingredient of crime.¹²⁹ As the offence of rape requires intent to have sexual intercourse without the woman's consent, therefore, intoxication can negative such intent.¹³⁰ Let us see, how English law deals with the situation.

The rule that a defendant cannot be convicted of rape if he believed, *albeit* mistakenly, that the woman consented, even though he has no reasonable grounds for that belief was upheld in *R. v. Morgan*¹³¹ However, in *R. v. Woods*¹³² where the appellant with three

¹²² Clarkson, C. M. V., & Keating, H. M., *Criminal Law: Text & Material* (3rd ed. Sweet & Maxwell, London, 1994) p.403.

¹²³ Allen, Michael J., 1997, op. cit. F.N. 87, p.143.

¹²⁴ *Williams* (1984) 78 Cr. App. R. 276.

¹²⁵ *Beckford v. Queen* [1987] 3 WLR 611.

¹²⁶ Milgate, H.P., 1987, op. cit. p.382.

¹²⁷ Law Com. No. 177, 1977, op. cit. Para 8.42.

¹²⁸ C.L.R.C., 14th Report. Cmnd. 7844, 1980, op. cit. Para.277.

¹²⁹ Clarkson, C. M. V. & Keating, H. M., 1994, op. cit. p.403.

Notes, "Intoxication as a Criminal Law Defence" 55 [1955] *Columb. L.R.* 1210 at 1214.

¹³⁰ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.595.

¹³¹ *R. v. Morgan* [1975] 2 All. ER 347; [1976] AC 182; [1975] 2 WLR 913. (Contrary to the Morgan approach, The Sexual Offences Bill introduced into the House of Lords in 2003 indicates the biggest

other young men was charged with the rape of a young girl. The jury were directed that the appellant's self induced intoxication afford him no defence to the allegation that he was reckless as to whether the girl consented to sexual intercourse. An interesting point is that in *Jaggard v. Dickson* the court held that the accused is not guilty of criminal damage if he believed in consent; however a drunken accused is guilty of rape if he believed mistakenly in the woman's consent,¹³³ although in both the cases the offences are of basic intent.

In *R. v. Fotheringham*,¹³⁴ the accused made a drunken mistake with respect to identity of the woman with whom he was having sexual intercourse. The jury were directed that they had to ask themselves whether there were reasonable grounds for the accused to believe that he was having sexual intercourse with his wife. The accused was convicted of rape. This decision may be criticised; on one view of *Majewski*, drunkenness supplies recklessness. In this case, however, the accused did not make a mistake as to reckless element, consent, but as to an element defined solely in terms of intent. The accused did not intend to have unlawful sexual intercourse rather he intended to have it with his wife. His mistake was as to the identity of the woman and drunkenness explains why it was made. Rape is a crime of basic intent as to consent, but is a crime of specific intent in relation to the victim not being his wife.¹³⁵ It is unlikely that courts will hold that the answer to the question whether rape is a specific or basic intent crime depends on with regard to which element of the offence the accused has made a mistake¹³⁶ It could also be argued that although a drunken rapist is culpable but he is not as culpable as a deliberate rapist hence his crime should not be treated as rape rather some lesser offence such as negligent sexual invasion.¹³⁷ The offence would differ from rape to the same extent as manslaughter from murder. Moreover, if there ought to be a distinction

overhaul of this area of the criminal law. Clause 76 of the Bill sets up a rebuttable presumption that the complainant did not consent to penetration in certain circumstances. The Explanatory Notes to the Bill indicate the intention is to require the defendant to adduce positive evidence of his own. A further presumption is that the defendant is to be taken not to have believed that the complainant consented unless he proves that he did believe it. The Explanatory Notes envisage a legal burden of proof on the defendant on the balance of probabilities. (<http://www.publications.parliament.uk/>) 2004.

¹³² *R. v. Woods (Walter)* (1982) 74 Crim. App. R. 312.

¹³³ Jefferson, Michael, 1997, op. cit. p.266.

¹³⁴ *R. v. Fotheringham* (1989) 88 Crim. App. R. 206.

¹³⁵ Jefferson, Michael, 1997, op. cit. p.263.

¹³⁶ *Ibid.*

¹³⁷ Wells, Celia, 1982, op. cit. p.213.

between the negligent and the reckless, why not a similar distinction between the reckless and the intentional?¹³⁸

It suggests that in English law, there was no uniform and consistent rule to deal with the situation. In certain cases, defence of voluntary intoxication has been successfully pleaded on the basis that it has led to mistake as to essential element of the offence,¹³⁹ whereas in others it has been totally rejected, highlighting the arbitrariness and complexity of the principles of criminal liability of an intoxicated offender. An attempt has been made in 2003 to remove the ambiguity by defining the offence of rape newly and fixing a criterion for determining the reasonable belief of the accused in the consent of the victim. Section 1 of the Sexual Offences Act 2003 states that a person shall be convicted of rape if he penetrates, with his penis, the vagina, anus or mouth of the non consenting victim and does not have a reasonable belief that the victim consents. Section 1(2) describing the criteria to determine the reasonable belief of the accused states that all the circumstances, including any steps taken by the accused to ascertain the consent of the victim shall be taken into account. It shows that the legislature is willing to use objective standards in determining the liability of the offenders in sexual offences by introducing a test of absence or presence of reasonable belief to replace the previous recklessness requirement.¹⁴⁰ It may be pointed out here that this approach is notably different from the judicial decision in *R. v. G.*¹⁴¹ where the House of Lords preferred a subjective approach in the offences of damage to property and overruled the principle laid down in *Caldwell*.¹⁴²

8.3.12 Crimes of Specific and Basic Intent

As mentioned earlier voluntary intoxication is no defence to a criminal charge. However, in the 19th century English and American judges attempted to introduce an element of flexibility into the law to allow partial exculpation of intoxicated offender.¹⁴³ The search for such a doctrine resulted in what has become known as the specific intent exception. Although the exception was supposedly based on classical principles of criminal law, in fact, the judges constructed a novel but inappropriate doctrine in an effort to handle the

¹³⁸ *Ibid.* at p.214.

¹³⁹ Orchard, Gerald, "Surviving without Majewski: A view from down under" [1993] *Crim. LR.*426.

¹⁴⁰ "Arson: Mens rea- Recklessness whether Property Destroyed or Damaged" *Crim. LR.* 369 at p.372.

¹⁴¹ *R. v. G* [2004] 1 AC 1034.

¹⁴² *R. v. Caldwell* [1981] 1All. ER. 961.

¹⁴³ Fingarette, H. Herbert & Hasse, Ann Fingarette, 1979, op. cit. p.77.

problem of liability of an intoxicated offender.¹⁴⁴ The practical application of this principle seemed easy enough at first glance but it has led to many complicated issues.

8.3.12.1 *Origin of Specific/Basic Intent Distinction*

The distinction between offences of specific/basic intent has become a persistent headache for criminal lawyers, especially over the last two or three decades.¹⁴⁵ The terminology of specific intent is traceable to the second quarter of the 19th century. Patterson J. in *R. v. Cruse*¹⁴⁶ stated that intoxication can defeat the positive intention required for murder.¹⁴⁷ While in *R. v. Monkhouse*,¹⁴⁸ Coleridge J. held that drunkenness would not lead to an acquittal unless, *inter alia*, it deprived the defendant of the power of forming specific intention.¹⁴⁹ Later on the statement of Stephen J. in *R. v. Doherty*¹⁵⁰ is considered to be the basis for the technical concept of specific intent.¹⁵¹ Most importantly, Lord Birkenhead L.C., in the first quarter of the 20th century, referred to specific intent.¹⁵² His statement contains a number of conflicting propositions. He used the term specific intent in the first part of his opinion¹⁵³ whereas intent *simpliciter* in the second part.¹⁵⁴ Seemingly both the terms were used interchangeably.¹⁵⁵ He did not explain what he meant by specific intent rather it can be said confidently that he had nothing very special in his mind but unfortunately he did not cross the word out of his speech before delivering it.¹⁵⁶ This indicates that he may not have meant to distinguish between specific/basic intent rather he simply referred to the offences where intent is an important element of an offence.¹⁵⁷ He just mentioned that the criminal law requires that the *mens* to be *rea* as to each element of *actus reus* of every crime.¹⁵⁸

¹⁴⁴ *Ibid.*

¹⁴⁵ Gough, Stephen, "Surviving without Majewski?" [2000] *Crim. LR.* 719 at 719.

Gough, Stephen, "Intoxication and Criminal Liability: The Law Commission's Proposed Reforms" 112 (1996) *LQR* 335 at 342.

¹⁴⁶ *R. v. Cruse & Mary his wife* (1838) 8 C. & P. 541; 173 ER. 610.

¹⁴⁷ 8 C. & P. at p. 545; 173 ER 612.

¹⁴⁸ *R. v. Monkhouse* (1849) 4 Cox. C.C. 55.

¹⁴⁹ *Ibid.* at p.56.

¹⁵⁰ *R. v. Doherty* (1887) 16 Cox. C.C. 306.

¹⁵¹ Fingarette, H. Herbert & Hasse, Ann Fingarette, 1979, op. cit. p.77.

¹⁵² *R. v. Beard* (1920) A C. 479.

¹⁵³ *Ibid.* at p. 499.

¹⁵⁴ *Ibid.* p.504.

¹⁵⁵ Gough, Stephen, 1996, op. cit. p.343.

¹⁵⁶ Williams, Glanville, 1983, op. cit. p.471.

¹⁵⁷ Colvin, Eric, 1981, op. cit. p.765.

¹⁵⁸ *R. v. Beard* (1920) A C. 479 at 504.

The adjective specific means no more than the presence of appropriate *mens rea* for the guilt and conviction of the offender.¹⁵⁹ Specific intent makes no legal sense other than a legal fiction providing partial defence to an intoxicated offender.¹⁶⁰ The cases gave no indication that a specific intent was different from an ordinary intent. Similarly, other intoxication cases of the same period omit any reference to it.¹⁶¹ The reason for occasional use of words specific or positive intent was to denote malice or a form of negligence that intoxication would obviously not negate.¹⁶² The view can be supported by the fact that the phrase specific intent has never been defined.¹⁶³ Clearly in the early usage of the term judges were not referring to, or attempting to formulate, a doctrine with independent substantive contents. Rather, they were simply using the phrase to refer to the intent element of the crime with which the defendant was charged.¹⁶⁴ Specific intent, indeed, seems to be a meaningless expression and it is a discredit to English law that it should continue to be used in determining issues as important as those dealt within serious criminal cases.¹⁶⁵

8.3.12.2 *What Might be Possible Grounds for Distinction?*

Specific/basic distinction seems to be based upon a belief that alcohol does not affect a person's ability to control bodily movements but may affect the ability to form intention regarding those movements. This distinction is artificial because the intention to perform a bodily movement is usually inseparable from the reason why movement was made.¹⁶⁶ Another ground for distinction and allowing the defence of intoxication in the offences of specific intent could be that if such a defence is allowed in the offences of murder and wounding with intent, the amplitude of the basic intent offences of manslaughter and unlawful wounding lies beneath them ensuring defendant's liability. The distinction has also been annexed to the punishment for the offence of murder; aiming to reduce murder by an intoxicated person to the less serious homicide of manslaughter. Had murder been a non capital crime or had it not carried a mandatory sentence it would probably have remained untouched by the specific intent rule.¹⁶⁷

¹⁵⁹ Beck, Stanley M., & Parker, Graham E., 1966, op. cit. p.578; Fingarette, Herbert & Hasse, Ann Fingarette, 1979, op. cit. p.81.

¹⁶⁰ Parker, Graham, 1977, op. cit. p.701.

¹⁶¹ Gough, Stephen, 1996, op. cit. pp. 342-43.

¹⁶² *Ibid.* p.344.

¹⁶³ Butler Committee Report, 1975, (Cmnd. 6244) Para.18.52, p.235.

¹⁶⁴ McCord, David, 1990, op. cit. p.380.

¹⁶⁵ *R. v. Burns* [1975] Crim.LR.155.at p.157.

¹⁶⁶ McCord, David, 1990, op. cit. p.384.

¹⁶⁷ N. L. A. Barlow, "Drug Intoxication and the Principle of *Capacitas Rationalis*" 100 (1984) *LQR* 639 at 640. Sullivan, G. R., "Involuntary Intoxication and Beyond" [1994] *Crim. LR.* 272 at 273.

The doctrine of specific intent has become a time-honoured rule in English law; nonetheless, it fails to identify the essential reasons for finding that an intoxicated offender is less morally responsible than his sober counterpart. The doctrine does not lead logically to the overall result that was desired, that intoxication may mitigate but should never completely exonerate. The specific intent exception, therefore, has arbitrary applications and must be learned by rote, since most have little logical relationship to the principles underlying the doctrine, or indeed to the facts doctrine is often used to cover.¹⁶⁸

8.3.12.3 What is Meant by the Crimes of Specific and Basic Intent?

Though defining specific intent is still problematic; crimes of specific/basic intent can be differentiated on certain grounds. In *R. v. Morgan*,¹⁶⁹ Lord Simon said that *actus reus* is generally composed of an act and some consequences that may be very closely or remotely connected with it. In the crimes of basic intent the *mens rea* does not extend beyond the act and its consequences, however remote, as defined in the *actus reus*.¹⁷⁰ Prosecution need not prove the *mens rea* required for the offence, the accused can be convicted simply on the proof of *actus reus*.¹⁷¹ In the crimes of specific intent prosecution will succeed only if it can prove intention, knowledge, foresight or belief contained in the definition of the offence.¹⁷² Precisely, crimes of specific intent are crimes where the *mens rea* of the offence extends beyond the *actus reus*, while in crimes of basic intent the *mens rea* goes no further than extending to the elements of *actus reus* itself.¹⁷³

Whether an offence falls in any particular kind will depend upon which type of *mens rea* prosecution seeks to prove. For example, in the offence of simple criminal damage, if prosecution alleges that the defendant damaged the property recklessly, the offence is one of basic intent. However, if it alleges that the damage was done with intent, the

¹⁶⁸ Fingarette, Herbert & Hasse, Ann Fingarette, 1979, op. cit. p.78.

¹⁶⁹ *R. v. Morgan* [1975] 2 All. ER 347; [1976] AC 182; [1975] 2 WLR 913.

¹⁷⁰ *Ibid* [1975] 2 All. ER at p. 363; [1976] AC 182 at 216.

¹⁷¹ Card, Richard, 2001, op. cit. F.N. 88, p.622.

Jefferson, Michael, 1997, op. cit. p.256.

¹⁷² The Law Commission Consultation Paper No. 127, 1993, op. cit. Para.2.5.

As per Lord Simon in *D.P.P. v. Majewski* [1976] 2 All. ER. 154.

Holder, J., 1995, op. cit. p.538.

¹⁷³ Clarkson, C. M. V. & Keating, H. M., 1994, op. cit. p.393.

offence is one of specific intent.¹⁷⁴ But, whatever the prosecution may allege in any particular case, it is still considered to be the offence of simple criminal damage.¹⁷⁵

The safest way to describe these offences is that crimes of specific intent are those where the defence of voluntary intoxication is permitted by the courts, whereas in the crimes of basic intent the courts have refused to accept the defence.¹⁷⁶ This distinction can be criticised on the ground that if the principles of justice require the admission of the intoxication defence for crimes such as murder, theft, etc. it is difficult to see why the same consideration of justice do not apply for manslaughter, rape and assault etc.¹⁷⁷ Logically no distinction should be drawn between specific intent and any other kind of intent, and that if the evidence of intoxication tended to negative whatever kind of intent was necessary to prove a particular charge, then there should be an acquittal.¹⁷⁸

8.3.13 Examples of the Crimes of Basic and Specific Intent

On the basis of distinction discussed above following offences have been designated as offences of specific intent: murder, wounding or causing grievous bodily harm with intent, theft, robbery, burglary with intent to steal, handling stolen goods, endeavouring to obtain money on a forged cheque, criminal damage contrary to s.1(1) or (2) of the Criminal Damages Act 1971 where only intention to cause damage or, in the case of s.1(2) of the same Act only intention to endanger life, is alleged, indecent assault where proof of indecent purpose is required, an attempt to commit any offence requiring specific intent and possibly some forms of secondary participation in any crime.¹⁷⁹ The list could be further extended to cover a number of other offences in which intent as to at least one element of the offence suffice as *mens rea*.

On the other hand, manslaughter, rape, maliciously wounding or inflicting grievous bodily harm, kidnapping and false imprisonment, assault occasioning actual bodily harm, assault on a constable in the execution of his duty, indecent assault where act is unambiguously indecent, common assault, taking a conveyance without the consent of the owner, criminal damages where intention or recklessness, or only recklessness, is

¹⁷⁴ White, Stephen, "Offences of Basic and Specific Intent" [1989] *Crim. LR.* 271 at 272.

¹⁷⁵ *Ibid.*

¹⁷⁶ *D.P.P. v. Majewski* [1977] AC 443 at 469.

McCord, David, 1990, op. cit. p.381.

¹⁷⁷ Colvin, Eric, 1981, op. cit. p.778.

Fingarette, Herbert & Hasse, Ann Fingarette, 1979, op. cit. p.77.

¹⁷⁸ Smith, J.C., "Case and Comments: Drink and Drugs" [1975] *Crim. LR.* 570 at 571.

¹⁷⁹ Smith, J. C., 1996, op. cit. F.N. 30, p.229.

alleged and possibly an attempt to commit an offence where recklessness is a sufficient element in *mens rea* as in attempted rape are offences of basic intent.¹⁸⁰

8.3.14 Is this Classification agreed upon?

The classification above is not agreed upon by the English courts. In *Gray v. Barr*,¹⁸¹ Lord Denning stated that in manslaughter of every kind there must be a guilty mind otherwise the accused must be acquitted.¹⁸² Similarly, in *R. v. Lamb*¹⁸³ it was held that *mens rea* is the essential ingredient in manslaughter.¹⁸⁴ These opinions suggest that manslaughter is an offence of specific intent where intoxication could be relied upon to negate it, whereas in English law generally it is treated as an offence of basic intent.

In the light of the classification above, all the attempted offences are crimes of specific intent.¹⁸⁵ This is true even where the completed offence is a crime of basic intent like the offence of rape. The situation is still confusing because in *R. v. Khan*¹⁸⁶ the Court of Appeal held that the *mens rea* of rape and attempted rape is the same; only difference between the two is the accomplishment of the offence.¹⁸⁷ It, therefore, seems that the crime of attempted rape is an offence of basic intent. However, the court itself admitted that the same principle does not apply to the other offences and their attempts.¹⁸⁸ It is not merely a difference of opinion among English courts on the point; various American jurisdictions also held contradictory views regarding rape and assault crimes whether they are the offences of specific or basic intent.¹⁸⁹ It shows that though the offences have been divided into specific/basic yet the division is controversial.

8.3.15 Nature of Specific and Basic Intent

Nature of specific intent is thus a matter of great importance in order to ascertain the liability of the offender. What does the terms "specific" and "basic" intent mean? The true answer is obviously nothing. They are like things the courts are acquainted with when they observe them i.e. they knew when a defendant's liability could be reduced but they could not define. Complications started arising when judges began trying to define them. Attempting to define terms designed to provide maximum flexibility for

Seago, Peter, 1994, op. cit. p.175; Jefferson, Michael, 1997, op. cit. pp.267-68.

¹⁸⁰ *Ibid.*

¹⁸¹ *Gray v. Barr* [1971] 2 QB 554.

¹⁸² *Ibid.* at p.568.

¹⁸³ *R. v. Lamb* [1967] 2 QB 981.

¹⁸⁴ *Ibid.* at p.988.

¹⁸⁵ Colvin, Eric, 1981, op. cit. p.757.

¹⁸⁶ *R. v. Khan* [1990] 1 WLR 813.

¹⁸⁷ *Ibid.* at p.819

¹⁸⁸ *R. v. Khan* [1990] 1 WLR 813 at 819.

¹⁸⁹ McCord, David, 1990, op. cit. p.382.

policy consideration always proved to be problematic.¹⁹⁰ A careful analysis of the authorities, particularly *Majewski* itself fails to reveal any consistent principle.¹⁹¹

In *Majewski*, the term specific intent was compared with basic intent.¹⁹² Lord Simon suggested that the distinguishing factor between the two is that “the *mens rea* in a crime of specific intent requires proof of a purposive element.”¹⁹³ In his view specific intent means the purposive element in a crime but did not define the purposive element, and the term is difficult to fit in with present law.¹⁹⁴ The prosecution must prove that the purpose of commission of the act extends to the intent, expressly or impliedly required for the commission of that act. This distinction between the two terms is not satisfactory because the offence of rape, declared as basic intent offence, obviously requires a purposive element.¹⁹⁵ It is difficult to imagine any case of rape where the defendant does not have the purpose of having sexual intercourse with a woman.¹⁹⁶ Lord Elwyn-Jones L.C., with whom Lord Diplock and Kilbrandon concurred, adopted the view that specific intent is equivalent to further intent;¹⁹⁷ whereas Lord Simon in the same case opined that further intent is only one type of specific intent.¹⁹⁸ The outcome of *Majewski* was that the House of Lords had decided that there was a distinction between basic/specific intent, but could not explain the difference.¹⁹⁹

The courts have not stated clearly how they conceive the intent as specific. The phrase ‘with intent’ in the definition of a crime normally refers to an ulterior intent but in the crime of causing grievous bodily harm with intent to cause grievous bodily harm no such ulterior intent is required. Causing grievous bodily harm with intent to cause it

¹⁹⁰ Clarkson, C. M. V. & Keating, H. M., 1994, op. cit. p.392.

¹⁹¹ Smith, J. C., 1996, op. cit. F.N. 30, p.228.

¹⁹² *Majewski* [1977] AC.443 at 473.

¹⁹³ *Ibid.* at p. 480.

¹⁹⁴ Jefferson, Michael, 1997, op. cit. p.259.

¹⁹⁵ Smith, J. C., 1996, op. cit. F.N. 30, p.228.

¹⁹⁶ *Drink & Drugs: D.P.P. v. Majewski* [1976] Crim. LR. 374 at p.378. (Similarly, if we take into account the definition of crimes of basic intent, as given in 8.3.12.3, murder is a crime of basic intent. The *actus reus* is killing and it is certainly not necessary to prove any *mens rea* going beyond that. If the basic intent test is applied then, intoxication negating *mens rea* ought not to be a defence to murder or to an offence under section 18 of Offences Against the Person Act 1861. Yet it is accepted on all hands that it is a defence to both these crimes. The law approved by the House of Lords seems totally inconsistent with the theoretical basis proposed. *Drink & Drugs; DPP v. Majewski* [1976] Crim.LR. 374 at 377)

¹⁹⁷ Card, Richard, 1998, op. cit. F.N. 5, p.612.

¹⁹⁸ *D.P.P. v Majewski* [1977] AC 443 at p.478.

¹⁹⁹ Jefferson, Michael, 1997, op. cit. p.260.

merely means intentionally causing grievous bodily harm.²⁰⁰ The Law Commission also admits that the *Majewski* approach does not apply to all offences that require subjective *mens rea*, but only to what the courts have determined to be offences of basic as opposed to specific intent.²⁰¹ The difference between these two types of offences, the policy reasons for distinction, and the basis, on which the distinction is made, are all obscure.²⁰² The distinction can also be rejected on the ground that those who would otherwise be liable for their criminal conduct will escape because they were drunk at the time the offence was committed.²⁰³ This clearly shows that it goes contrary to the policy for which the distinction was drawn i.e., to make it sure that an intoxicated offender shall not escape the criminal liability.

8.3.16 How to Resolve Ambiguity?

To put an end to all this confusion and conflict, the decision is to be left on the discretion of courts to grant or withhold the title of specific or basic intent. It depends on the fact whether the evidence of voluntary intoxication is considered to be relevant to the question of liability for a particular offence.²⁰⁴ Even this solution does not seem to be workable because the courts themselves are confused in designating crimes as of specific intent or basic intent. In *R. v. Clarkson*,²⁰⁵ Megan L.J. stated that intoxication could negate the *mens rea* for aiding or abetting the crime because the offender might not realise that he was giving encouragement by his presence at the scene of the crime.²⁰⁶ The dictum shows that aiding and abetting of any offence is a crime of specific intent. This view has been discarded by Lord Simon in *D.P.P. v. Lynch*²⁰⁷ when he says that neither aiding nor abetting a crime requires a proof of *mens rea* because definition of the crime does not itself suggest any ulterior intent.²⁰⁸ Now the only appropriate solution that may be suggested, because of the ambiguity inherent in the terms, is to focus on what courts do rather than what they say.²⁰⁹

²⁰⁰ Williams, Glanville, 1983, op. cit. p. 472. (For example in the offence of assault with intent to rob, wounding with intent to resist arrest or breaking into a house with intent to commit robbery).

²⁰¹ The Law Commission Consultation Paper No. 127, 1993, op. cit. Para.1.7.

²⁰² *Ibid.*

²⁰³ *Bernard. v. The Queen* [1988] 2 SCR. 833 at p. 7 of 30 (http://www.lexum.umontral.ca/csc-scc/en/pub/1988/vol2/html/1988scr2_0833.html) 2001.

²⁰⁴ Card, Richard, 1998, op. cit. F.N. 5, p.613.

²⁰⁵ *R. v. Clarkson* [1973] 3 All. E.R. 344.

²⁰⁶ *Ibid.* at p.347.

²⁰⁷ *D.P.P. v. Lynch* [1975] AC. 653.

²⁰⁸ *Ibid.* at pp.698-99

²⁰⁹ Loewy, Arnold H., *Criminal Law* (West Publishing Co. ST. Paul, Minn., 1975) p.239.

8.3.17 Rationale of Specific/Basic Distinction

Different theories have been presented to justify the distinction between specific and basic intent. One such theory states that, the idea behind the *Majewski* rule is that the people, who get drunk and later commit offences requiring recklessness, cannot introduce evidence of intoxication to negative recklessness, for the very process of getting drunk contained sufficient element of recklessness.²¹⁰ To argue that intoxicated person really are reckless because getting drunk is reckless course of conduct involves a manifest confusion between a general, non legal use of the term reckless and the technical, legal term which denotes that the defendant was aware of the risk of the result which actually occurred.²¹¹ Recklessness in getting drunk is magically linked to the subsequent action in a way which defies doctrinal stricture of *actus reus* and *mens rea* combination.²¹² It is well known now that a culpable state of mind which is contemporaneous with prohibited conduct has the status of fundamental principle from which departures are not to be permitted.²¹³ Arguably, House of Lords had not felt the need to satisfy what is perceived as the dictates of the formal requirement '*actus non facit reum mens sit rea*' it need not have explained the intoxication rule in recklessness terms at all.²¹⁴

Various attempts have been made to explain why some offences are crimes of specific intent where as others are not, but none is satisfactory.²¹⁵ For example, to argue that all these crimes require some form of further intent is unconvincing, since that is not true of murder.²¹⁶ Murder is an offence of basic intent; killing constitutes the *actus reus* and certainly we need not to prove any *mens rea* going beyond that. In *R. v. Hyam*,²¹⁷ Lord Diplock stated that it is the uncomplicated view in English law that in crimes of murder no distinction is to be drawn between specific and basic intent.²¹⁸ This view can be affirmed by the statement of Stephen J. in *R. v. Doherty*,²¹⁹ where he said that it is difficult to see how a man can fire a loaded pistol at another without intending to cause

²¹⁰ Per Lord Elwyn-Jones in *R. v. Majewski* [1977] AC. 443 at 475.

²¹¹ Ashworth, Andrew, 1999, op. cit. p.220.

²¹² Lacey, Nicola & Wells, Celia, *Reconstructing Criminal Law* (2nd ed., Butterworths, 1998) p.206.
De Burca, Grainne, "Intoxication and Criminal Law" 141 (1991) *NLJ* 560.

²¹³ Colvin, Eric, 1981, op. cit. p.753.

²¹⁴ Wells, Celia, "Whither Insanity?" [1983] *Crim. LR.* 787 at 789.

²¹⁵ Ashworth, Andrew, 1999, op. cit. p.219.

²¹⁶ Smith, J. C., 1996, op. cit. F.N. 30, p.228.

Ashworth, Andrew, 1999, op. cit. p.219.

²¹⁷ *R. v. Hyam* [1975] AC. 55.

²¹⁸ *Ibid.* at p.86.

²¹⁹ *R. v. Doherty* (1887) 16 Cox. C.C. 306.

his death. It would be murder though he did not intend to kill.²²⁰ In *R. v. Meakin*²²¹ it was held that where the accused has used deadly weapon, the fact that he was drunk does not at all alter the nature of the case; but if the accused has intemperately used a non deadly weapon, at the time when he was drunk, the fact of his being drunk might be taken into account by the jury. It can be argued that there is nothing in the principles of criminal law or the concept of *mens rea* that support the basic/specific intent distinction. Indeed, all crimes are of specific intent, in the sense that the *mens* has to be *rea*. The issue in the cases would not be whether or not the accused was drunk but whether or not the *mens rea* required for the particular crime with which he is charged. If he has the *mens rea* he should be convicted.²²²

These decisions are in line with the principles of criminal liability and proof of intention of the offender. It can be said that an intoxicated person can decide to kill some body. If he rushes at the victim and stabs him, the jury may come to the conclusion that he intended to kill.²²³ Indeed it is hardly possible to preserve the physical capability to execute such crimes, without also retaining a low degree of intelligence which is sufficient for the offence.²²⁴

As mentioned earlier basis for specific/basic intent distinction are not clear. Another case adds more to the confusion. In *R v. Richardson & Irwin*,²²⁵ the complainant and the defendants were university students. After drinking they indulged in horseplay. The defendants dropped the complainant from a height of about 10-12 feet and he suffered injuries. The prosecution case was that the defendants had acted both unlawfully and maliciously in the sense that they actually foresaw that dropping the complainant would or might cause harm and nevertheless took the risk of doing so.

The defendants pleaded that the complainant had consented to the horseplay and that his fall was an accident. They were convicted of inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. Interestingly, the Court of Appeal allowing their appeal quashed the conviction but neither substituted conviction

²²⁰ *Ibid.* at p. 308.

²²¹ *R. v. Meakin* (1836) 7 Car. & P. 297; 173 ER.131-32.

²²² Mewtte, Alan W. & Manning, Morris, *Criminal Law* (2nd ed., Butterworths, Toronto, 1985) p.210.

²²³ Williams, Glanville, 1983, op. cit. p.467.

²²⁴ Markby, William, Sir, *Elements of Law* (6th ed., Oxford at the Clarendon Press, London, 1905) p.363.

²²⁵ *R v. Richardson & Irwin* [1999] Crim. L.R. 494; [1999] 1 Cr. App. R. 392.

for a lesser degree of assault nor did it order a retrial.²²⁶ It suggests that an accused cannot be convicted if he mistakenly believe or might have believed, due to intoxication, that the victim consented. The decision discards the rule laid down in *Majewski* that self induced intoxication is no defence, except to the offences requiring specific intent. "This rule requires modification if the decision is correct. Intoxication is a defence if it causes the defendant to believe that the victim is consenting, although, if he had been sober, he would have known that this is not so."²²⁷

It can be said that the specific/ basic intent distinction is far from satisfactory, as has been discussed, we have to wait for a judicial pronouncement before we can safely categorise a particular offence.²²⁸ It can be summed up that the distinction, between the effects of voluntary intoxication on the crimes of specific/basic is juristically unjustifiable and is supported only on historical and practical grounds.²²⁹

8.3.18 Illogicality of the Distinction

The distinction between specific/basic intent crimes is not logical because the *mens rea* of an offence will often, if not always, contains element of both basic and specific intent together.²³⁰ For example, the offence of unlawfully and maliciously wounding with intent to prevent the lawful arrest of any person, contrary to the section 18 of the Offences Against the Person Act 1861, is an offence of specific intent.²³¹ Suppose that the accused admits that he was intending to protect a lawful arrest but, due to intoxication, never realised that what he was doing created a risk of wounding. Here the element of *mens rea* he is denying is basic intent, and therefore the evidence of intoxication should be irrelevant.²³²

The distinction may lead to some irrational and illogical results like; the same criminal conduct may be classified as a specific intent crime at one occasion and basic intent crime on another. For example, rape is considered to be a crime of basic intent however, an assault with intent to commit rape is a crime of specific intent. By the application of the principle of specific/basic intent a voluntary intoxicated accused would have a

²²⁶ Nicolson, D. & Bibbings, L., *Feminist Perspectives on Criminal Law* (Cavendish Publishing, 2000) p.142.

²²⁷ Commentary on *R. v. Richardson and Irwin* [1999] Crim. LR. 494 at 496.

²²⁸ Mackay, R. D., 1995, op. cit. p.150.

²²⁹ Per Lord Simon *Majewski* [1977] AC. 443 at 479.

²³⁰ White, Stephen, 1989, op. cit. p.273.

Smith, J.C., *R. v. Fortheringham* [1988] Crim. LR. 846 at p. 847.

²³¹ White, Stephen, 1989, op. cit. p.273.

²³² *Ibid.*

defence to assault with intent to commit rape and not in the complete offence of rape even though his conduct and state of mind were same in both the cases. Another objection to the theory of distinction could be that intoxication may reduce a murder into manslaughter. The court in these cases takes notice of public outrage if the defendants were totally exculpated. However, if this was reasoning of the courts it would have made more sense had rape been classified as a crime of specific intent with indecent assault as its basic intent counter part.²³³ It is difficult to envisage a man, however drunk, having sexual intercourse without intending to do so.²³⁴ Specifically, for a male offender, it is not possible to achieve penetration without erection that cannot be attained without having a specific intention for sexual intercourse.²³⁵ It can also be argued that though under prevailing classification "rape is a crime of basic intent, but in relation to the act of intercourse the prosecution must establish that the defendant intended to have intercourse with the woman."²³⁶ The view can further be fortified by the opinion of Lord Birkenhead who considered the offence of rape as an offence of specific intent by saying that intoxication could be no defence to the offence of rape unless proved that the accused was too drunk to form the intent to commit it.²³⁷

Finally, their Lordships themselves admitted that the distinction between basic and specific intent is illogical.²³⁸ Taking into account all the evidence, it can be said that neither common law nor psychology knows any such phenomenon as basic intent distinguishable from specific.²³⁹ Leaving all other evidences and arguments apart, only the views of their Lordships are sufficient to discard the distinction because that what is illogical cannot be justified. It is impossible to devise a principle of criminal law that despite its illogicality and inconsistency provides justice and protection to the subjects, as much as a logical and consistent rule can. Once the principle of responsibility because of voluntary intoxication is abandoned for some offences, it should be

²³³ Seago, Peter, 1994, op. cit. p.176.

²³⁴ Smith, J. C., 1996, op. cit. F.N. 30, p.230.

²³⁵ (The proposition is approved by the Section 1 of the Sexual Offences Bill 2003 which retains the term rape for the offence which, exceptionally, can be committed only by a man who "intentionally penetrates the vagina, anus or mouth of another person with his penis.") (<http://www.publications.parliament.uk>) 2004.

²³⁶ Seago, Peter, 1994, op. cit. p.177.

²³⁷ *D.D.P v. Beard* [1920] AC 479 at pp 504-05.

²³⁸ Per Lord Simon in *R. v. Majewski* [1977] AC. 443 at 483; Lord Edmund-Davies at p. 493; Lord Russell at 498.

²³⁹ McCord, David, 1990, op. cit. p.385.

abandoned for all, otherwise the result is arbitrary.²⁴⁰ The proposition is perfectly compatible with the rule that when the law requires *mens rea* in the sense of intention or recklessness, a person who lacks that *mens rea*, whether he was drunk or not cannot be convicted.²⁴¹

The distinction may lead to another problem; the trial courts have no guidance as to how to treat new offences, or offences that happen so far to have escaped judicial consideration at appellate level.²⁴² The confusion over the distinction arises from the fact that it is merely a device, envisaged by common law, to achieve a certain result rather than reflecting a rational theory.²⁴³ It permits the evidence of voluntary intoxication, for conviction of the offender to a crime of lesser degree, who otherwise would have been acquitted. It is pertinent to mention that almost all the common law jurisdictions, which adopted specific/basic distinction, have subsequently discarded the *Majewski* rule²⁴⁴ and adopted a uniform principle to deal with the problem of intoxicated offender. English criminal law is out of step with other jurisdictions which have abolished the special rules on intoxication,²⁴⁵ and is becoming isolated in the commonwealth in clinging to it.²⁴⁶

8.4 Crimes of Basic Intent and Defence of Intoxication

Voluntary intoxication is no defence in the crimes of basic intent.²⁴⁷ The accused would not be permitted to assert lack of *mens rea* due to intoxication. It means that intoxication causes no problem in relation to crimes that may be committed recklessly or without intention.²⁴⁸ An offender who relies on voluntary intoxication as a defence to a crime of basic intent may be convicted notwithstanding that the prosecution has not proved any intention or foresight.²⁴⁹ It is claimed that Section 8 of Criminal Justice Act

²⁴⁰ Colvin, Eric, 1981, op. cit. p.756.

²⁴¹ Smith, J. C., "Case & Comments: R. v. Majewski" [1975] *Crim. LR.* 570 at 573.

²⁴² The Law Commission Consultation Paper No. 127, 1993, op. cit. Para. 3.5.

²⁴³ Robinson, Paul H., 1984, op. cit. Vol. I, p.298.

²⁴⁴ In Australia, in *The Queen v. O' Connor* (1980) 146 CLR 64. In New Zealand in 1975 in *R v. Kamipeli* [1975] 2 NZLR 610 and in Canada, the principle was discarded in 1994 in *Daviault v. The Queen* (1994) 118 DLR (4th) 469.

²⁴⁵ Jefferson, Michael, 1997, op. cit. p.273.

²⁴⁶ Smith, J. C., 1996, op. cit. F.N. 30, p.237.

²⁴⁷ As Per Lord Elwyn-Jones L.C. in *DPP. v. Majewski* [1976] 2 All. ER 142 at 146.

²⁴⁸ The Law Commission Consultation Paper No.127, 1993, op. cit. Para. 2.34.

²⁴⁹ C.L.R. C., 14th Report, Cmnd. 7844, 1980, op. cit. para.257, p.111.

1967 is irrelevant.²⁵⁰ The section does not abrogate the rule of substantive law nor does the rule contravene the section.²⁵¹

The conviction of voluntary intoxicated offender for a basic intent offence is explained by the courts on the ground that he was reckless as to the risk of becoming mentally impaired while taking the drink or drugs and recklessness is sufficient *mens rea* for the offence in question.²⁵² This theory can be rejected for the reason that it proceeds on the basis that one who takes drink or drugs is conclusively presumed to be reckless, which conflicts with the provisions of section 8 of the Criminal Justice Act, 1967.²⁵³ The section requires the court or jury to take into account any evidence which may help them to draw such inferences as it thinks proper and reach a decision on the issue. The section does not say "except the evidence of intoxication" but the courts act as if these words were there.²⁵⁴ The object of section was to prevent the trial judge from directing the jury that as a matter of law they must ignore certain evidence on the issue of intention. The section was passed to rule out artificial treatment of the notion of intention but that is the very thing that the judges are doing under the cover of the doctrine of basic intent.²⁵⁵

It is also contradictory to the general principle of criminal law requiring the prosecution to prove that the accused intended or foresaw would be consequences of his act. A defendant while intoxicated might have committed the offence mistakenly or accidentally but it appears that for the crimes of basic intent recklessness will be imputed to him and no evidence shall be admissible to rebut the imputation.²⁵⁶ Presuming an intoxicated person automatically reckless is to replace *mens rea* with strict liability.²⁵⁷

Another objection may be raised that this theory discards the rule of coincidence of *actus reus* and *mens rea* at the time of prohibited conduct. To convict an accused simply on the basis of recklessness when he took drink or drugs as to the risk involved in taking

²⁵⁰ Seago, Peter, 1994, op. cit. p.175.

²⁵¹ Per Lord Elwyn-Jones in *D. P.P. v. Majewski* [1977] AC. 442 at 476.

²⁵² Card, Richard, 1998, op. cit. F.N. 5, p.606.

²⁵³ *Ibid.* & Ashworth, Andrew, 1999, op. cit. p.219.

²⁵⁴ Commentary on *R. v. McPherson* [1973] Crim. LR. 457 at 458.

²⁵⁵ Williams, Glanville, 1983, op. cit. p.474.

²⁵⁶ Note, "Intoxication as a Criminal Defence" 55 (1955) *Colum. L. Rev.* 1210 at pp.1212-13.

it is to base liability on a very different ground from that specified by the definition of the offence.²⁵⁸ It is strange that the law enacted by the parliament is superseded by the controversial rule enunciated by the courts. The interpretation reduces the section to impotence. It means anything that would have been withheld from the jury's consideration before the section was passed can still be withheld from them because the judges declare it to be irrelevant.²⁵⁹

8.5 Proposed Reforms in English Law on Intoxication Defence

With a view to assure the liability of an intoxicated offender, the Butler committee proposed creation of a new offence of dangerous or criminal intoxication. On conviction on indictment, maximum penalty suggested is one year imprisonment for a first offence, three years for a second or subsequent one; on summary trial maximum sentence suggested is six months.²⁶⁰ The new offence would be committed whenever an individual caused the *actus reus* of an indictable offence but lacked, through intoxication, the required *mens rea*.²⁶¹ The proposal of creating the new offence is advantageous in the sense that the problem of distinguishing between specific/basic intent would disappear. The offender would not be totally acquitted as now happens when he is charged with a specific intent crime and there is no fall-back basic intent offence.²⁶²

The proposal means that the new offence would be one of strict liability in respect of the conduct of the offender. It would require the fault element of becoming voluntarily intoxicated.²⁶³ Under the committee's proposal the offence would be an included offence; the defendant would not be charged with this special offence at first instance and could only be convicted of such offence after being acquitted of the principal offence charged. The creation of new offence of being drunk and dangerous would pay more respect to the logic of criminal liability than the existing English approach and such a special offence could empower the courts to order either treatment or punishment of the offender according to the circumstances.²⁶⁴

²⁵⁷ Parker, Graham, 1977, op. cit. p.704.

²⁵⁸ Card, Richard, 1998, op. cit. F.N. 5, p.606.

²⁵⁹ Williams, Glanville, 1983, op. cit. p.473.

²⁶⁰ Butler Committee Report (Cmnd. 6244, 1975) Para 18.51-18.59.

²⁶¹ Ashworth, A.J., 1975, op. cit. p.118.

²⁶² Jefferson, Michael, 1997, op. cit. p.269.

²⁶³ Butler Committee Report (Cmnd. 6244, 1975) Para 18.54 to 18.58.

²⁶⁴ Ashworth, A.J., 1975, op. cit. p.117.

However, the proposal can be objected upon several grounds like the punishment proposed by the committee is considerably less severe for serious offences such as homicide or rape.²⁶⁵ It may encourage offenders to raise the issue of voluntary intoxication in their defence more frequently in the hope of being acquitted of a more serious offence. The special offence may later become a defence to the serious offences because the degree of intoxication has not been specified in the proposal and even the slightest level of intoxication would be sufficient to attract its application. The proposal was rejected by the majority of C.L.R.C. in 1980, however, the minority opinion of the committee agreed with the proposal suggesting a major modification that the punishment of the proposed offence should be the same as for the principle offence.²⁶⁶ The suggestion of minority would definitely reduce the number of defendants pleading defence of intoxication because there would have been no significant advantage for the defendant in making such a plea.

The proposal of equivalent punishment has also been approved by the New Zealand Criminal Law Reform Committee because a defendant who habitually consumes intoxicants and commits criminal acts in that condition deserves it.²⁶⁷ However, creation of a special offence with an equivalent punishment to the principal offence seems to be needless, given that the accused convicted of the special offence would be liable for the punishment of the principal offence charged and in this case there is no justification for the extra time and labour involved in proving the special offence.

8.5.1 The Law Commission's Proposals

In 1993, the Law Commission concluded that the present law is complicated, difficult to explain, though it purports to apply a social policy of ensuring the liability of an intoxicated offender yet only does so in an unpredictable and unprincipled way; and if taken seriously it creates many difficulties of practical application.²⁶⁸ The Commission expressed its dissatisfaction over the prevailing law but admitted that it is based on public policy. Even if we accept that the policy behind the rule is to ensure the liability of intoxicated offenders, there is no rationale reason for protecting the public against some drunken offender but not against others, particularly where the distinction is not based upon the gravity of the offence or the availability of included offences. If the

²⁶⁵ C.L.R.C., 14th Report, Cmnd. 7844, 1980, op. cit. Para. 261, p.113.

²⁶⁶ *Ibid.* Para. 263.

²⁶⁷ New Zealand, Criminal Law Reform Committee, *Report on Intoxication as Defence to a Criminal Charge*, 1984, Para. 67.

²⁶⁸ The Law Commission Consultation Paper No. 127, 1993, op. cit. Para.3.24.

public protection require special measures, that should be accomplished through comprehensive legislation rather than ad hoc judicial re-casting of some offences.²⁶⁹

Taking into account the illogicality of basic/specific intent distinction and growing criticism on *Majewski* approach, the Law Commission in its consultation paper recommended its abolition.²⁷⁰ The Commission admitted that the present law on intoxication is difficult to state with any certainty²⁷¹ and suggested a number of options to make the law on intoxication reasonable and certain. Among these options is the abolition of *Majewski* rule without replacement or its abolition with a new offence (options 5 and 6). So after the abolition of *Majewski* rule, the prosecution shall be bound to prove subjective *mens rea* of the offender in all the cases regardless of any distinction between the crimes of specific/basic intent. The defendant's intoxication will merely be one piece of evidence to determine his intent and awareness or foresight at the time of commission of the offence. Option No. 6, abolition of the rule combined with a new offence is not a new one. The same suggestion was made by the Butler committee in 1975. The Commission suggested that the jury should be able to take into account the evidence of intoxication, together with the other circumstances, in deciding whether the defendant acted with the requisite mental element.²⁷²

The abolition of the *Majewski* rule without any replacement will bring the law on intoxication in line with the provisions of section 8 of the Criminal Justice Act, 1967. If the intent of the accused is proved, intoxication or resulting inhibition or lack of self control shall not serve as a defence. The same principle is enforced in Australia, New Zealand and in some jurisdictions in U.S.A.²⁷³ The first and second options of leaving *Majewski* intact, or codifying its approach were dismissed declaring them impracticable and undesirable in the light of criticism by the Commission itself and others.²⁷⁴

In 1995, the Law Commission retreated from all its proposals previously made and recommended the codification of the present law of intoxication with a few significant

²⁶⁹ *Bernard v. The Queen* [1988] 2 SCR. 833 at p.12 of 30 (http://www.lexum.umontral.ca/csc-scc/en/pub/1988/vol2/html/1988scr2_0833.html) 2001.

²⁷⁰ The Law Commission Consultation Paper No.127, 1993, op. cit.

²⁷¹ *Ibid.* Para, 3.1, p.27.

²⁷² The Law Commission Consultation Paper No.127, 1993, op. cit. Para. 6.30.

²⁷³ *Ibid.* Para. 5.23., p.63.

²⁷⁴ Paton, E., "Reformulating the Intoxication Rules: The Law Commission's Report" [1995] *Crim. LR.* 382.

amendments.²⁷⁵ This proposal is the option No. 2 among the options suggested by the Law Commission in its consultation paper.²⁷⁶ The grounds provided by the Commission for the deviation from their earlier proposals are that the abolition of the *Majewski* rule would be perceived by the public as unacceptable.²⁷⁷ They declared the *Majewski* rule as prudent policy which dominated the general principles of criminal law.²⁷⁸ They also claimed that the consultation with the majority of judges, law society and others asserted that the rule worked fairly and without any undue difficulty.²⁷⁹ The idea of creation of a new offence was dropped because more trials would take place, expert evidence would be needed as to whether the accused was substantially impaired, more police time would be spent on ascertaining the extent of his intoxication and the prosecution would not know in advance of trial whether the proposed offence should be included in indictment.²⁸⁰

It appears that all the ground realities regarding the defence of intoxication have been changed within two years thus leading the Law Commission to abandon all its previous proposals. Only considering the abolition of the idea of creating a new offence will reveal the strength of the Law Commission's opinion. All the reasons, provided for not creating a new offence, seem to be merely an excuse for the sake of an excuse. Firstly, the accused shall be convicted of this offence where he has committed a dangerous offence and due to intoxication his intent could not be proved. It needs no separate trial for this purpose if all other elements of the crime have been proved except the intention. The accused shall be convicted for the proposed offence and sentenced accordingly. In such cases jury would be directed that they may give a verdict of not guilty of the offence charged but guilty of the offence of dangerous intoxication if they find that the defendant did the act charged but by reason of the evidence of intoxication they are not sure that at the time he had the state of mind required for the offence, and they are sure that his intoxication was voluntary.²⁸¹

Secondly, expert evidence is also required under the present rules. No one could be convicted or acquitted unless his mental capacity was proved by the expert evidence.

²⁷⁵ Law Com. No. 229, 1995, op. cit. Para. 5.48, p.53.

²⁷⁶ The Law Commission Consultation Paper No. 127, 1993, op. cit.

²⁷⁷ *Ibid.* Para. 1.27, p.8

²⁷⁸ *Ibid.* Para. 1.14, p.4.

²⁷⁹ *Ibid.* Para. 1.28, p.8.

²⁸⁰ Jefferson, Michael, 1997, op. cit. p.277.

²⁸¹ *Butler Committee Report.* (Cmnd. 6244, 1975) Para. 18.54.

Thirdly, it is the duty of the police to ascertain the extent of intoxication of the offender, because police is the first official agency taking his custody after commission of the crime. In addition, in all other cases the burden also lies on the shoulders of the police to prove the extent of intoxication of the accused, like breath test in the case of a drunk driver. Fourthly, prosecution need not know in advance whether to include the proposed offence in the indictment, because impliedly it is included in the original offence for which the accused is charged as argued earlier.

The Law Commission accordingly recommended some new proposals for legislating on the issue.²⁸² The proposals contained in the report were extremely complex and awkward.²⁸³ The legislation in furtherance of this report appears unlikely.²⁸⁴ The provisions of draft bill 1998, 'Offences Against the Person' are largely based upon the straight forward proposals of Law Commission Report No. 218.²⁸⁵ This is an attempt to present the common law rules on intoxication into statutory form.²⁸⁶ Clause 19 (1)(a) of the draft bill²⁸⁷ treats a voluntary intoxicated person having been aware of any risk of which he would have been aware had he not been intoxicated. Clause 19(1) (b) provides that a voluntary intoxicated person must be treated as having known or believed in any circumstances which he would have known had he been sober. The effect of the bill's provisions is that a mistaken belief cannot be relied upon to negative liability where awareness of risk suffices for liability.²⁸⁸ The proposal imposes the liability even for specific intent offences on the basis of what the accused would have known had he not been intoxicated.²⁸⁹

The object of the corresponding provisions in the earlier drafts, and the principle followed by the courts in such cases, was not to attribute to the defendant a belief which he did not in fact hold but to prevent him from relying, by way of defence, on a belief which he did hold.²⁹⁰ This clause is unexplained and, it seems, unhappy deviation from Law Com. No.218 and the earlier proposals regarding intoxication.²⁹¹ It can be

²⁸² Law Com. No.229, 1995, op. cit. Para.1.34, p.10.

²⁸³ Reed, Alan & Saego, Peter, 1999, op. cit. p.204.

²⁸⁴ Allen, Michael J., 1997, op. cit. F.N. 87, p.152.

²⁸⁵ Reed, Alan & Saego, Peter, 1999, op. cit. p. 204.

²⁸⁶ Allen, Michael J., 1997, op. cit. F.N. 87, p.152.

²⁸⁷ Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998) Draft Bill.

²⁸⁸ Paton, E, "Reformulating the Intoxication Rules: The Law Commission's Report" [1995] *Crim LR*. 383.

²⁸⁹ Simester, A P. & Sullivan, G R., *Criminal Law: Theory & Doctrine* (Portland-Oregon, 2002) p.566.

²⁹⁰ Smith, J.C., "Offences against the Person: The Home Office Consultation Paper" [1998] *Crim.LR*. 317 at 321.

²⁹¹ *Ibid.*

concluded that clause 19(1) (b) is unnecessary as the draft Offences Against the Person Bill does not deal with defences, and should be omitted. Its sole purpose in the earlier drafts was to deal with an intoxicated belief in facts relied on by way of defence.²⁹²

Conclusion

The whole discussion can be concluded by saying that the distinction between specific/basic intent is artificial and two fundamental problems stem from it. Firstly, parliament not the courts should alter the law if it is to be done in the name of policy over principle.²⁹³ This is in line with the decisions of Court of Appeal where reduction of murder to manslaughter was refused, in cases of use of excessive force in self-defence.²⁹⁴ Logically, if the creation of any new rule in the cases of self-defence is left to the discretion of parliament, the application of the same principle requires that in the cases of defence of intoxication the matter should also be left to parliament. But the courts have evolved this makeshift solution, in furtherance of a generally agreed policy of social defence, rather than await legislative action.²⁹⁵

Secondly, even if it was appropriate for the courts to do so, there is no evidence that the artificiality of the specific intent requirement is actually required for social protection.²⁹⁶ If the bases for the policy are ambiguous there is no justification to continue it. Well known dangers of voluntary intoxication can be minimised by replacing the confusing specific/basic distinction with a simple and easily understandable rule that intoxication is no excuse for a criminal conduct.²⁹⁷ A voluntarily intoxicated offender should be held liable, for he himself caused a disabling condition in which he might cause harm to the person or property of others.

The policy implicit in the distinction represents a compromise between punishment of voluntary drunkard offenders disregarding their mental condition, and total exculpation suggested by the actual facts at the time the offence was committed. The persistence in the belief that a person who voluntarily indulges in alcohol should not escape the

²⁹² *Ibid.* at p.322.

²⁹³ *Bernard v. The Queen* [1988] 2 SCR. 833 at p.3 of 30 (http://www.lexum.umontral.ca/csc-scc/en/pub/1988/vol2/html/1988scr2_0833.html) 2001.

²⁹⁴ *R. v. Hussin* [1963] Crim. L.R 582 ; *R. v. Clegg* [1995] A.C. 482.

²⁹⁵ Ashworth, A.J., 1975, *op. cit.* p.117.

²⁹⁶ *Bernard v. The Queen* [1988] 2 SCR. 833 at p.3 of 30 (http://www.lexum.umontral.ca/csc-scc/en/pub/1988/vol2/html/1988scr2_0833.html) 2001.

²⁹⁷ Keiter, Mitchell, 1977, *op. cit.* p.511.

consequences has helped to reach this compromise.²⁹⁸ However, this compromise is not satisfactory and the dissatisfaction is based on the fact that drunkenness by itself has never been regarded as a defence in English criminal law.²⁹⁹ A comparison between the present law and the attitude of common law courts up to the 19th century shows that the present law gives an allowance to the intoxicated offender guaranteeing him a less severe punishment to that which he actually deserves.

The law on defence of intoxication is unscientific and complicated; it impeded justice, confuses judges and juries, promotes lengthy trials and triggers an inordinate numbers of appeals.³⁰⁰ If public policy is the only base for the law then its mitigating role should be denied even if it negates *mens rea*. It will deter voluntary intoxication and close-off an easy loophole for many intoxicated offenders.³⁰¹ If justice requires admission of the intoxication defence for some kinds of offences, it is difficult to see why the same consideration does not apply for the others.³⁰² The intoxicated offender does not have two minds; one for specific and the other for basic intent.³⁰³

The study suggests that no single principle can explain the distinction between specific/basic intent and further it does not reflect a qualitative difference between states of mind indeed, to say the least, that terminology of specific/basic intent is unhelpful.³⁰⁴ Whatever the merit of this criticism, it is certain that the intoxication rules in English law are based upon fiction and illogical legal devices.³⁰⁵ Public interest, protection of the rights of offenders and victims require that all the terms used in criminal law should be defined, unambiguous and used consistently and general principles of criminal liability should be preferred over policy.

In the next chapter we shall take into account the principles of *Shari'ah* dealing with the problem of intoxication in an Islamic society.

²⁹⁸ Hall, Jerome, *General Principles of Criminal Law* (The Bobbs-Merrill, Indianapolis, 1960) pp. 546-47.

²⁹⁹ Smith, J. C., *Towards a Rational Criminal Law* (The Holdsworth Club of the University of Birmingham, 1983) p.5.

³⁰⁰ Mitchell, Chester N., 1988, *op. cit.* p.77.

³⁰¹ Note, "Intoxication as a Criminal Defence" 55 (1955) *Colum. L. Rev.* 1210 at 1217.

³⁰² Colvin, Eric, 1981, *op. cit.* p.778.

³⁰³ Beck, Stanley, M., & Parker, Graham E., 1966, *op. cit.* p.581.

³⁰⁴ Colvin, Eric, 1981, *op. cit.* p.767.

³⁰⁵ Ashworth, Andrew, 1999, *op. cit.* p.221.

Chapter-9 Intoxication and its Defence in *Shari'ah*

9.1 Introduction

Shari'ah covers, on the individualistic level, spiritual, moral, intellectual, esthetical, and physical aspects of man's personality, and collectively, social, economic and political dimensions of society.¹ Every Muslim is under an obligation to fashion his entire life in accordance with its injunctions and to observe at every step what is permissible and prohibited.² The reason is simple, man's life is a unit and any defect in any aspect affects the others also, therefore, *Shari'ah* regulates all the aspects of human life including food and drink.

In this chapter, it is proposed to study the principles of *Shari'ah* in connection with intoxication and the strategy for its control and prohibition. The effects of intoxication on human beings and criminal liability of an intoxicated offender shall also find their place in the chapter. Analytical synthesis of English law and *Shari'ah* shall be presented to show that *Shari'ah* has adopted a realistic approach to deal with the vice of intoxication and it is the only law that has successfully controlled use of intoxicants in an Islamic society. The chapter underlines the proactive characteristic of *Shari'ah* as well.

9.2 *Shari'ah's Directions Regarding Food and Drink*

The directions regarding edibles in *Shari'ah* have been enunciated in the Holy *Qur'an* as "O mankind! Eat of that which is lawful and wholesome in the earth, and follow not the footsteps of the devil. Lo! He is an open enemy for you."³ Enjoining the use of wholesome and permissible any transgression has been ascribed to Satan. The prohibited foods have been made known to the Muslims, the verse ordains, "You are forbidden to eat that which dies of itself and blood and flesh of swine and that which has been dedicated unto any other than Allah, and the strangled, and the dead through beating, and the dead through falling from a height, and that which has been killed by (the goring of) a horns and the devoured of wild beasts."⁴ In many other verses⁵ the similar provisions have been provided and other than the things expressly prohibited consumption of anything is lawful. A Muslims is under an obligation to follow these directions in his everyday life.

¹ Ansari, Muhammad Fazl-ur-Rahman, *The Qur'anic Foundations and Structure of Muslim Society* (1st ed., Indus Educational Foundation, Karachi, Pakistan, 1973) Vol. 1, p.116.

² Doi, Abdur Rehman, *Shari'ah: The Islamic Law* (Ta-ha Publishers, London, 1984) p.i.

³ *Al-Qur'an* 2:168

⁴ *Al-Qur'an* 5:3

9.3 *Islamic Society and Intoxication*

In Arabia at the time of the Holy Prophet the only intoxicating substance known was alcoholic drink made from grapes, dates, wheat, barley or maize.⁶ The brewing of alcohol from these substances was popular among pre-Islamic Arabs.⁷ The intoxicating substance made from these materials is known as "*Al-Khamr*" which means a substance which mixes up, covers, or swamps the mind and reason.⁸ *Khamr* is an Arabic word which literally means which veils, covers or conceals a thing.⁹ Alcoholic beverages are termed as *Khamr* because they veil the intellect and obscure the moral sensibilities of a man. The definition itself describes the characteristics of intoxication and distinguishes it from insanity; insanity destroys the intellect and mental capacities of a person, whereas intoxication merely covers and conceals them.

Shari'ah not only prohibits excessive drinking, rather a drop of wine is prohibited as strictly as a glass. There is a principle that if the large quantity of a drink intoxicates, a smaller quantity of it is prohibited.¹⁰ The logic behind the principle is that large quantities usually begin with smaller ones. The first drop leads to other drops and consequently the intoxicated person drops his position, health, respectability, fortune, friends, family and all prospects of his life. It is very important to beware of the first drop. It is not only the use of intoxicants that has been declared unlawful rather any type of connection with intoxicants is prohibited. The Holy Prophet said, "God has cursed upon ten persons in connection with wine: the one who brews it and the one for whom it is brewed; the one who drinks it and the one who serves, the one who carries it and the one for whom it is carried, the one who buys it and the one for whom it is bought; the one who sells it and the one who eats its profits."¹¹

⁵ Like, *Al-Qur'an* 2: 172-173

⁶ Ibn Majah, Muhammad bin Yazid, *Sunan Ibn Majah* (Gagri Yayinlari, Turkey, 1981) Vol. II, p.1121.

Abu Daoud, Sulaiman bin Ash'ath, *Sunan Abu Daoud* (Gagri Yayinlari, Turkey, 1981) Vol. IV, p.78.

Al-Bukhari, Muhammad bin Ismail, *Saih al-Bukhari* (Gagri Yayinlari, Turkey, 1981) Vol. VI, p.242.

⁷ Bassher, Taha, "The Use of Drugs in Islamic World" *British Journal of Addiction* 76 (1981) 233 at.233.

⁸ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1121.

Abu Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.78.

⁹ Ibn Manzur, *Lissan Al-Arab* (Dar Sader, Beirut, 1955) Vol. IV, p.254.

Ibn Faras, *Mu'jam Maqayis Al-Lugha* (Al-Dar Al-Islamia, Ghadeer, 1990) Vol. II, p.215.

Al-Johri, *Al-Sihhah Taj Al-Lugha wa Sihhah Al-Arbia* (Dar Al-Kutb Al-Ilmia, Beirut, 1999) Vol. II, p.310.

¹⁰ Al-Tirmidhi, Muhammad bin Isa, *Al-Jameh al-Saih* (Gagri Yayinlari, Turkey, 1981) Vol. IV, p.292

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1124.

Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.82.

¹¹ Ahmed, bin Hanble, *Masnad Ahmed bin Hanble* (Gagri Yayinlari, Turkey, 1981) Vol. I, p. 316.

Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.18.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1121.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. III, p.589.

Both the *Qur'an* and the *Sunnah* of the Holy Prophet are clear and unequivocal in prohibition of intoxicants. These sources provide logical and reasonable arguments why intoxication is such a great evil to society. It is obvious that drunkenness is viewed in *Shari'ah* as a crime of considerable seriousness and it has succeeded to greater extent than most religions and philosophies of the world in exterminating this evil from society. Despite the socio-economic differences and varying cultural traditions among Muslim countries of the world, the practice of Islamic doctrine is considered to be the most essential factor in maintaining a relatively low prevalence rate of alcohol consumption as compared to the other parts of world.¹²

Intoxicants are prohibited because they can damage a person psychologically, physically, socially and mentally. Many people know the bad effects of liquor on their health but they still drink. There are millions of Muslims who have read no research on effects of liquor on human health, many of them cannot read at all but they have never tasted even a drop of it in their lives. This has been the case since the emergence of Islam for the last fifteen centuries.

9.4 What is meant by Intoxication in Shari'ah?

Intoxication may be defined as dominance of a condition, caused by ingestion of some substance, which prevents a person acting according to the guidance of intellect without destroying it.¹³ The definition suggests that human intelligence is neither lost nor diminished by intoxication though remains suspended for the time being.

Muslim jurists have defined various conditions of an intoxicated person that may lead to prove his state of intoxication. According to *Hanfite* and *Malkite* an intoxicated person is one who cannot distinguish between earth and sky or between a man and a woman and his speech and gait are not co-ordinated.¹⁴ According to *Shafite* an intoxicated person is one whose speech is slurred and un-coordinated and his secrets are disclosed.¹⁵ *Hanblite* say that an intoxicated is one who does not know what he utters.¹⁶ Their view is in conformity with the *Qura'nic* concept of intoxication which states that

¹² Bassher, Taha, 1981, op. cit. p.238.

¹³ Al-Bukhari, Abdul Aziz, *Kashaf al-Asrar* (Hussain Hilmi, Turkey, 1307 A.H) Vol. IV, p.1482.

¹⁴ Ibn Nujaym, *Al-Ashbah Wa Al-Nazair* (Idara Al-Qur'an Wa Al-Uloom Al-Islamia, Karachi) p.553.

Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen* (Dar al-Fiker, Beirut) Vol. IV, p.41.

Al-Dasooqi, Shamas ud din Muhammad Arafa, *Hashiat Al-Dasooqi Ala Sharah al-Kabir* (Dar al-Ahya Al-Kutab al-Arabia Isa al-Babi al-Halbi, Egypt) Vol. IV, p.359.

¹⁵ Al-Sauti, Jalal ud din, *Al-Ashbah Wa Al-Nazair* (Dar al-Ktub Al-Ilmia, Beirut, 1979) p.217.

¹⁶ Ibn Qadama, *Al-Mughni* (Maktaba Al-Riaz al-Hadisa, Riyadh) Vol. VIII, p.192.

an intoxicated person does not know what he utters.¹⁷ According to another view it is not necessary that an intoxicated person should be incapable of distinguishing between man and woman or earth and sky, rather it is sufficient if he cannot distinguish between his own clothes or shoes if mixed with the other people.¹⁸

The conditions of an intoxicated person as described by the Muslim jurists have been confirmed by modern research. It is admitted that human brain starts reacting to alcohol with the first sip and keep on reacting until well after the last drink. Its stimulating effects are changed into depressant; leading to lack of self control, loss of ability to make good decisions, slurred speech, lost co-ordination, and uncontrolled behaviour.¹⁹ These conditions leads to the conclusion that a person must be grossly intoxicated before he is designated so and his intoxication is to be considered by a court to determine his liability. This view of *Shari'ah* is on a par with the similar view in English law as discussed in 8.3.6.

9.5 *Shari'ah's View Regarding Alcohol and Drugs*

Shari'ah prohibits use of *Khamr* regardless of its source, kind and nature whether from grapes, wheat, barley, dates or any other substance.²⁰ The view is based upon the saying of the Holy Prophet expressly enunciating that the intoxicants brewed from these substances are *Khamr*.²¹ However, *Hanfite* and an opinion of *Malkite* differ with the view and say that the intoxicant brewed only from grapes is to be termed as *Khamr*.²² They argue that at the time of prohibition there were certain other intoxicating substances but the one brewed from grapes were termed as *Khamr*.²³ The difference of opinion is practically of great implications because an accused shall be liable for the *Hadd* if he consumed *Khamr*, regardless of the fact whether he was intoxicated or not, whereas in the cases of substances not termed as *Khamr* he shall be liable for *Hadd* only when he becomes intoxicated after the consumption of the intoxicating substance.

¹⁷ *Al-Qur'an* 4:14.

¹⁸ Al-Bahli, Ali bin Abbas, *Al-Qawaid wal Fawaid al-Usulia* (Matba al-Sunnah, Cairo, 1956) p.38. Ibn Qadama, *Al-Mughni* (1st ed., Dar Al-Hadith, Cairo, 1996) Vol. XII, p.450.

¹⁹ National Institute on Alcohol Abuse and Alcoholism, National Institute of Health, *New Year, Old Myths, New Fatalities* (<http://www.niaaa.nih.gov>) 2002.

²⁰ Ibn Qadama, op. cit. F.N. 16. Vol. VIII, p. 304.

Al-Khatib, Shamas ud din Muhammad bin Ahmad al Sharbini, *Al-Iqnah fi Hal Alfaz Abi Shujjah* (Dar Al-Marfa, Beirut, 1979) Vol. II. p.186.

Malik Bin Ans, *Al-Mudawana Al-Kubra* (Dar Sader, Beirut) Vol. VI, p.261.

Al-Sherazi, Abu Ishaq Ibrahim bin Ali, *Al-Mohazzib* (Matbah Isa Al-Babi Al-Halbi, Egypt) Vol. II, p.286.

²¹ Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.78.

²² Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen*, op. cit. Vol. III, p.178. Al-Dasooqi, Shamas ud din Muhammad Arafa, op. cit. Vol. IV, p.352.

Shari'ah takes an uncompromising stand in prohibiting intoxicants. Despite the difference of opinions on the use of word *Khamr* for a particular substance, there is complete unanimity on the point that use of any intoxicating substance is unlawful. The saying of the Holy Prophet, "All intoxicants are *Khamr* and all types of *Khamr* are forbidden"²⁴ is unanimously admitted. The saying suggests that the Arabic word *Al-Khamr* signifies any substance which causes intoxication. There remains no doubt that any substance capable of befogging or clouding mind of man, impairing his faculties of thought, perception and discernment is prohibited, with whatever name we call it, for it produces the same public harm.²⁵

Shari'ah's approach to deal with the problems of intoxicants is more consistent as compared to English law. Unlike English law, it does not differentiate between drugs and alcohol. Logically there must not be any difference between the two from the legal point of view because they affect the human mind exactly the same way. The approach can be supported by the fact that the industrial revolution and modern scientific research has resulted in a huge increase of manufactured chemicals and new drugs used for intoxication. The recognition of the hazards of a new drug may take considerable time prior to proper preventive intervention and control by the governments. *Shari'ah* has just given a simple principle that any substance, whatever its name may be, if causes intoxication, should be regarded as harmful and prohibited.

9.6 Pre-Islamic Society and Alcohol

In pre-Islamic Arab society use of wine was an integral part of their social life. Specifically the young were very fond of wine, woman and wars.²⁶ Alcohol probably served a much greater psychological necessity, to the pre-Islamic Arabs than to any other society of that time.²⁷ They were so fond of alcohol and drinking parties that their love for alcohol is reflected in the Arabic language which has nearly one hundred names for wine.²⁸ Different names described different kinds of *Khamr* regarding its origin, alcohol contents, the substance from which it was brewed, specific method of its

²³ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VI, p.241.

²⁴ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1122.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.291.

Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, pp.83-84.

²⁵ Lippman, Matthew, *Islamic Criminal Law and Procedure* (Praeger, New York, 1988) p.48.

²⁶ Jawad Ali, Dr, *Tarikh-al-Arab Qabl-al-Islam* (Dar al-ilm Lilmalayeen, Beirut, 1970) Vol. IV, p.665.

²⁷ Badri, M. B., *Islam and Alcoholism* (American Trust Publications, 1976) p.11.

²⁸ Qardawi, Y. Ali, *The Lawful and Prohibited in Islam* (5th ed., Islamic Publications, Lahore, 1995) p.70.

fermentation and brewing, its effects on drinker and many other qualities.²⁹ Ancient Arabic literary work and poetry is full of praises glorifying intoxicants, excessive drinking and gambling.³⁰ Alcoholic indulgence was praised for its pleasure producing and overjoyed effects. It seemed that the people were worshipping the bottle rather than their God. The prevailing condition in English society is closely identical to that of Arabs before Islam. The study, how *Shari'ah* successfully banned the use of intoxicants would be helpful to form a strategy to control the present situation in English society.

9.7 Strategy of *Shari'ah* in Prohibiting use of Intoxicants

To eradicate the vice of drinking *Shari'ah* has adopted the strategy of prohibiting it gradually. It has adopted a wise course of teaching and training that worked very effectively. After about fifteen centuries the successful Islamic model of alcohol prevention and prohibition still stands out as exceptional and indeed unique in human history.³¹ It is because of the fact that *Shari'ah* is not confined only to commands, prohibition and their consequences, but unlike secular laws it addresses the conscience of the individuals as well. This moral appeal to the conscience consists of a persuasion of a warning, an impression to the possible benefit and harm that may follow the obedience of command or violation of a prohibition including a promise of reward or threat of punishment in the Hereafter.³² This gives an additional strength to the injunctions of *Shari'ah* and the common man obeys the law more willingly. The prohibition settled gradually and prevented use of liquor in four different phases.

9.7.1 First Phase

The first *Qura'nic* verse dealing the problem of intoxication touches the question very lightly. It states, "And of the fruits of the date, palm, and grapes, whence ye derive strong drink and also good nourishment. Lo! Therein is indeed a portent for people who have sense."³³ The verse, indeed, differentiates between strong drink and good nourishment. For the people of intellect and senses the verse was enough to raise suspicion about the use of *Khamr*. This verse acted as an alerting signal and raised probing questions on the harmful effects of alcohol.³⁴ The people having good judgement and rational sense started raising questions regarding use of *Khamr*. A few of them must have reduced their alcoholic intake or attempted to abstain from drinking though it was still

²⁹ Badri, M. B., 1976, op. cit. p.16.

³⁰ *Ibid.*

³¹ Bassher, Taha, 1981, op. cit. p.233.

³² Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (I.T.S., Cambridge, 1991) p.139.

³³ *Al-Qur'an* 16: 67.

³⁴ Bassher, Taha, 1981, op. cit. p.233

religiously and legally not forbidden.³⁵ The message proved to be a ground levelling step which paved the way for the second phase.

9.7.2 Second Phase

In the second phase, replying the questions of believers raised to the Holy Prophet, the matter has been dealt more directly. It has been said, "They question thee about intoxicants and games of chance. Say: In both is great sin and (some) utility for men; but the sin of them is greater than their utility."³⁶ It could be inferred from the question raised that the growing community of believers were more concerned about the virtue of the use of alcohol.³⁷ The verse clearly supports the views of those whose pious character made them perceive the great sin in alcohol use before they were told about it. The Holy *Qur'an* acknowledges that there is some benefit in intoxicants, but warns that the danger of its use is greater.

Some Muslim scholars opined that use of alcohol contains some benefits like profit of trading for brewers, assistance in digestion, provision of energy, increase in sexual drive, courage to the coward, deriving of pleasure and leading to a fair complexion.³⁸ However, the opinion is questionable on the ground that had alcohol consumption really contained such benefits it would have not been prohibited by the law giver, the only proved benefit is the profit of trading.³⁹ It contains all the characteristics contrary to those mentioned above.⁴⁰ It leads to the enmity between the subjects, suspension of reason, which leads to the violation of rights of man and Allah, like murder, unlawful sexual intercourse, and many other crimes; it also prevents the intoxicated to perform worship of Allah.⁴¹ There is no doubt that its harmful effects are far greater than its benefits. Though the verse made the believers more considerate to the sinful effects of *Khamr* yet the final decision to use or to abstain from *Khamr* was dependent upon the personal discretion. Majority of the community continued to drink; nonetheless, the injunction alerted the community of believers to its harmful effects and prepared the way for a more decisive stage of prohibition.

³⁵ Badri, M. B., 1976, op. cit. p.23.

³⁶ *Al-Qur'an* 2:219.

³⁷ Bassher, Taha, 1981, op. cit. p.235.

³⁸ Al-Razi, Muhammad Fakhar ud din, *Tafseer Al-Fakhar al-Razi* (Known as) *Al-Tafseer Al-Kabir wa Mafatih al-Ghaib* (Dar al-Fiker Littabbah wa al-Nasher, Beirut, 1995) Vol. III, p.51.

Al-Qurtabi, *Al-Jamah Li-Ahkam Al-Qur'an* (Mataba Dar-Al-Ktub, Cairo, 1936) Vol. III, p.57.

³⁹ Al-Razi, Muhammad Fakhar ud din, 1995, op. cit. Vol. III, (Foot note) p.51.

Raza, Muhammad Rashid, *Tafseer Al-Minar* (Dar Al-Fiker, Beirut) Vol. II, p.330.

⁴⁰ Al-Razi, Muhammad Fakhar ud din, 1995, op. cit. Vol. III (Foot note) p. 51.

⁴¹ Al-Qurtabi, 1936, op. cit. Vol. III, p.55.

9.7.2.1 A Comparison of Utility and Disadvantages of Intoxicants

If the disadvantages of a thing are greater than its advantages it is collectively termed as injurious and wisdom demands that it should be avoided. The only benefit ascribed to alcohol consumption in moderate quantity is that it produces a feeling of warmth in stomach, in certain cases increases enjoyment and well-being, elevates mood, and helps digestion.⁴² A comparison of its advantages and disadvantages in the context of the British Society will be interesting. Its production, marketing, and selling has employed about 775,000 people in UK.⁴³ Export of alcoholic beverages exceeds £1000 million per annum which is helpful to keep balance of international trade.⁴⁴ Annual VAT and excise duty raised on the sale exceeded £5,000 million, in 1983, that was equivalent to 1/3 of NHS annual budget.⁴⁵ In 1987-88, the amount elevated to £7.5 billion⁴⁶ and in 1993-94 it reached £9.1 billion being 5.5% of the total government income.⁴⁷ Moreover, the export of Scottish whisky comprises 2% of the value of total UK's exports.⁴⁸ These are the economic benefits associated with the alcohol industry and its trade, but at what cost these benefits are derived can be observed by looking on the other side of the picture. Comparing the revenue generated by the production and sale of alcoholic beverages with the enormous damages caused by its use proves the truthfulness of the *Qur'anic* verse and the importance of guidance revealed fifteen centuries ago.

The public health agencies promote policies and conditions that foster health and well-being of the community, whereas consumption of alcohol create conditions that foster disaster for the public.⁴⁹ Alcohol misuse costs Britain up to £3 billion a year in terms of NHS services with over 28,000 admissions in hospitals caused by alcohol dependence or poisoning.⁵⁰ This amount is 12% of the total expenditure by NHS on hospitals.⁵¹ A

⁴² Hastings, James, *Encyclopaedia of Religion and Ethics* (T & T Clark, Edinburgh, 1908) Vol. I, p.299. *Alcohol and the Public Health: A Study by a Working Party of the Faculty of Public Health Medicine of the Royal Colleges of Physicians on the Prevention of Harm Related to the use of Alcohol and other Drugs* (Macmillan Education Ltd., 1991) p. 23.

⁴³ Saunders, W. M., "Alcohol Use in Britain: How Much is Too Much?" *Health Edu. J.* 43 (1984) 66 at 66. [According to a recent analytical report total value of the UK alcoholic drink market exceeds £30 billions providing approximately 1million jobs across the value chain from forming through distribution to pubs, bars and restaurants {Strategy Unit alcohol Harm Reduction Project, *Interim Analytical Report*. (<http://www.strategy.gov.uk/files/pdf>)}] 2004.

⁴⁴ Saunders, W. M., 1984, op. cit. p.66.

⁴⁵ *Ibid.*

⁴⁶ Crooks, Edmund, *Alcohol Consumption and Taxation* (Institute of Fiscal Studies, London, 1989) p.7

⁴⁷ Whent, Hilary, *Health Update: Alcohol* (2nd ed., Health Education Authority, 1997) p.30.

⁴⁸ *Ibid.*

⁴⁹ Editorial, "Warning: The Alcohol Industry is not Your Friend" *British Journal of Addiction* 87(1992) 1109 at 1110.

⁵⁰ Alcohol Concern, *Your Very Good Health?* (<http://www.alcoholconcern.org.uk>) 2003.

survey of 2988 patients, aged between 18 and 85, of acute admission in a hospital revealed that 41% of the admissions were either ascribed to abuse of alcohol/drugs or it was a contributory factor for the admissions.⁵² It is estimated that 20% of all adult patients admitted to hospital may be classified as harmful or hazardous drinkers.⁵³ Another survey of A&E (Accident & Emergency) patients determined that 12% of attendance to A&E is ascribed to alcohol.⁵⁴

In addition to the cost mentioned above another £3 billions are required a year as cost of sickness, absence, unemployment, pre-mature deaths, alcohol related crimes and accidents.⁵⁵ The financial costs to society due to alcohol misuse are calculated to be £10 billion per annum.⁵⁶ English people spend more on alcohol than they do on all other necessities of life.⁵⁷ More than 7% of consumer expenditure goes on alcoholic drink, the amount that is supposed to be spent on better health, clothing and food.⁵⁸ In 1982, the British people consumed 1350 million gallons of beer equivalent to 30 million pints a day, 35 million proof gallons of spirits and 106 million gallons of wine.⁵⁹ This costs Britain £33 million each day.⁶⁰ Alcohol misuse costs British industry about £1,700 million each year in the form of loss of approximately 8 million working days through alcohol-related absenteeism.⁶¹ The statistics proves that millions upon millions pounds have been spent in what amounts to a futile and divisive disaster.⁶²

Alcohol consumption may cause a number of social problems like, domestic violence, child neglect/abuse, divorce, debt, fraud and financial difficulties.⁶³ It is estimated that 1 million children in UK. are currently growing up in problem drinking families, having

⁵¹ Alcohol Concern, *Alcohol's on Everyone's Lips* (<http://www.alcoholconcern.org.uk>) 2003.

⁵² Canning, U. P. "Substance Misuse in Acute General Medical Admissions" 92 (1999) *QJM* 319.

⁵³ *Ibid.*

⁵⁴ Pirmohamed, M., Brown, C., "The Burden of Alcohol Misuse" 93 (2000) *QJM* 291.

⁵⁵ Editorial, "Warning: The Alcohol Industry" *British Journal of Addiction* 87 (1992) 1109 at p.1110.

⁵⁶ Alcohol Concern, *Alcohol Strategy* (<http://www.alcoholconcern.org.uk>) 2003 (A new report estimates that alcohol misuse is now costing around £ 20 bn. a year (Prime Minister Strategy Unit, *Alcohol Harm Reduction Strategy for England* (<http://www.image.guardian.co.uk/sys>) 2004. p.7.

⁵⁷ The Royal College of Physicians, *A Great and Growing Evil* (Tavistock, London, N.York, 1987) p.7. Saunders, W. M., 1984, op. cit. p.66.

⁵⁸ Crooks, Edmund, 1989, op. cit. p.7

⁵⁹ Saunders, W. M., 1984, op. cit. p.66.

⁶⁰ *Ibid.*

⁶¹ Lord President's Report, *Action against Alcohol Misuse* (HMSO, London, 1991) p.3.

⁶² A latest report estimated that alcohol misuse is now costing £ 20 bn a year including 1.2 million violent incidents, 360,000 cases of domestic violence, 30,000 hospital admissions for alcohol dependence syndrome, 22,000 premature deaths, loss of 17 m working days, 1000 suicides, more than 1 m children affected by parental alcohol problems, increased divorce rate, 70% of all admissions to A&E at peak times, £95m. on specialist alcohol treatment. (Cabinet Office Prime Minister's Strategy unit, *Alcohol Harm Reduction Strategy For England* (<http://image.guardian.co.uk/sys>) 2004. p.7.

higher levels of problems than children of non drinkers, alcohol misuse doubles the risk of divorce and separation and is a major factor in 40% of domestic violence and 25% of known child abuse, 20% of pupils excluded from school were suspended for alcohol consumption.⁶⁴ It can be imagined that alcohol is not only destroying the families but it may also be an element degrading educational system.

The whole story has not yet been told. Alcohol consumption is responsible for a number of diseases as mentioned in 6.6. Alcohol results in over 5000 deaths a year directly attributed to its use.⁶⁵ In addition, it is an important factor in road accidents, drowning and various other circumstances leading to death. Drinking and driving is a serious and avoidable road safety problem, one in six people died on roads is a result of drink drive accidents.⁶⁶ About 16,830 lives were claimed by alcohol in traffic accidents in 1999.⁶⁷ In 2000, 21% of total deaths caused by drowning were credited to alcohol.⁶⁸ Total number of deaths toll between 25000 and 40000 annually where alcohol is a significant contributory factor.⁶⁹ In addition, 50-73% assault victim injuries, 50% of all serious road accidents, 50% of domestic violence against females, 47% of serious injuries, 40% of self poisoning are credited to alcohol's use.⁷⁰ Further, alcohol is a major factor in 60-70% homicides, 75% stabbing, 70% beating and 50% fights or assaults.⁷¹ Is that not ridiculous that English law prevents the expected harm, caused by oneself to himself, by enforcing the wearing of safety helmet by motorcyclists and fastening belts by motorists but it does not prevent a definite harm caused by alcohol consumption?

Alcohol misuse is a more serious problem as compared to drug abuse in UK; twice as many people are dependent on drink than all other drugs put together.⁷² The seriousness of consumption of alcohol and resulted crime is reflected by the fact that there were 5.2

⁶³ Anderson, Peter, *The BMA Guide to Alcohol and Accident* (B. M. A., London, 1989) p.8.

⁶⁴ Straight Talk, *From Stigma to Solution*, Winter (2001) Vol.16, No.1. pp. 14-15;

Alcohol Concern, *Britain Ruin? Statistics* (www.alcoholconcern.org.uk) Press Release, May 11, 2000.

Report From General Practice, *Alcohol: A Balanced View* (Royal College of General Practitioners, 1986)p.45.

⁶⁵ Alcohol Concern, *Your Very Good Health?* (www.alcoholconcern.org.uk) 2002.

⁶⁶ Department of the Environment, Transport and the Region, Transport Statistics, Road Safety: Drinking and Driving (<http://www.transtat.dft.gov.uk/>) 2002.

⁶⁷ Department of Health, *Statistics on Alcohol: England, 1978 Onwards* (<http://www.doh.gov.uk>) 2002.

⁶⁸ Water & Leisure Safety, *Water Safety Fact Sheet-June 2002* (<http://www.rospa.co.uk/>) 2002.

⁶⁹ Report From General Practice, 1986, op. cit. p.45.

Alcohol Concern, *The State of the Nation: Britain's True Alcohol Bill* (www.alcoholconcern.org.uk) 2002.

⁷⁰ Alcohol Concern, *Your Very Good Health?* (<http://www.alcoholconcern.org.uk>) 2002.

⁷¹ Anderson, Peter, 1989, op. cit. p.5.

⁷² Alcohol Concern, *Alcohol's on Everyone's Lips* (<http://www.alcoholconcern.org.uk>) 2002.

million crimes recorded by police in 2000-2001,⁷³ inclusive of 733,300 violent crimes showing an increase by 4.3% and increase in robberies by 13%.⁷⁴ The statistics above leads to the conclusion that the demerits of alcohol use are undoubtedly many times greater than its merits. Alcohol took more out of the drunk than he took out of alcohol. Even if we leave all the financial losses due to alcohol misuse, merely loss of one human life is greater than any amount of monetary benefit. Though the costs of alcohol misuse, personal, social, and economic, may be difficult to quantify, yet without doubt they are great.⁷⁵

These are some of demerits of alcohol consumption whereas, it is estimated that merely a 5% reduction in the level of alcohol misuse with in a five year term could result in a minimum annual saving of £542.7 million.⁷⁶ About 70% of population agree that UK would be a healthier and better place if alcohol consumption is reduced, 63% believe that binge drinking is the major problem in the society, 88% think that alcohol misuse is the major cause of violence.⁷⁷ It suggests that general public is well aware of the cost they are paying for alcohol misuse.

Here, it is worth mentioning that prohibition of alcohol in an Islamic society is independent of all these merits and demerits. From *Shari'ah* perspective, right and wrong are determined, not by reference to the nature of things, but because Allah has declared them as such.⁷⁸ The believers, even if there are benefits in alcohol, will not take them into account because it has been declared harmful by Allah, the Lord of the universe and the supreme authority of values.

9.7.3 Third phase

Muslim community was becoming more aware of alcohol's evil effects and was anxious to have some revealed injunction in this regard. Meanwhile it happened that one of the Muslims, leading the evening prayer in Madina, was too drunk to recite the Holy *Qur'an* accurately.⁷⁹ This incident seriously demonstrated the harmful effects and sinful outcome of alcohol use and the appropriate psychological climate had been created for a

⁷³ Home Office, *Statistical Bulletin Recorded Crime* (Communication & Development Unit, 2001) p.3

⁷⁴ *Ibid.* p.9

⁷⁵ Lord President's Report, *Action against Alcohol Misuse* (HMSO, London, 1991) p.1.

⁷⁶ Alcohol Concern, *Alcohol Strategy: Executive Summary* (<http://www.alcoholconcern.org.uk>) 2002.

⁷⁷ Alcohol Concern, *Public Ready for Action on Alcohol* (<http://www.alcoholconcern.org.uk>) Press Release, May 21, 2001.

⁷⁸ Kamali, Mohammad Hashim, 1991, *op. cit.* p.245.

⁷⁹ Al-Tibri, Muhammad bin Jareer, *Tafseer Tibri* (Dar Ahya al-Taras, Beirut, 2001) Vol. V, p.115.

more restrictive action. The incident became the cause of receiving timely declaration of the third phase of prohibition.

In this phase some restriction were imposed and alcohol consumption was prohibited at the time of performing religious worship. The Holy *Qur'an* says, "O ye who believe! Draw not near unto prayer when you are drunken, till you know that which ye utter."⁸⁰ The verse admonished the believers not to come to prayers with their minds befogged by intoxicants. The verse describes a particular phenomenon that an intoxicated person does not know what he is uttering because his mental capacities have been suspended for the time being. This phase was very important because drunkenness was placed in a direct encounter with the prayer.

Since prayer is a an obligation of every adult and sane Muslim five times a day, logically the verse leads to the conclusion that one should drink only such a quantity insufficient to intoxicate him or one should not drink at the time of prayer, so as to pray in the state of sobriety. If a Muslim should perform his prayer regularly and he was not to pray while drunk, it simply meant that he could not drink anymore. The psychological effects of this stage were far reaching. At every call for prayer, the believers were reminded to abstain from drinking. This could be viewed as a major step in the systematic de-sensitisation process of collective abstention, analogical to behaviour therapy.⁸¹ This obviously has served as a well-suited means for strengthening the spiritual drive to enter into a new pattern of life.

This phase has given birth to another factor, social pressure, to abstain from use of alcohol. The believers were supposed to offer congregational prayers in the mosque led by the Holy Prophet. It was unimaginable that someone will miss them without any valid excuse, like serious illness. If he missed any of his prayer his friends would visit him at home expecting him to be seriously ill. He would feel quite ashamed to admit that he missed his prayer because he was drunk. The influence of group dynamics was optimally utilised to induce the hardcore of chronic alcoholics to conform socially to a new religious life. This is the basic characteristic of an Islamic society that people do not keep minding their own business. They are liable to co-operate in goodness and

Al-Qurtabi, 1936, op. cit. Vol. V, p.200.

⁸⁰ *Al-Qur'an* 4:43.

discourage evil, it is their duty to prevent the evil deeds if within their power or at least admonish the wrongdoer. By this way the addicted were helped out by social pressure and friendly influence of religious brotherhood that made them believe that compliance to dictates of *Shari'ah* bears a much greater value than addiction to alcohol.⁸²

The traditional wine drinking had to be given up or reduced to the minimum in order that people might be sober and observe the above commandment.⁸³ However, still the use of alcohol was not declared as prohibited. This was the probable reason that the companions of the Holy Prophet were constrained to enquire about some clear injunction as to the use of liquor. They asked the Holy Prophet and also prayed to the Almighty Allah to issue a clear and satisfactory injunction.⁸⁴ On the other hand some alcohol addicts were still drinking. They drink after the night prayer and were well in their senses till the morning to offer their dawn prayer.⁸⁵ When Muslims became accustomed to abstain from drinking for long hours and controlled their temptation for alcohol, a clear, general and unequivocal prohibition for all the times was finally revealed.

9.7.4 Fourth Phase

Over the preceding years the circumstances changed and the scene was appropriately set for a complete preventive and prohibitive measure. In response to their inquiry the following verse was revealed which not only categorically prohibits use of liquor but also explains the causes of prohibition. In the fourth and final phase it is said, "O ye who believe! Intoxicants and games of chance and (sacrificing to) idols and divining arrows are only an uncleanness (*Rijs*) and an infamy of Devil's handiwork; shun it therefore and you may succeed. The devil only desires to cast among you enmity and hatred by means of intoxicants and games of chance and to keep you off from the remembrance of Allah and from (his) worship, will you then desist?"⁸⁶ This is the most forceful command describing alcohol as the tool of devil, a means that leads to greater sins, creates enmity among human, therefore, believers are commanded to shun it.

The verse reveals the social and religious harmful consequences of *Khamr*. Drinking *Khamr* and gambling has been linked to idol's worship and declared as filthy (*Rijs*) and

⁸¹ Bassher, Taha, 1981, op. cit. p.236.

⁸² Badri, M. B., 1976, op. cit. p.26.

⁸³ Bassher, Taha, 1981, op. cit. p.236.

⁸⁴ Abu Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.79.

⁸⁵ Al-Zokhali, Wahba, *Al-Tafseer al-Munir fi al-Aqeeda* (Dar Al-Fiker, Beirut, 1991) Vol. V, p.81.

⁸⁶ *Al-Qur'an* 5: 90-91.

ascribed to the work of Satan. It refers to the major risks resulting from alcohol consumption. Alcohol excites enmity and hatred among the community of believers by making the intoxicated person indifferent to moral and religious values and irresponsible towards his duties. The incidents of violence as a result of alcohol use are very common in Western society, a live example to prove the truth of the revelation. In fact, the injunction is accompanied by the cause and wisdom that has been proved scientifically centuries after it was revealed.

An objection may be raised that the Holy *Qur'an* has not declared it unlawful (*Haram*); at the most it has declared it as *Rijs* and the act of Satan. The objection may be rejected on the ground that the word *Rijs* is more comprehensive as compared to *Haram*. A substance that has been declared as *Haram* may not be *Rijs*. For example, the property obtained by theft is *Haram* but is not *Rijs* or filthy. On the other hand a *Rijs* substance shall always be *Haram*.⁸⁷ It is worth noting that Allah Almighty when prohibited use of alcohol, mentioned seven causes for the command, out of which any single cause is sufficient to declare it prohibited. It has been linked with the worship of idols, it is designated as *Rijs*, it is called a handiwork of Satan, it has been enjoined to be abandoned, success has been linked with abstaining from it, it leads to hatred and enmity among human beings, it prevents from remembrance of Allah and His worship.

The verse ends with a very severe admonition to abstain; will you then desist? The response of the community of believers to the injunction was prompt and decisive. It has been narrated that when the Holy Prophet had finished the recitation of the verses for the first time, the listeners answered with an enthusiastic cry, "We have desisted oh Lord! We have desisted!"⁸⁸ The word "desist" used in *Qur'anic* verse for the prohibition of alcohol has a wider meaning than mere abstaining and it aims at establishing a strong avoidance reaction to association with alcohol in any form.

The response of believers to the commandment was remarkable indeed. Some people were drinking wine at that time, having partly filled glasses in their hands. As soon as they heard the announcement "wine has indeed been prohibited," they poured the remaining drink on the ground and broke the big clay pots filled with fermented

⁸⁷ Al-Qurtabi, 1936, op. cit. Vol. VI, p.289.

⁸⁸ Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.80.

drinks.⁸⁹ History records that on the day of its complete prohibition wine flowed in the streets of Madina like water after heavy shower.⁹⁰ There is no other such precedent in the history of legislation of people complying so swiftly and wholeheartedly with the law, especially in the case of prohibition of drinking, which was a deep rooted habit of the pre-Islamic Arab society, glamorised by its poets and affecting its trade.

9.8 How was the Goal achieved?

The time period between these four steps was logically necessary to mentally prepare the people to abandon use of alcohol and to overpower its withdrawal effects. The first verse was revealed a few months before the Holy Prophet's emigration to Madina.⁹¹ It was the time when the reformation of the false believes was at the stage of its maturity and the people were willing to adopt a new social and moral code of life. The second verse was revealed soon after the emigration,⁹² while the third verse was revealed after almost seven years from emigration, whereas, the last and final verse was revealed two or three years after the third⁹³ and it is amongst the last revelations.⁹⁴ It took almost ten years to achieve the object that has ever been achieved anywhere.⁹⁵

People had been accustomed to drinking wine and dealing in it. It would be unbearable for them to prohibit its use and trade at once. Obviously there were no sedative or analgesic drugs available to recover from any withdrawal symptoms.⁹⁶ There might be some persons acutely addicted to alcohol, who would have certainly been given honey as a medicine to overcome the withdrawal effects. There is a long *Surah* in the Holy *Qur'an* named as "The Bee."⁹⁷ The Holy *Qur'an* describing the characteristics of honey says that there is healing for mankind in it.⁹⁸ There are a number of traditions of the Holy Prophet proving the fact that honey can cure many diseases.⁹⁹ Modern science has

Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. V, p.254.

⁸⁹ Al-Qurtabi, 1936, op. cit. Vol. VI, p.292.

Al-Tibri, Muhammad bin Jareer, 2001, op. cit. Vol. VII, p.43.

⁹⁰ Badri, M. B., 1976, op. cit. p.4.

⁹¹ Asad, Muhammad, *The Message of the Qur'an* (Dar Al-Andalus, Gibraltar, 1980) p.393.

⁹² Raza, Muhammad Rashid, op. cit. F.N. 39. Vol. II, p.322.

⁹³ *Ibid.*

⁹⁴ Ibn Kathir, *Tafseer Al-Qur'an Al-Azim* (1st ed., Dar Ahya Al-Turas Al-Arabi, Beirut, 1977) Vol. II, p.5

⁹⁵ Emigration of Muslims from Makkah to Madina took place in A.D. 622 (Encyclopaedia of Islam Vol. I, p.548). If we take the same year for the revelation of the first verse then the last verse was revealed around A.D. 631-32.)

⁹⁶ Bassher, Taha, 1981, op. cit. p.236.

⁹⁷ *Surah* 16

⁹⁸ *Al-Qur'an* 16:69.

⁹⁹ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol.VII, p.12.

Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV. p.409.

Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1142.

proved that honey contains a large amount of fructose that is very effective for the detoxication of drunkenness. Research confirms that two doses of 125 grams of honey at an interval of half an hour are more suitable to overcome the problem.¹⁰⁰ Beside this, the strong religious and emotional feelings of Muslims, motivation to change and unity with the other members of religious community, increasing social support and group interaction, a firm and unconditional faith in Almighty Allah, raised greater hopes to meet the challenging experience of abstaining from *Khamr*.¹⁰¹

The most successful campaign that had ever been launched by man against alcohol was miraculously achieved.¹⁰² The response of believers to the call was not astonishing. This was the result of ten years gradual religious, spiritual, ethical, and social control for the desire of drunkenness. It can be said without any fear of contradiction that it has not taken just ten years to completely eradicate the evil from Islamic society, there is a continuous effort of long and difficult thirteen years of Makkan period behind it, to reform the believes of converts to the new religion. In the beginning, pre-Islamic customs and traditions were not touched at all, rather the preference were given to the deep-rooted false beliefs like idolatry, tribalism, and values acknowledged during the period of ignorance. These ill beliefs were the roots of a large tree of evils, of which intoxication and gambling were only small branches.¹⁰³ The Makkan period seeded the new belief in hearts of believers, nourished it and it was grown to a large tree of a new social order, where Allah Almighty is the Lord of the whole universe, faith in the Day of Judgement, and fear of accountability are the principles of life, that discarded all the beliefs of ignorance. When the Arabs abandoned idolatry and prejudices of tribalism, the tree of evils lost its roots and intoxication and gambling were merely like weak and dry branches of this tree.

The strategy adopted by *Shari'ah* in prohibiting use of alcohol confirms the fact that even the most effective preventive measures imposed by external authority are incapable of liberating a community from a social vice unless a desire for liberation awakened in the hearts of the people concerned.¹⁰⁴ Every step, to the prohibition of

¹⁰⁰ Larsen, Martensen Oluf, "Detoxication of Drunkenness" *British Medical Journal* 2 (1954) p.464.

¹⁰¹ Bassher, Taha, 1981, op. cit. p.236.

¹⁰² Badri, M. B., 1976, op. cit. p.6.

¹⁰³ *Ibid.* p.31.

¹⁰⁴ Ahmad, Khurshid, *Islam: Its meaning and Message* (Ambika Publications, New Delhi, 1977) p.41.

alcohol, was taken whenever the spiritual and moral influence of the early step reached its climax.¹⁰⁵ The strategy of *Shari'ah*, to control a social evil, points out two very essential elements of any permanent social change in the life pattern of a society. Firstly, the proposed change must be well planned and gradual rather than an abrupt. Secondly, there must exist a calming and peaceful psycho-social reaction to neutralise or reduce the tension aroused by the resistance to comply the change.¹⁰⁶ Men are rational beings and they will follow their realistic interests provided that these were made known to them; any change conforming to these interests will be welcomed by them and will be of perpetual nature.

In conclusion it will be appropriate to mention the remarks of John Burns with regard to the effects of alcohol on human being individually, and on the social, economical, moral, physical health, and life standards of society collectively. He says that throughout the history of human beings, drink and drunkenness have been an active cause of social degradation, moral decadence and political decline. Its harmful effects were not restricted to a particular class rather they have affected peasant and merchant, serf and emperor, soldier and statesman, rich and poor. Scholars sunk beneath it, priest and politician, artists and craftsman have sacrificed their competency and decency, character and capability, to the vitiating temptation that drink offers them in its demoralising yet delightful charms. Through all the ages drunkenness has evoked greatest condemnation where it has been most widely used. Alcohol pollutes whatever it touches. It enervates when it does not enslave. It destroys slowly that which it does not degrade quickly. For the individuals it is a malignant disease, for the community it is murrain, for the nation it is an obstacle to all phases of progress. It lies across the path of personal reformation, municipal progress and state amelioration, obstructing all the forces of slow remedial reform and rapid changes to industrial elevation. It excites when it does not divert the best faculties and qualities of labour class. It irritates where it does not brutalise and makes for discord, conflict and bitterness, where calmness, sobriety, kindness and decency should prevail. It is an aid to laziness and is often an incentive to the most exhausting and reckless work; it is the most insidious foe to independence of character;

¹⁰⁵ Badri, M. B., 1976, op. cit. p.29

¹⁰⁶ *Ibid.* p.22.

it undermines manhood, enervates maternity and dissipates the best element of human nature, as no other form of surfeit. It is the mother of want and nurse of crime.¹⁰⁷

The statement above suggests that alcohol is either a single cause, or in conjunction with certain others, which influences much of the crime and misery, social disorder, poverty, lunacy, physical and moral degradation leading towards darkening the life of a nation. It is a major cause to waste national resources. It impoverishes the services maintained by the state for education and health. It perpetuates the slums and absorbs an immense amount of capital and enterprise but gives a smaller return in employment, wages than any other industry, trade or service of equal magnitude. Expenditure on drink is an indefensible burden on the income of the nation. Money spent on drink is money wasted and labour and capital required for its brewing and trade injure the nation, instead of bringing moral and material benefits to the people.¹⁰⁸

9.9 Medicinal Use of Alcohol; Is it Allowed in Shari'ah?

The discussion above proves that *Shari'ah* has unequivocally prohibited use of alcohol or any other intoxicant. A question still remains unanswered, is it permissible to use alcohol as a medicine? The question may be answered in the light of the *Sunnah*. It is narrated that a companion asked the Holy Prophet about the use of alcohol as medicine, "Verily it is not a medicine but a disease" replied the Holy Prophet.¹⁰⁹ It has been confirmed by scientific research that use of alcohol may cause almost all the diseases, like Hepatitis, Gastritis, Gout, Pancreatitis, Cardiac arrhythmia, Trauma, Strokes, Acute alcohol poisoning, Impotence, Infertility, Foetal damage, Obesity, Diabetes, Hypertension, Brain damage, acute renal failure, Neuropathy, Myopathy, Cirrhosis, Cancer and many others.¹¹⁰ It is the only disease that is sold under the licence by the government, advertised in the media and countless outlets available to spread it. *Shari'ah* has precedence in declaring alcohol a disease, adopting a realistic approach to abandon its use, centuries ago without any reliance upon such research.

Another tradition reports "Allah has created diseases and sent them down; He also created their cure. Take medicines to cure them but not anything prohibited."¹¹¹ The

¹⁰⁷ Burns, John, *Labour and Drink* (Lees & Raper Memorial Trust, London, 1904) pp.5-6.

¹⁰⁸ The Liquor (Popular Control) Bill Committee, *Let the People Decide: Some Notes on Drink Problem* (The Liquor (Popular Control) Bill Committee, London, 1928) p.1.

¹⁰⁹ Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.206.
Ahmed, bin Hanble, 1981, op. cit. Vol. IV, p.202.

¹¹⁰ Anderson, Peter & Wallace, Paul, *Alcohol Problems* (Oxford University Press, 1988) p.24.
Report From General Practice, 1986, op. cit. p.14

¹¹¹ Abu, Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.202.

Holy Prophet also narrated that Allah has not put the cure of any disease in a thing which He has prohibited.¹¹² The text of the sayings of the Holy Prophet proves that in *Shari'ah* it is not permissible to use alcohol even as medicine. Treatment of diseases with alcohol is prohibited in the same way as its use as intoxicants or the taking of any other prohibited substance.¹¹³ In UK, the Royal Commission confirmed the proposition by saying that alcohol is neither a specific cure for any disease nor it has any prophylactic value,¹¹⁴ on the contrary its use leads to certain disadvantages.¹¹⁵

It is not surprising that *Shari'ah* does not allow use of alcohol or any other prohibited substance as medicine. The prohibition of a thing demands avoiding and staying away from it, while allowing its use as medicine renders it desirable and keeping it on hand which is contrary to the spirit of prohibition. The logic behind prohibiting its medicinal use is that if alcohol were permitted as medicine when people are already inclined towards it, it would provide them an excuse to drink for pleasure and enjoyment, especially since they have the impression that alcohol is beneficial for their health, alleviates their complaints and cures their diseases.¹¹⁶

A logical reason forwarded by Ibn Qayyem, is that one condition for efficacy of medicine is the belief of the patient that Allah has placed the curing qualities in it. Now when a Muslim believes that alcohol is prohibited and *Haram*, it prevents him from believing that alcohol can be beneficial. Thus, he will not have any trust in it nor will he take it approvingly.¹¹⁷ In addition, if he believes that Allah has put some blessings or benefits in it that will go against his faith that it is prohibited.

Taking into account the explicit provisions of *Shari'ah*, Muslim jurists are of unanimous opinion that medicinal use of alcohol is not allowed.¹¹⁸ However, there is a

¹¹² Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol.VI, p.248.

¹¹³ Al-Shoukani, Muhammad bin Ali, *Neil Al-Aoutar* (Dar Al-Ktub al-Ilmia, Beirut, 1999) Vol. VIII, p.212.

¹¹⁴ Royal Commission on Licensing (England and Wales) 1929-31, Cmd.3988 (HMSO, 1932) Para.79.

¹¹⁵ *Ibid.* Para 77.

¹¹⁶ Ibn Qayyem, Al-Jawziyah, *Zad al-Ma'ad* (Moassasa al-Risala, Beirut, 1979) Vol. IV, p.156.

¹¹⁷ *Ibid.*

¹¹⁸ Ibn Qadama, op. cit. F.N. 16. Vol. VIII, p.308.

Al-Sarakhsi, *Al-Mabsut* (Matba al-Saada, Egypt, 1324H) Vol. XXIV, p.9.

Al-Rammali, *Nihayat al-Mohtaj* (2nd ed., Dar Ahya al-Taras al-Arabi, Beirut, 1992) Vol. VIII, p.14.

Al-Dasooqi, Shamas al din Muhammad Arafa, op. cit. Vol. IV, p.353.

Al-Jamal, Al-Shaikh Sulaiman, *Hashiat al-Jamal ala Sharah al-Manhaj* (Maktaba Mustafa Muhammad, Egypt) Vol. V, p.158.

Alish, Shaikh Muhammad, *Sharah Manah al-Jalil* (Dar al-Baz, Makkah) Vol. IV, p.552.

weaker opinion in *Shafite* school that in the cases of dire necessity, it is permissible to use such quantity of alcohol that is insufficient to cause intoxication.¹¹⁹ Nonetheless, this exception is not a specific one rather it comes under the general principle that necessity renders permissible that which is prohibited.¹²⁰ Even, in the presence of this exception it can be said that medicinal use of alcohol is strictly prohibited where the person uses it with a belief of benefiting from it.

The injunctions to prohibit intoxicants are as effective and applicable after fifteen centuries as they were at the time of their revelation. These are perfect, immutable and admit no modifications. The object of prohibiting intoxicants was to provide all that which is essential for a complete, all-embracing and everlasting law to raise the standard of human society to the highest degree of consummation and sublimity. The steps taken by the modern world to suppress this evil, and predominant cause of criminality, have been unscientific, uncertain and, therefore, unsuccessful. Let us have a look at the efforts of various social organisations to tackle the problem in English society.

9.10 Social Organizations and Alcohol Control in U.K.

At the moment, to help the people with alcohol related problems, there are 543 agencies in England and Wales.¹²¹ A number of services are being provided to such persons, like advice to cut down drinking, detoxification therapies programmes providing group work, skills training and relapse prevention work. In addition, there are 328 advice and counselling centres, 123 day programmes, 191 residential programmes, and more than 100 other agencies providing a combination of alcohol treatment services free of charges.¹²² Despite all the efforts the consumption is gradually increasing and admittedly from 1950 to 1980 alcohol consumption has been doubled.¹²³ This increase has not been noted only for UK; rather published data shows a world-wide increase in the average population consumption of alcohol during the past three decades.¹²⁴ It is not only the quantity of alcohol consumption doubled, rather consequent crime rate also doubled from 15.9/10,000 adults to 30.9/10,000 adults.¹²⁵ There can be no doubt that

¹¹⁹ Group of Muslim Scholars, *Al-Mousu'a al-Fiqhiyya* (Ministry of Religious Affairs, Kuwait) Vol. V, p.26. Al-Rammali, 1992, op. cit. Vol. VIII, p.14.

¹²⁰ Raza, Muhammad Rashid, op. cit. F.N.39.Vol. VII, p.88

¹²¹ Alcohol Concern, *The State of the Nation: Britain's True Alcohol Bill* (<http://www.alcoholconcern.org.uk>) 2003.

¹²² *Ibid.*

¹²³ Hertz, Catherine, *Alcohol and Health* (The Medical Council on Alcohol, London, 1990) p.5.

¹²⁴ McIntosh, I. D. "Population Consumption of Alcohol and Proportion Drinking" *British Journal of Addiction* 76 (1981) 267.

¹²⁵ Saunders, W. M., 1984, op. cit. p. 68.

the raise in the crime statistics which has occurred over the past 30 years is directly linked to the increased availability and consumption of alcohol. If the number of private organisations and agencies, their endeavours to tackle the alcohol problem, and the effect of all the efforts on the alcohol consumption is taken into account, it can be concluded that the answer to the raising tide of alcohol problems lies more with governments and politicians rather than with social workers.

Despite all such efforts, no indicator shows a decrease in alcohol consumption (as we have discussed in 6.4). Binge drinking and alcohol fuelled crime and disorder risks spiralling out of control.¹²⁶ Alcohol has drunk the whole nation, rather it drinks alcohol. People have been completely enslaved by their habit and could not forgo the pleasure of self indulgence. They have drowned their private sovereignty in alcohol and surrendered before their desire of intoxication. All the efforts failed to change the situation because of lack of any motivation behind them. A number of proposals have been made and experimented, throughout human history, to completely prohibit use of alcohol or at least to control its consumption but none can be said to have solved the problem, except the strategy adopted by *Shari'ah*. The strategy still possesses tremendous potential to fight the problem of alcohol in the modern world.

While concluding it can be taken into consideration what might be achieved by a nation if it successfully enforces prohibition. There would be a much larger proportion of healthy citizens and better medical services available to a large number of people, less number of crimes and hence a peaceful and law abiding society, vast number of people relieved of the miseries which the drinking bring upon them, strong family relationships and better environment for future generations, in abundance supply of food grain and fruit otherwise used in breweries and hence sober and healthy nation, increased efficiency of workers that will enhance industrial production and national economy.¹²⁷

9.11 Intoxication and Criminal Liability in *Shari'ah*

Shari'ah considers intoxicants as the root cause of all the crimes in a society.¹²⁸ Modern research has confirmed that use of alcohol is certainly related with the commission of

¹²⁶ Home Secretary's Letter to the Prime Minister (<http://www.bbc.co.uk>) March 31, 2004.

¹²⁷ Reason, Will, *Drink and the Community* (Student Christian Movement, London, 1922) pp.98-99.

¹²⁸ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1119.

Ahmed, bin Hanble, 1981, op. cit. Vol. V, p.238.

crimes.¹²⁹ Though *Shari'ah* has strictly prohibited use of intoxicant yet the probability of being intoxicated and commission of crime cannot be ruled out. Generally an intoxicated person shall be liable for all his acts done, for intoxicated wrong doing is not different from any other legally prohibited wrong.

Shari'ah differentiates between intoxication and insanity since an accused can be blamed for bringing about intoxication, whereas insanity being the act of God renders him immune from criminal liability.¹³⁰ If the liability of an intoxicated person is taken into account in terms of legal capacity, intoxication, whether involuntary or voluntary, does not affect the capacity of acquisition, because the basis of this capacity is humanity and intoxication does not negate it. Thus an intoxicated person has perfect capacity of acquisition. On the other hand the basis of capacity of execution is perfection of intelligence and understanding that is suspended for the time being due to consumption of intoxicant. It logically requires that the legal obligations should be extinguished on account of intoxication. The divine communication defining rights and obligations should not be directed to the intoxicated, for lack of understanding the command. It is almost the same problem as we discussed in English law. How is this tackled by the Muslim Jurists? To answer the question we'll take into account the two conditions of intoxications and the *Shari'ah's* view point.

9.11.1 Involuntary Intoxication and Criminal Liability

Muslim jurists unanimously agreed that if intoxication was caused due to mistake, duress, under dire necessity, like where the accused was about to die of thirst and no other drink was available,¹³¹ or the person took a prescribed medicine and he was intoxicated, or his intoxication was caused by any other manner which is not punishable, he will not be criminally liable for the acts done in this condition.¹³² It shall be considered as if he was acting under necessity or coercion¹³³ or he shall be treated like an insane.¹³⁴ It is because of this condition that he is not bound to perform any act

¹²⁹ See 6.8.

¹³⁰ Al-Bahli, Ali bin Abbas, 1956, op. cit. p.37.

¹³¹ Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed., I. R. I. Islamabad, 1993) p.341.

¹³² Ibn Nujaym, *Al-Ashbah Wa Al-Nazair*, op. cit. F.N. 14. p.552.

Al-Kasani, Ala al-din, *Badai al-Sanai* (H. M. Saeed Co. Karachi, 1979) Vol. VII, p.134.

Ibn Abdeen, Muhammad Ameen, *Hashia Ibn Abdeen*, op. cit. Vol. IV, p. 45.

Al-Khatib, Shamas ud din Muhammad bin Ahmad al Sharbini, *Mughni al-Mohtaj* (Dar Ahya al-Taras, Beirut, 1933) Vol. IV, p. 146.

Ibn Farhoon, *Tabssarat al-Hukkam* (Matba Mustafa Al-babi Al-halbi, Egypt) Vol. II, p.252.

Ibn Qadama, op. cit. 16. Vol. VIII, p. 307.

¹³³ Al-Zokhali, Wahba, *Usul al-Fiqh al-Islami* (1st ed., Dar Al-Fiker, Damascus, 1986) Vol. I, p.179.

¹³⁴ Al-Sherazi, Abu Ishaq Ibrahim, *Al-Mohazzib* (Dar al-Qalam, Damascus, 1996) Vol. IV, p.278.

relating to the rights of Allah till it lasts; nonetheless, he shall perform these acts as atonement after attaining sobriety.¹³⁵ If he causes loss of someone's life or damages property, he shall be liable to pay damages and to compensate the victim or his heirs; however, corporal punishment shall not be inflicted on him because he was devoid of intelligence and rationale understanding without his intention or fault.¹³⁶ It implies that in this particular condition Muslim jurists have not taken into account the intoxication itself rather its cause as a decisive factor to determine the liability of the offender

Taking into account the definition of intoxication as provided in 9.4, it can be concluded that involuntary intoxication could provide a defence to a criminal charge provided that the offender was incapable of forming an intention and controlling his physical movements. It appears that the provisions of English criminal law in this regard, as affirmed in *R v. Kingston*,¹³⁷ are synonymous with *Shari'ah*.

9.11.2 Voluntary intoxication and criminal liability

Voluntary intoxication may be defined as intentional use of intoxicant, knowing its intoxicating tendencies. How does this condition affect the liability of an accused? Muslim jurists differed while answering the question. According to *Hanfite*, if the offender was intoxicated voluntarily he shall be treated like a sober man except in three cases, apostasy, confession of *Hudood* offences, and anything said contrary to his own deposition already submitted.¹³⁸ They argue that an intoxicated person is incapable of using his intellect so his apostasy is not valid by way of *Istehsan* because injunctions of belief and disbelief are dependent upon the intention hidden in the mind of a person and his confession of the same is the evidence to prove it, but the confession of a person incapable of using his intellect and reason is inadmissible. Whereas, by way of analogy it should be a valid apostasy and he should be liable for that. The reason for validity by analogy is that the belief and the disbelief are based upon the confession of a person and for that we need not to take into account his intention because it will lead to unnecessary hardship.¹³⁹

Confession of an intoxicated person has further been divided into two kinds, confession for *Hudood* pertaining to the exclusive rights of Allah, like theft, drinking wine, and

¹³⁵ Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed., I. R. I. Islamabad, 1993) p.340.

¹³⁶ *Ibid.* p.341.

¹³⁷ *R. v. Kingston* [1994] 3 All. ER. 353.

¹³⁸ Ibn Nujaym, *Al-Ashbah Wa Al-Nazair* (Moa'ssasa Al-Halbi Linnasher wa al-Touzih, Cairo, 1968) p.310.

¹³⁹ Al-Kasani, *Al-Badai wa Al-Sanai* (H. M. Saeed Co. Karachi, 1979) Vol.VII.,p.134

Ibn Nujaym, *Al-Ashbah Wa Al-Nazair*, op. cit. 14. p. 553

unlawful sexual intercourse. In such cases his confession is not admissible since there is probability of truth or falsity of the confession leading to a doubt sufficient to avoid the infliction of *Hadd* punishment. He can retract such confession made in the state of intoxication.¹⁴⁰ However, if he confesses offence of theft, in intoxicated condition, he shall be liable to the value of stolen property even if he retracts after being sober. It suggests that the retraction shall be effective to the extent of the right of Allah but it leaves the right of man intact. A confession, made and retracted in intoxicated condition, if repeated in sobriety shall be valid both for the right of Allah and the right of man.¹⁴¹

However, if the confession is related to the violation of exclusive right of man or where the right of man is dominant, like offence of wrongful accusation of unlawful sexual intercourse, or an offence liable to *Qisas*, he shall not be allowed to retract and the punishment shall be inflicted after he attains sobriety. It is evident that except the three acts mentioned above a voluntarily intoxicated person shall be liable for all his acts and omissions.¹⁴² *Hanfite* jurists argue that voluntary intoxication in itself is a crime and as such cannot be a defence for any other crime. Moreover, if a drunken person is exempted from criminal liability, it will become a means for the commission of offences and evading criminal liability.

According to *Shafite* a voluntarily intoxicated offender is liable for all his offences and he will be treated like a sober man.¹⁴³ However, they differentiate between his transactions conducted and completed in the state of intoxication, into two kinds. According to them all his commercial transactions are invalid because the knowledge of the subject matter, the essential element for the validity of such transactions, is negated due to intoxication. But his dealings relating to the rights of man like debt, tortious liability and divorce, made in the state of intoxication are binding upon him by way of punishment.¹⁴⁴

Hanblite jurists are divided into two groups on the liability of a voluntary intoxicated offender.¹⁴⁵ According to the first opinion, which is dominant in the school of thought,

¹⁴⁰ Nyazee, Imran Ahsan Khan, *Theories of Islamic Law* (I.I.I.T. & I.R.I., Islamabad, 1994) p.98.

¹⁴¹ Badran, Abu Al-Ainain Badran, *Usul al-Fiqh al-Islami* (Moassasa Shabab al-Jamah, 1984) p.328.

¹⁴² Al-Kasani, *Al-Badai wa Al-Sanai* (H. M. Saeed Co. Karachi, 1979) Vol.VII, p.223.

¹⁴³ Al-Sherazi, Abu Ishaq Ibrahim Bin Ali, *Al-Mohazzib* (Dar al-Qalam, Damascus, 1996) Vol. IV, p.278.

¹⁴⁴ Al-Suyuti, *Al-Ashbah Wa Al-Nazair* (Dar al Kutub al-Ilmia, Beirut, 1979) p. 216.

¹⁴⁵ Ibn Qadama, *Al-Mughni* (Maktaba Al-Mustafa Al-babi al-Halbi, Egypt) Vol. VIII, p.195.

an intoxicated person is liable for all the offences committed in state of intoxication and proved by the evidence but he shall not be liable for any offence proved by his confession in such a state because he does not realise what he is saying.¹⁴⁶ The opinion is supported by a number of arguments;

Firstly, they argue by the saying of Ali, when consulted by Omar bin Al-Khattab regarding the liability of an intoxicated offender, he said, "an intoxicated person accuses others, and if he accuses with unlawful sexual intercourse, he is liable for eighty stripes."¹⁴⁷ Ali determined the punishment of an intoxicated person on the analogy of accusation of unlawful sexual intercourse. The opinion proves that the intoxicated offender, if accuses someone of unlawful sexual intercourse, will be criminally liable notwithstanding his intoxication. Similarly, if the accused, while intoxicated, killed someone; he will be liable for *Qisas* on the basis of above mentioned authority.¹⁴⁸

The consultation mentioned above was with regard to determine the liability of a person who drinks alcohol or uses other intoxicants voluntarily. The Caliph felt the necessity of consultation because fixed punishment for intoxication has neither been prescribed in the Holy *Qur'an* nor there is the *Sunnah* to ascertain it.¹⁴⁹ Whenever the Holy Prophet imposed a punishment for alcohol ingestion he neither mentioned that it was imposed according to revelation nor did he himself fixed a definite punishment.¹⁵⁰ It is reported that the First Caliph, Abu Baker, inflicted forty lashes upon the drunkard; Omar followed the precedent in the beginning, but afterwards when the number of intoxication cases increased unprecedented, he consulted the Prophet's companions to develop a consensus of opinion.¹⁵¹

¹⁴⁶ *Ibid.* (1st ed., Dar Al-Hadith, Cairo, 1996) Vol. XII, p.233.

¹⁴⁷ Malik bin Ans, *Al-Muwatta*, (Gagri Yayinlari, Istanbul, Turkey, 1981) Vol. II, p.694.

¹⁴⁸ Ibn Qadama, Al-Maqdasi, *Al-Sharah Al-Kabir* (Published at the Foot margin of *Al-Mughni*) (1st ed., Dar Al-Hadith, Cairo, 1996) Vol. XI, pp. 365-66.

¹⁴⁹ Ibn Qadama, 1996, op. cit. F.N. 18. Vol. XII, p.442.

¹⁵⁰ El-Ewa, Mohamed S., *Punishment in Islamic Law: A comparative Study* (American Trust Publications, Plainfield, 2000) p.45. {However, the authorities from the *Sunnah* prove that the Holy Prophet inflicted 40 lashes for drinking wine. Muslim, *Saih Muslim* (Cagri Yayinlari, Turkey, 1981).Vol. II, p.1330 and Abu Daoud, Sulaiman bin Ash'ath, 1981, op. cit. Vol. IV, p.621}.

¹⁵¹ Al-Tirmidhi, Muhammad bin Isa, 1981, op. cit. Vol. IV, p.48.

Group of Muslim Scholars, *Al-Mousu'a Al-Fiqhiyya* (Ministry of Religious Affairs, Kuwait) Vol. XXV, p. 96 {Though there is difference of opinion whether the punishment for intoxication is proved by the *Sunnah* or the *Ijma* yet the majority of Muslim jurists adopted the view that it is a Hadd punishment amounting to 80 strips, except *Shafite* who say that *Hadd* is only 40 whereas the other 40 are *Tazir*.(Gibb, H.A. R., *Encyclopedia of Islam* (E. J. Brill, Leiden, 1973-78) Vol. IV, p.990)}

Secondly, the intoxicated person is under an obligation to perform worships and he has not been exempted from the liability to discharge his religious duty, it logically leads to the conclusion that he should be liable for his conduct.¹⁵² Thirdly, the intellect of the intoxicated person has not been destroyed, rather concealed and diminished so he feels the pleasure and pains of the respective conditions, his condition resembles more closely to drowsiness than to sleep, thereby rendering him liable for his criminal conduct.¹⁵³ Fourthly, he himself has caused this condition by doing an unlawful act. Hence he is not entitled to its benefits.¹⁵⁴ Their arguments prove that according to predominant opinion a voluntary intoxicated person is liable for his conduct and he will not be entitled for any defence. According to their second opinion, an intoxicated person is not liable for *Hadd* punishment because his condition resembles insanity and this gives rise to a doubt sufficient to relieve him of his liability. The opinion, in the school of thought, is comparatively weaker and not preferred.¹⁵⁵

It suggests that majority of the Muslim jurists agree that if a person commits an offence in the state of voluntary intoxication, he shall be liable for the punishment.¹⁵⁶ The reason being that his transactions and acts are binding upon him and his condition is different from an insane person. The other reason is that the principle of liability of a

¹⁵² Ibn Qadama, 1996, op. cit. F.N. 18. Vol. XII, p.149.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* p.233.

¹⁵⁵ Ibn Qadama, op. cit. F.N. 16. Vol. VIII, p.308.

There is another exceptional opinion of *Zaherite* stating that an intoxicated person is not liable for anything except the punishment for using intoxicant. They support their opinion by the *Qura'nic* verse "O ye who believe! Draw not near unto prayer when you are drunken, till you know that which ye utter." (*Al-Qur'an* 4:43) They interpret the verse as an intoxicated person is discharged of his religious obligation for not knowing what he utters or does, hence logically should not be held liable for his conduct as well. {Ibn Hazm, Ali bin Ahmad bin Saeed, *A-Mohallah* (Dar Al-Afaq al-Jadeeda, Beirut) Vol. XI, p.293}. However, the interpretation is not apposite. We have already mentioned that according to the majority opinion an intoxicated person is not discharged of his religious obligations, rather liable to perform them as atonement after sobriety. Moreover, they argue that a specific punishment has been provided under *Shari'ah* for intoxication and holding him liable for his acts in such a state would amount to punishing him twice for the same offence, which is not reasonable. Though the *Zaherite* treat the condition of intoxication akin to insanity; however, they say that the insane or the intoxicated should be imprisoned, in order to incapacitate him from causing further harm, till he repents from intoxication or till he attains sanity by treatment.

¹⁵⁶ Al-Kasani, *Al-Badai wa Al-Sanai* (H. M. Saeed Co. Karachi, Pakistan, 1979) Vol. VII, p.134.

Al-Khatib, Shamas ud din Muhammad bin Ahmad al Sharbini, 1979, op. cit. Vol. II, p.190.

Al-Khatib Shamas ud din Muhammad bin Ahmad al Sharbini, 1933, op. cit. Vol. III, p.296.

Ibn Nujaym, *Al-Ashbah Wa Al-Nazair*, op. cit. F.N. 14. p.552.

Ibn Qadama, *Al-Mughni* (Maktaba Al-Mustafa Al-babi al-Halbi, Egypt) Vol. VIII, p.195.

Al-Qartabi, Abi Omar Yousaf bin Abdullah bin Muhammad Syed Abdul Birr, *Kitab al Kafi Fi Fiqh Ahl al Madina* (Maktaba Al-Riyadh al-Hadisa, Riyadh) Vol. II, p.96.

Al-Dasooqi, Shamas ud din Muhammad Arafa, op. cit. Vol. IV, p. 237.

Hassan, Ahmad, *Principles of Islamic Jurisprudence* (1st ed., I. R. I., Islamabad, 1993) p.342.

voluntarily intoxicated offender operates as a preventive measure for the commission of crimes; otherwise anyone intending to commit a crime may get intoxicated to avoid the criminal liability. Moreover, he takes a free and autonomous decision to consume intoxicant, knowing that it is unlawful for him to consume and normally he knows that it will affect his capacity of self control, appreciation and that it will cause disinhibition so his liability should be aggravated by punishing him for the offence of intoxication in addition to the offence committed in that condition.¹⁵⁷ Intoxication shall not affect his liability because it is an offence in itself and it is not reasonable that an offence should be treated as a mitigating factor for another offence.¹⁵⁸

Analysis of the opinion reveals that though intoxication can affect a person's capacity to appreciate the unlawfulness or nature of his conduct, to control his conduct so as to conform to the provisions of law, yet he is not allowed to claim this condition as a defence to a criminal charge. There is no bifurcation of offences into specific/basic intent. *Shari'ah* does not take notice of the temporary suspension of the offender's judgement, intelligence, discretion and understanding by a wilful transgression of its commands. Allowing a defence in such condition would amount to encourage disobedience of the commands.

9.12 Modern Trends of International Community

Driven by innumerable changes in social, political, medical and legal philosophies during the past two centuries, the courts have greatly expanded the exculpatory effects of intoxication. However, by the end of the last century, the pendulum began to swing back towards a policy of accountability for acts committed in a state of voluntary intoxication.¹⁵⁹ Taking into account the harmful effects of alcohol and resulting criminal behaviour, the international community has also changed its trend towards criminal

¹⁵⁷ Badran, Abu Al-Ainain Badran, *Usul al-Fiqh al-Islami* (Moassasa Shabab al-Jamah, 1984) p.328.
 Al-Dasooqi, Shamas ud din Muhammad Arafa, op. cit. Vol. IV, pp. 313,325,345,352.
 Al-Suyuti, *Al-Ashbah Wa Al-Nazair* (Dar al-Kutub al-Ilmia, Beirut, 1979) p.216.
 Al-Khatib, Shamas ud din Muhammad bin Ahmad al Sharbini, 1933, op. cit. Vol. III, p.146, 155.
 Al-Rammali, *Nihayat al-Mohtaj* (Al-Maktaba al-Islamia) Vol. VII, p.406.
 Ibn Qadama, op. cit. F.N. 16. Vol. VIII, p.304.
 Ibn Farhoon, *Tabsarat al Hukkam* (Matba Mustafa Al-babi Al-halbi, Egypt) Vol. II, p.250.
 Ibn Nujaym, *Al-Behar Al-Raiq Sharah Kanaz al Daqaiq* (Maktaba al-Majidia, Quetta) Vol. V, p.28.
 Ibn Al-Hamam, *Sharah Al-Feth Al-Qadeer* (Dar Ahya al-Taras al Arabi, Beirut) Vol. V, p.81.
 Ibn Hajar, Al-Haithmi, *Tofa't Al-Mohtaj* (Dar Sader, Beirut, 1315 A. H) Vol. IX, p.169.
 Al-Shaqeti, Ahmad bin Mukhtar, *Mawahib al-Jalil* (Idara Ahya al-Tarasal-Islami, Qatar, 1987) Vol. IV, p.377.

¹⁵⁸ Al-Shafi, Ahmad Mahmood, *Usul Al-Fiqh* (Moasassa al-Saqafa al-Jamhia, Alexandria, 1983) p.212.

¹⁵⁹ *Ibid.* at p. 482.

liability of intoxicated offenders. The Rome statute of International Criminal Court¹⁶⁰ is a clear proof of the fact. Article 31(1)(b) dealing with grounds for excluding criminal responsibility states that anyone intoxicated voluntarily under such circumstances where he knew the risk that such intoxication is likely to engage him in a criminal conduct shall not be excluded from criminal liability.¹⁶¹ The basic idea of this principle is to prevent *mala fide* intoxication with an objective to commit an offence in a condition of non-responsibility and later to invoke this condition as an exculpatory ground. The principle that voluntary intoxication prior to the commission of a crime shall negate the defence of absence of *mens rea* is generally recognised in both continental and common law.¹⁶² Though at the moment voluntary intoxication will not provide a ground for defence in cases of genocide or crimes against humanity only yet it is a healthy sign that the international community has realised that the defence is not reasonable. Complete abolition of defence of intoxication will further strengthen the efforts to stop not only drug abuse but also a number of serious crimes from the society.¹⁶³

A policy of excluding evidence of an offender's voluntary intoxication comply with the general rule that criminal defences are not available to those offenders who are at fault in creating the conditions supporting their defence.¹⁶⁴ An offender who culpably creates circumstances which require him to commit the otherwise excusable offence may not take such circumstances in his defence. For example, if the accused was responsible to start a brawl he is not allowed to take the plea of self-defence against the crime that he committed in this condition. Similarly, a person who wilfully joins a gang of criminals shall be liable for any crime subsequently committed, though under coercion of the criminals and, likewise, a person is not allowed to claim the defence of provocation, who himself has caused the conditions of provocation to exist. The person who knowingly casts off the restraint and judgement of his sobriety does not deserve to plead that he would not have committed the offence if sober. Intoxication turns men into

¹⁶⁰ The statute was adopted on 17 July 1998, obtaining 120 votes in favour and only 7 against with 21 abstentions.

¹⁶¹ (<http://www.un.org/icc/index.htm>) A/Conf.183/9.

¹⁶² Fletcher, George P., *Rethinking Criminal Law* (Little, Brown & Company, Boston, 1978) p. 846.

¹⁶³ Keiter, Mitchell, "Just Say No Excuse: The Rise and Fall of Intoxication Defence" 87 (1997) *JCL* 482 at 483.

¹⁶⁴ *Ibid.* 499.

beasts preying upon society and thus such inebriates are as responsible for subsequent harm as if they set free an actual dangerous animal upon the defenceless victims.¹⁶⁵

Many cases of disability based upon the excuse of intoxication may lead to the recurrence of the same situation and hence re-offending of the accused. A logical argument can be forwarded that the society has a right to protect itself and the interests of its subjects at stake, from further harmful but excused conduct of the offender. Under the circumstances it is reasonable to insist upon punishment of the offender to control the self-induced disability. This can further be illustrated by an example of a madman. It is true that he is not blamed for his conduct and hence not liable for the offence committed. However, if a man is so deranged that he is likely to engage in dangerous conduct, it is quite reasonable to put him under some form of restraint. No one would deny that it is the most appropriate step to prevent harm from others. Likewise, where it has been established by research and we are sure that drunkenness is likely to result into offensive conduct,¹⁶⁶ it is quite logical to put certain restraints on its use.

Conclusion

Modern research has proved that use of intoxicants is injurious to human health and it weakens man's reason and intellect. Beside its bad affects on human health it leads to economic losses in the shape of industrial and road accidents by intoxicated workers and drivers respectively. It injures human health and life, damages the body and character, overthrows will and destroys self control. Intoxication is an offence not only against religion, person of the intoxicated, moral standards, decency, and society but also against innocent wives and children and the family of the drunk. Everyone had to be sober all the time for their good and good of their families and society.¹⁶⁷ Their duties towards themselves, their families and society should be made known to them.

If statistics were collected worldwide of all the patients admitted to hospitals due to alcohol use and those who are suffering from mental disorder, *delirium tremens*, nervous breakdowns, cancer, AIDS, ailment of the digestive tract, liver diseases, heart strokes and many others to which are added the statistics of suicides, homicides, rapes and other crimes, bankruptcies, broken homes, neglected children, distorted relations, related to the consumption of alcohol, the number of such cases would be so high and

¹⁶⁵ *Ibid.*

¹⁶⁶ Gough, Stephen, "Intoxication and Criminal Liability" 112 (1996) *LQR* 335 at p.337.

¹⁶⁷ Keiter, Mitchell, 1997, *op. cit.* p.488.

unbelievable that, in comparison to it, all efforts, campaigns and preaching against drinking would not be enough. The statistics will lead to a unanimous conclusion that mankind has not suffered any greater disaster and misfortune than that brought about by the use of alcohol. There is an urgent need to change public attitude regarding its use. It is needed that to avoid alcohol related harms the concept of alcohol use should be changed, alcohol should be replaced by other healthy and cheaper soft drinks and better alternatives to relieve stress should be available to the masses.

Though the law cannot prevent every factor which contributes to crime nevertheless it can prevent many such crimes by prohibiting the use of intoxicants and punishing a factor common to so many crimes. Taking into account this particular point the Law Reform Commission for Ireland proposed that an express provision should be included in the statutes that self-induced intoxication should never afford a defence to a criminal charge.¹⁶⁸

Shari'ah prohibited use of intoxicants centuries ago and adopted a strategy that can be followed by any society at anytime to eradicate the problem of intoxication. A voluntarily intoxicated person is criminally liable for his conduct so the condition may not be taken into account while determining his mental condition. The absence of defence of voluntary intoxication in *Shari'ah* and contemporary concept of the full responsibility of the accused leads to the conclusion that there is no fundamental right to introduce the evidence of voluntary intoxication as defence.

The next part shall explore the principles of private defence in English law and *Shari'ah*.

¹⁶⁸ A Law Reform Commission Report on Intoxication (Ireland) LRC 51-1995 (<http://www.lawreform.ie/publications>) 2003.

Part-III

Chapter-10 Right of Private Defence in English Law

10.1 Introduction

The defence of one's self is quite natural, one would prefer to kill rather than be killed. It is no offence to defend oneself or any other from unlawful violence causing reasonable apprehension of death or grievous bodily harm or to use force in execution of a duty imposed by law, provided no greater harm is inflicted than necessary.¹ The rule of self preservation renders it fair and just for a person to save his life or bodily integrity even if the only way to do so is to sacrifice the assailant's life or limb.² The right is a means to an end, to save the defender's interests properly recognised by the law.³ Law neither requires nor wishes people to submit passively to a bodily assault because this would simply be an inducement to the criminals.⁴ There would be a logical inconsistency if the right to life has been affirmed but the permission to use reasonable means necessary to repel aggressive threats is refused. Self-defence may be considered as the oldest ground of justification for use of force in all legal systems of the world.⁵

This chapter is devoted to deal with the principles of self-defence as enunciated in English criminal law, need of such a defence in a society, quantum of force required to defend, and a rational analysis of the principles regulating the right. It will also show that English law on the subject is still in a developing stage. Before dealing with the core principles it seems appropriate to analyse whether self-defence is an appropriate term to be used.

10.2 *Is it Appropriate to Use Self-defence for the Defence under Question?*

An individual has a right to defend attack of an assailant by using such force as may be necessary. This right is not confined to the defence of his body rather extends to that of his family and possibly, in the cases of a felonious assault, even to that of one who actually needs his protection.⁶ In addition, the right may be exercised to prevent a crime,

¹ Stephen, J. Fitzjames, Sir, *A Digest of the Criminal Law* (9th ed., Sweet & Maxwell, London, 1950) p.252.

² Holmes, Oliver Wendell, *The Common Law* (Macmillan, London, 1968) p.40.

Gur-Arye, Miriam, "Should the Criminal Law Distinguish between Necessity as Justification and Necessity as an Excuse?" 102 [1986] *LQR* 71 at 71.

³ Brett, Peter, *An Inquiry into Criminal Guilt* (Sweet & Maxwell Ltd., 1963) p.152.

⁴ Ross, Alf, *On Guilt, Responsibility and Punishment* (Stevens & Sons, London, 1975) p.4.

⁵ Eser, Albin, "Justification and Excuse" 24 [1976] *AJCL* 621 at 631.

⁶ Warmington, L. Crispin, *Stephen's Commentaries on the Law of England* (21st ed., Butterworth, London, 1950) Vol. IV, p.38.

to effect or assist a lawful arrest, to prevent or terminate a breach of peace, to protect property from unlawful appropriation, destruction or damage.⁷

English criminal law justified a woman killing an assailant who attempted to rape her and likewise a husband or father while defending an assault of rape on his wife or daughter but not in the instances of adultery by consent.⁸ However, according to Maitland an adulterer might be killed by the woman's husband, father, brother, or son without any differentiation between the consensual or non consensual act.⁹ In *R. v. Wheeler*,¹⁰ the defendant pleaded that the deceased attempted to rape his common law wife and he killed him in her defence. The jury was directed, *inter alia*, that death caused while reasonably defending someone is not unlawful and unless it was proved to have been unlawful they should not convict. Historically English law required that if an accused claims benefit of self-defence; he must show that the assailant was attacking him or any other, attempting to commit a rape, carrying stolen property or resisting a lawful arrest.¹¹

The principle of self-defence can also be applied between parents and children,¹² husband and wife,¹³ brother and sister¹⁴ and other kin. A number of cases confirm that apart from any relationship between the assaulted and the rescuer, there is a general liberty even between strangers to take reasonable steps to prevent commission of a crime or to rescue the attacked.¹⁵ The law allows a stranger to use reasonable force for the defence of any other on rational and moral grounds.¹⁶ Both, ancient and contemporary authorities, support the view that the right of defence is not limited to the family relationship.¹⁷

The law permits the defence of others because the righteous resentment, kindled while observing the strong ill-treating the weak, is surely a noble impulse. It prompts

⁷ The Law Commission, *A Criminal Code for England and Wales* (Law Com. No.177, 1989) Clause 44 (1).

⁸ Blackstone, *Commentaries on the Law of England* (15th ed., A. Starhan, London, 1809) Vol. IV, p.180.

⁹ Pollock, F., Sir, & Maitland, F. W., *The History of English Law* (2nd ed., University Press, Cambridge, 1898) Vol. I., p.53.

¹⁰ *R. v. Wheeler* [1967] 1 WLR. 1531.

¹¹ Holdsworth, W. S., *A History of English Law* (3rd ed., Methuen & Co, London, 1923) Vol. II, p.44.

¹² *R. v. Rose* (1884) 15 Cox. C.C. 540; *R. v. Harrington* (1866) 10 Cox. CC. 370.

¹³ *R. v. Driscoll* (1841) C & M 214; 174 ER 477.

¹⁴ *R. v. Duffy* [1967] 1 QB 63.

¹⁵ See, *Devlin v. Armstrong* [1971] NI 13; *Albert v. Levin* [1982] AC 546 and *R. v. Duffy* [1967] 1 QB 63.

¹⁶ Williams, Glanville, *Textbook of Criminal Law* (Stevens & Sons, London, 1983) p.501.

individuals to forget their own personal risk and help those in distress. The law must be cautious lest it loosen the bonds that form this generous alliance between courage and humanity. Let it rather give all honour and reward to him who protects the interests of others. It deeply concerns public good that every man should look upon himself as a natural protector of others.¹⁸ This indicates that self-defence is perhaps rather a narrow term to describe the defence since it applies to the defence of not only one's self, but also property and family, his friends or even a complete stranger.¹⁹ Hence, it is appropriate to use the term private defence as a more general expression.²⁰

10.3 Need for the Right of Private Defence

The right of private defence is common to all legal systems, though its function and scope may vary with the degree of maturity attained by the system in which it finds a place.²¹ It is in the interest of general peace and good order that society should take upon itself the task of protecting rights of individuals and prohibit use of force by themselves. Although a well regulated and organised society will provide general protection to all its subjects, it cannot guarantee protection at the very moment when an individual is subjected to a sudden attack.²² This inability of providing protection at all times, in all contingencies led to the recognition of the right of private defence. The use of force in private defence is tolerated only because state fails in its task of providing protection against aggression.²³ It means that the right is not merely an individualistic right to protect one's own interests rather it is regarded as the actualisation of legal interest in promotion of general peace.²⁴

Right of private defence is an essential right, for the vigilance of law could never take the place of that watchful care which every individual takes on his own behalf. Aggressors would never be restrained as effectively by mere fear of laws as they are by fear of resistance of individuals. In certain inevitable occasions dependence upon the arrival of official help would be disaster and it would be extremely unjust if the remedy of private defence were altogether denied.²⁵ Taking away this right is to encourage the

¹⁷ For Ancient Authority See *Tooly* (1709) 11 Mod. 242 at pp. 250-51; 88 ER 1015 at 1020.

¹⁸ Atkinson, Charles M., *Bentham's Theory of Legislation* (Oxford University Press, 1914) Vol. II, p.46.

¹⁹ Reed, Alan & Seago, Peter, *Criminal Law* (Sweet & Maxwell London, 1999) p.206.

²⁰ Williams, Glanville, 1983, op. cit. p.501.

²¹ Ashworth, A. J., "Self-defence and the Right to Life" (1975) *C L J.* 282 at 288.

²² Ashworth, Andrew, *Principles of Criminal Law* (3rd ed., Oxford University Press, 1999) p.138.

²³ Fletcher, George P., *Rethinking Criminal Law* (Little, Brown & Co. Boston, Toronto, 1978) p.867.

²⁴ Eser, Albin, 1976, op. cit. p.631.

²⁵ Clarkson, C.M.V. & Keating, H. M., *Criminal Law: Text and Materials* (3rd ed., Sweet & Maxwell London, 1994) p.297.

mischievous to do wrong.²⁶ Furthermore, right of private defence is certainly a factor helpful to minimise the incidences of public and private violence. The right can be supported either on the basis of self preference or on the ground that law cannot prevent such a conduct by the threat of punishment. This is because a threat of death on some future time can never be a sufficiently powerful motive to make a man choose death now.²⁷ If reasonable private defence were to be criminal, it might be thought to undervalue the victim's life for the sake of that of an aggressor.²⁸ Private defence, as it is justly called the primary law of nature, cannot be taken away by the law of society.²⁹

10.3.1 Private Defence: An Exception to Prohibition of Use of Force

Unlike other defences private defence is related only to crimes against the person and property.³⁰ The right is an exception to the prohibition of use of physical force by one person against another.³¹ Cases may arise in which an individual's right to life conflicts with his duty to abstain from violence. Legal systems generally resolve this conflict by permitting the individual's right to life to disregard the social duty not to use force. Indeed, on practical grounds the right to use force in private defence is essential if members of society are not to be put at the mercy of the strong and corrupt.³² A plausible claim that defender's case falls within this exception requires that the use of force is necessary and reasonable for private defence.³³

Private defence may justify use of violence against the assailant. However, beyond this, the law recognises a few if any, exceptions to the ordinary principles of liability.³⁴ The significant feature of this defence is the unilateral violation of the defendant's autonomy. If a person's autonomy is compromised by intrusion, then he has a right to expel the intruder and restore the integrity of his domain.³⁵ Whatever is done in lawful exercise of right of private defence is looked upon as done upon the highest necessity and compulsion.³⁶ The following section will give gist of the defence in English law.

²⁶ Atkinson, Charles M., 1914, op. cit. Vol. II, p.45.

²⁷ Holmes, Oliver Wendell, *The Common Law* (Harvard University Press, Cambridge, 1963) p.40.

²⁸ Feldman, D., *Civil Liberties & Human Rights in England & Wales* (Clarendon Press, Oxford, 1993) p.98.

²⁹ Blackstone, 1809, op. cit. Vol. III, p.4.

³⁰ Loewy, Arnold H., *Criminal Law* (West Publishing Co. ST. Paul, Minn. 1975) p.64.

³¹ Ashworth, A.J., 1975, op. cit. p.282.

Bowett, D. W., *Self Defence in International Law* (Manchester University Press, 1958) p.3.

³² Ashworth, A.J., 1975, op. cit. p.283.

³³ Bayles, Michael D., *Principles of Law: A Normative Analysis* (D. Reidel Publishing, 1987) p.334.

³⁴ Warmington, L. Crispin, 1950, op. cit. Vol. IV, p.26.

³⁵ Fletcher, George P., 1978, op. cit. p.867.

³⁶ Blackstone, 1809, op. cit. Vol. IV, p.130.

10.4 Right of Private Defence and English Law: A Historical Review

10.4.1 No Right of Private Defence Initially

In early English law so much importance was attached to human life that at a time it had no distinction between murder, homicide committed by mistake or in private defence.³⁷ This was because the law took into account the destruction of human life only notwithstanding the cause behind that. Even in the cases of homicide by misfortune or in private defence a man was hanged just if he had acted feloniously.³⁸ There was no concept of *mens rea* and no distinction between accidental and intentional homicide.³⁹

It was in 1267 when homicide caused by misfortune and murder were differentiated.⁴⁰ However, up to the reign of Edward-1 (1275-1307) homicide could be justified only if committed in execution of the King's writ or other instances of execution of law.⁴¹ The statute of Gloucester⁴² regulated the procedure to be followed in the cases of homicide by misadventure and in private defence. Before the Statute, it had become the practice of the clerks in chancery to issue a writ to inquire whether a homicide for which a man was arrested had been committed by misfortune or in his own defence, or in any other non felonious manner. The statute forbade this and provided that a verdict should be found before the justice in Eyre or gaol-delivery.⁴³ The accused was not entitled to an acquittal by the jury. He was sent back to the prison and relied on the King's mercy for a pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime.⁴⁴ The pardon became so frequent that parliament complained that it had encouraged murderers and demanded that no pardon in future should be issued without its consent, or the king would remedy the matter by statute.⁴⁵

It is unbelievable for a modern lawyer that it was a rule of English law that a man who committed homicide either by misadventure or in the exercise of his legitimate right of

³⁷ Coke, Edward M., Sir, *The Second Part of the Institutes of the Law of England* (6th ed., W. Rawlins, For T. Basset, London, 1680) p.148.

³⁸ Barr, Ames James, "Law and Morals" 22 (1908-09) *Harv. L.R.* 97.

³⁹ Baker, J.H., *An Introduction to English Legal History* (3rd ed., Butterworths, 1990) p.600.

⁴⁰ 1267 (52. Hen-3) c. 25. "What kind of Manslaughter shall be Adjudged Murder?"

⁴¹ Beale, Joseph H., "Retreat from a Murderous Assault" 16 [1902-03] *Har. L.R.* 567 at 568.

⁴² 1278 (6.Edw-1) c. 9.

⁴³ Beale, Joseph H., 1902-03, op. cit. p.568.

⁴⁴ Barr, Ames James, 1908-09, op. cit. p.98.

Hawkins, Williams, *Pleas of the Crown* (E. & R. Nutt, London, 1728) Vol.1, Ch.27, s.7, p.72.

Holdsworth, W. S., 1923, op. cit. Vol. II, pp.358-59.

Beale, Joseph H., 1902-03, op. cit. p.569.

⁴⁵ Kaye, J. M., "The Early History of Murder and Manslaughter" 83 (1967) *LQR* 365 at 378.

private defence was held guilty requiring the King's pardon to escape punishment, and even if granted would still forfeit his property.⁴⁶ However, the moral sense of community could not tolerate indefinitely the idea that a blameless private defence was criminal or that he would make compensation to his culpable assailant.

10.4.2 Relaxation of the Rule

The need to allow private defence was felt by the lawmakers, and under certain exceptional circumstances, homicide committed in private defence was declared to be justified. In 1532, it was enacted that a person who killed another who had tried to rob him in his house or on or near a highway did not incur forfeiture of his goods and shall be acquitted and discharged⁴⁷ without formal pardon by the king.⁴⁸ Apart from these exceptions there is abundant authority for proposition that homicide committed by misadventure or in private defence was an offence which needed a Royal pardon.⁴⁹ Pardon for killing in private defence became a matter of course and ultimately the jury was allowed to give a verdict of not guilty in such cases.⁵⁰ The practice of forfeiting goods died out and was ultimately buried in 1828 by an Act of parliament.⁵¹ The final step to eliminate forfeiture was taken in 1870 whereby section 1 of Forfeiture Act 1870 clearly put the victim of an aggravated assault in a different position and relieved him from the punishment of forfeiture.

In the presence of all this evidence, it has been claimed that common law has always recognised the right of private defence.⁵² There is no justification for such a claim. At the most it can be said that this right has taken a fairly long time for its recognition and the right of private defence was recognised by the modern rather than medieval law.⁵³ The law gradually moved from a position which treated all homicides by an individual as unlawful to the position where it recognised that an individual may kill in the exercise of his right of private defence. It was realised that one who is unjustly threatened with death or grievous bodily harm commits no crime if he avoids that threat even at the cost of the life of the assailant.⁵⁴

⁴⁶ Turner, J. W. Cecil, *Kenny's Outlines of Criminal Law* (19th ed., University Press, Cambridge, 1966) p.143.

⁴⁷ 1532 (24. Hen-8) c. 5.

⁴⁸ Beale, Joseph H., 1902-03, op. cit. p.571.

⁴⁹ Holdsworth, W. S., 1923, op. cit. Vol. III, p.313.

Barr, Ames James, 1908-09, op. cit. p.97

⁵⁰ *Ibid.* at p.98.

⁵¹ 1828 (9. Geo-4) c. 31, s.10.

⁵² *Per Lord Griffith, Beckford v. R* [1988] AC. 130 at 144.

⁵³ Beale, Joseph H., 1902-03, op. cit. p.567.

⁵⁴ Holmes, Oliver Wendell, 1963, op. cit. F.N. 27. p.40.

10.5 Private Defence Justification or Excuse

English criminal law recognised distinction between justifiable and excusable homicide since the 16th century. An excusable killing led to the murderer's goods being forfeited but not when the killing was justifiable.⁵⁵ However, in course of the 19th century, the distinction between the two lost its procedural manifestations transforming a single body of principles covering cases of both excusable and justifiable homicide.⁵⁶ Though it has been argued that since the abolition of forfeiture both kinds of homicide ceased to be distinguishable by their consequences to the accused.⁵⁷ Nonetheless, the distinction has its importance in the modern laws. Justifiable homicide may result in acquittal while excusable homicide will render the accused liable for manslaughter.

10.5.1 The Criteria for Distinction

Initially the distinction was based upon nature of the offence to be defended. Homicide committed while defending known felonies, like to burn house of the defender, an assault to rape a woman, assault by thieves on someone on a highway or the offence of robbery committed at someone's house, was considered to be justified.⁵⁸ However, death of the assailant caused by the defender during commission of a non felonious offence; like assault to beat someone, was only excusable.⁵⁹ Another criterion for distinction was the kind of necessity leading to private defence. If it was avoidable and the defender could escape without committing homicide, he would be guilty, otherwise not.⁶⁰ In fact, the notion of involuntariness in this case having no choice but to kill justified the conduct.⁶¹ Justification or excuse of the defence may also be adjudged by the magnitude of the force used by the defendant. If he uses more force than is reasonably necessary to repel the attack, his conduct is not justified but may well be excused if it is based on a mistake as to the quantum of force needed for defence.⁶²

⁵⁵ Jefferson, Michael, *Criminal Law* (3rd ed., Pitman Publishing, London, 1997) p.209.

⁵⁶ Fletcher, George P., 1978, op. cit. p.866.

⁵⁷ Turner, J.W.Ceicl, 1966, op. cit. p.144.

⁵⁸ Hale, Mathew, Sir, *A Methodical Summary of the Law Relating to the Pleas of the Crown* (6th ed., Catherine Lintot, 1759) p.39.

Hawkins, Williams, 1728, op. cit. Vol. I, Ch. 28, s.21, p.77.

⁵⁹ Hale, Mathew, Sir, 1759, op. cit. p.40.

Hale, Mathew, Sir, *The History of the Pleas of the Crown* (Printed for T. Pyne, P. Uriel, etc, 1778) Ch. XLI, p.493.

⁶⁰ Thorne, Samuel E., *Bracton on the Laws and Customs of England* (Published in Association with the Seldon Society, The Belknap Press of Harvard University Press Cambridge, 1968) Vol. II, p.341.

Hurnard, Naomi D., *The King's Pardon for Homicide* (Clarendon Press, Oxford, 1969) p.70.

⁶¹ Fletcher, George P., 1978, op. cit. p.856.

⁶² Robinson, Paul H., *Criminal Law Defences* (West Publishing Co., 1984) Vol. I, p.110.
The Queen v. McKay [1957] ALR 648.

The concept of private defence represents a justifiable response of an innocent person to a culpable attack;⁶³ therefore, he is not to be blamed for killing.⁶⁴ Private defence, if raised in a criminal trial, must be disproved by the prosecution.⁶⁵ If the prosecution fails to do so the accused is entitled to be acquitted because unlawfulness of the accused's conduct has not been proved. The same is not true of excusable homicide, the name itself imports some fault, some error, howsoever trivial, that the law excuses it from the guilt of felony, though in strictness it judges it deserving some degree of punishment.⁶⁶

10.5.2 Private Defence: Why is it Justified?

In modern codification, private defence is appropriately treated, like lesser evils, as justification.⁶⁷ The justification is based on the fact that the interests of the victim are greater than those of the aggressor. His culpability in starting the fight tips the scales in favour of the victim.⁶⁸ The aggressor, by his culpable act of threatening the life of an innocent person, forfeits his own right to life.⁶⁹ The right of innocent person to life is morally superior to an aggressor's right. Therefore, by balancing moral interests, the safety of the innocent person represents the greater moral good; the aggressor's death is the lesser social evil.⁷⁰

Homicide in private defence may be treated as a classic kind of justifiable homicide⁷¹ provided that the defendant must have genuinely believed that he was being attacked, or in imminent danger of being attacked and his response must have been proportionate to the perceived threat.⁷² The view best accords with security; if the state through its law cannot provide security, then the victim can do it himself justifiably.⁷³

10.6 Conditions for the Exercise of Right of Private Defence

Right of private defence is available in all legal systems of the civilised societies. Now the question arises, are there any principles regulating the use of this right? The answer to this question is in affirmative. All the legal systems have regulated this right by

⁶³ Bayles, Michael D., 1987, op. cit. p.334.

⁶⁴ Dressler, J., *Understanding Criminal Law* (Matthew Bender/IRWIN, U.S.A., 1995) p.208.

⁶⁵ *Per Lord Griffith, Beckford v. R* [1988] AC. 130 at 144.

⁶⁶ Blackstone, 1809, op. cit. Vol. IV, p.181.

⁶⁷ Robinson, Paul H., 1984, op. cit. Vol. 1, p.110.

Reed, Alan & Seago, Peter, 1999, op. cit. F. N. 19. p.206.

⁶⁸ Williams, Glanville, "The Theory of Excuses" [1982] *Crim. L.R.* 733 at 739.

⁶⁹ Ashworth, A. J., 1975, op. cit. p.283.

Dressler, J., 1995, op. cit. p.208

⁷⁰ Dressler, J., 1995, op. cit. p.210.

⁷¹ Devine, Philip E., *The Ethics of Homicide* (Cornell University Press, London, 1978) p.151.

Ashworth, A.J., 1999, op. cit. p.137.

⁷² Carter, Peter & Harrison, Ruth, *Offences of Violence* (Waterlow Publishers, London, 1991) p.46.

⁷³ Bayles, Michael D., 1987, op. cit. pp.332-33.

certain principles and restricted its exercise by imposing certain conditions. The accused will be entitled for the benefit of the defence only if these conditions are met.

10.6.1 First Condition: Unlawful Assault on Life, Property, or Chastity

A general condition for exercise of such right is that the conduct of the assailant must be unlawful.⁷⁴ Both common law and section 3 of the Criminal Law Act 1967 impose a condition that the defendant must have used force to defend an unlawful assault or an unjustified conduct of the assailant. It is not permissible to resist a justified conduct.⁷⁵ Similarly, clause 27(1) of the Draft Criminal Law Bill authorises exercise of private defence against criminal act of the assailant.⁷⁶ Though in certain conditions, like immaturity, insanity, and mistake of fact, the assailant may not be committing an offence even then the victim has a right to defend. In such cases his right of defence depends upon his knowledge of the circumstances of the assailant, if he is unaware of the condition of the assailant, he is allowed to exercise his right under section 3 of the Criminal Act, provided that he was acting reasonably. However, if he is aware of the facts then section 3 is inapplicable but still he is allowed to use reasonable force to defend,⁷⁷ for the act of the assailant is merely excusable that can be resisted lawfully.⁷⁸

10.6.2 Second Condition: Reasonable Force

In English law, private defence is an answer to a criminal charge provided that the force used for the purpose was reasonably necessary. If the force used exceeds what is reasonably necessary in the circumstances, the justification of the defence fails and is eliminated from the case.⁷⁹ It means that private defence is either a complete defence or no defence at all.⁸⁰ The defendant can rely on the defence only if his action was necessary to prevent harm and he has used reasonable force.⁸¹ One must balance the possible harm of being the victim of unlawful force with the punishment for using excessive force.⁸²

⁷⁴ Reed, Alan & Seago, Peter, *Criminal Law* (2nd ed., Sweet & Maxwell, London, 2002) p.235.

⁷⁵ Smith, J. C., *Justification and Excuse in the Criminal Law* (Stevens & Sons, London, 1989) p.19.

⁷⁶ The Law Commission, *Legislating the Criminal Code; Offences against the Person and General Principles, Draft Criminal Law Bill*, Law Com. 218 (HMSO, London, 1993) Clause 27(1).

⁷⁷ Smith, J.C., *Smith & Hogan Criminal Law* (10th ed., Butterworths, Lexis Nexis, 2002) p.282.

⁷⁸ Smith, J. C., 1989, op. cit. p.21.

⁷⁹ Ashworth, A.J., "Excusable Mistake of Law" [1974] *Crim. L.R.* 652.

⁸⁰ Criminal Law Revision Committee, *Offences Against the Person* (Cmnd.7844) 14th Report 1980, Para.288, Part. VII, p.119.

⁸¹ Elliott, Catherine & Quinn, Frances, *Criminal Law* (4th ed., Longman, 2002) p.284.

⁸² Bayles, Michael D., 1987, op. cit. p.334.

Whether the defendant has used reasonable force in defence is a question of fact to be determined by the jury⁸³ applying objective test.⁸⁴ If the jury concludes that the accused has used excessive force and that no reasonable person, making all due allowance for the peril under which he was acting, could consider it justified, that use of force will be unlawful.⁸⁵ Account should also be taken of the purpose for which the force was used; force used to achieve one purpose may be reasonable, but may be unreasonable to the other.⁸⁶ Though the standard of reasonableness changes from case to case yet there are certain principles to be taken into account in all the cases of private defence. Like, mere words of assailant, however injurious, must not be resented by blows; it would no longer be private defence rather vengeance.⁸⁷ Similarly, a kick is not a justified mode of turning out a trespasser.⁸⁸ He must be asked to leave, and a reasonable time allowed for compliance, before force is used against him, for otherwise it is not clear that force is necessary. If the trespasser is evidently determined to use force to enter, moderate force may be used to expel him.⁸⁹

10.6.2.1 *Why Reasonable Force?*

The rule of reasonable force not only protects the rights of the defender rather it safeguards the rights of the assailant as well. When the assault is less serious, the criminal's right to life remains intact, he merely loses his right to physical security. In all cases, however, the assailant should retain the right not to be subjected to force which is neither necessary for the victim's defence nor for any other lawful purpose.⁹⁰ To achieve a just and proper balance between the interests of the defender and the assailant, an assailant ought to be protected against excessive force and any arbitrary treatment.⁹¹ Thus a legal system which supports maximum protection for every human life should provide that a person attacked ought if possible to avoid use of deadly force against his assailant.⁹² This will provide maximum protection to basic right to life of the defender and the assailant. The approach would reflect the human rights position that

⁸³ Reference under s.48 A, of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975) [1977] AC. 105 at 137.

⁸⁴ Mousourakis, G., *Criminal Responsibility & Partial Excuses* (Ashgate Publishing, Aldershot, 1998) p.181. Scanlan, G. & Ryan, C., *An Introduction to Criminal Law* (Financial Training Publications, 1985) p.179. Smith, J.C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) p.261.

⁸⁵ Allen, Michael J., *Textbook on Criminal Law* (4th ed., Blackstone Press Ltd., London, 1997) p.188.

⁸⁶ Card, Richard, *Card, Cross and Jones Criminal Law* (Butterworths, London, 1998) p.628. Ashworth, A. J., 1975, op. cit. p.290.

⁸⁷ Atkinson, Charles M., 1914, op. cit. Vol. II, pp.45-46.

⁸⁸ *Wilds* (1837) 2 Lewin 214; 168 ER 1132.

⁸⁹ Williams, Glanville, 1983, op. cit. p.517.

⁹⁰ Ashworth, A. J., 1975, op. cit. p.289.

⁹¹ *Ibid.*

⁹² *Ibid.*

every one's right to life shall be protected unless necessary for a lawful purpose.⁹³ However, deprivation of life shall not be regarded as inflicted in contravention of the Article if it results from the use of force which is no more than absolutely necessary in private defence or preventing a crime.⁹⁴ The provisions would discourage use of violent means for private defence and prevention of crime where the alternatives are reasonably available.

Though as a matter of principle it is admitted that a defender is entitled to use reasonable force in private defence, yet what does reasonable force mean is still incoherent in English law. For example, in a case of 2001, the defendant stabbed a burglar to death with a large carving kitchen knife. The jury took only 15 minutes to decide that the defendant acted in self-defence.⁹⁵ In another case of similar nature a 21 years old drug addict burglar, was repeatedly beaten by the house owner with a metal baseball bat causing him a broken wrist, fractured elbow, cracked ribs and a fractured skull. Despite such a ruthless beating it was held that the house owner has used reasonable force and the burglar was sentenced to one year imprisonment.⁹⁶ In 1996, a businessman along with his two employees caught a burglar, tied his hands behind his back, kept him a captive for three hours and allegedly beaten him with a cricket bat. The jury took 20 minutes to acquit him of unlawful assault.⁹⁷

The facts of the cases reveal that the force used was not reasonable however, the accused were acquitted. In all the cases the sympathies of the jury were allegedly with the defendants⁹⁸ and in almost all the cases the ability of the police force to protect citizens has been criticised. It is for the law to achieve a just and proper balance between the interests of a defender and the assailant. The approach of the courts in the above mentioned cases is contrary to the spirit of a legal system which supports the maximum protection for every human life preventing use of force where non-violent means of defence are reasonably open. A comparison of the cases with those discussed in 10.11 will underline the inconsistency in English criminal law.

⁹³ The European Convention on Human Rights, Article 2.

⁹⁴ *Ibid.*

⁹⁵ Simon, De Buxelles, "Intruder's Killer is cleared of Murder" 'The Times' Nov. 9, 2001.

⁹⁶ Summar's Case, 'Guardian' May 15, 2000. Referred to by Watson, Michael, "Reasonable Force and the Defence of Property" 166 (2002) *JP* 659 at 659.

⁹⁷ Midgley, Carol, Businessman who tied up Burglar is clear of Assault" 'The Times' June 8, 1996.

⁹⁸ *Juries and the Vigilante* 146 (1996) *NLJ* 869.

10.6.2.2 Use of Deadly Force; When is that Allowed?

Normally deadly force may be used only if it reasonably appears necessary to prevent immediate death or serious injury.⁹⁹ It should be remembered that homicide is a capital crime partly concerning the King whose peace is broken, and partly the individual who is unlawfully killed.¹⁰⁰ The only exception to the rule is homicide committed in exercise of right of private defence.¹⁰¹ However, use of deadly force is unreasonable if non-deadly force is obviously sufficient to avert the threatened harm.¹⁰² Similarly, no one is entitled to cause grievous bodily harm to another unless he himself is threatened with a seriously injurious attack.¹⁰³ Where the purpose can be achieved by use of lesser force use of deadly force is not allowed. Assume 'A' attacks 'B' with deadly force. 'B' a marshal arts expert, knows he can safely disarm 'A' without using deadly force. He would not be justified in using deadly force since it would violate the necessary requirement of private defence principle.¹⁰⁴ In determining whether the force used was reasonable the court will take into account all the circumstances of the case, including the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means.¹⁰⁵

10.6.2.3 Proportionate Force is Reasonable Force

The discussion above suggests that the force used in private defence must be reasonable to justify the act of the defender.¹⁰⁶ How to determine the reasonableness of the force? There is no other choice except to measure the magnitude of defensive force in terms of proportionality to the force used by the assailant.¹⁰⁷ Right of private defence is only a right to defend and not to retaliate so it should not extend to inflict more harm than it is necessary under the circumstances for the purposes of defence. In *Cook v. Beal* it was held that the defendant cannot justify a mutilation for every assault. If 'A' strikes 'B', he cannot justify the drawing of his sword and cutting his hand.¹⁰⁸ Exceeding the limits of necessary force in defence is fatal to the accused's claim of justification. The proportionality rule is based on the view that there are some insults and hurts that one must suffer rather than use extreme force, if the choice is between suffering the hurt and

⁹⁹ Loewy, Arnold H., 1975, op. cit. p.65.

¹⁰⁰ Thorne, Samuel E., 1968, op. cit. Vol. II, p.340.

¹⁰¹ *R. v. Rose* (1884) 15 Cox C.C. 540

¹⁰² Perkins, R. M & Boyce, R., *Criminal Law* (3rd ed., The Foundation Press, N.York, 1982) p.1113.

¹⁰³ Howard, Colin, "Two Problems in Excessive Defence" 84 (1968) *LQR*. 343. at 347.

¹⁰⁴ Robinson, Paul H., 1984, op. cit. Vol. I., p.103.

¹⁰⁵ Hailsham, Lord of ST. Marylebone, *Halsbury's Laws of England* (Butterworths, 1990) Vol. 11(1) Para. 455.

¹⁰⁶ Mousourakis, G., 1998, op. cit. p.185.

¹⁰⁷ Stephen, J.F., 1950, op. cit. Article 305, p.252.

Per Coleridge J. in *R. v. Driscoll* (1841) C & M 214; 174 ER 477.

¹⁰⁸ *Cook v. Beale* (1697) 1 Ld. Raym.176; 91 ER 1014.

using the extreme force.¹⁰⁹ In cases of very trivial offences it would not be reasonable to use even the slightest force to prevent them.¹¹⁰ The rule involves a community standard of reasonableness, and is left to the consideration of the jury.¹¹¹

It means that where a capital crime is endeavoured to be committed by force, it is lawful to repel it by death of the party attempting.¹¹² The principle of proportionality, i.e. use of deadly force to prevent death seems to be very reasonable. However, if we take into account the abolition of capital punishment for murder in various European jurisdictions, there is no logic to allow someone to cause the death of his assailant even if it was to save his own life. It can be argued that where causing death is not allowed in the due course of law, it must not be allowed by a private person.¹¹³

10.6.2.4 Is it Possible to Weigh the Exact Force Needed for Private Defence?

A man who exercises his right of private defence is usually taken by surprise. He is under a necessity to take prompt action to save his interests. While determining the quantum of reasonable force it should be kept in mind that a person defending himself cannot weigh to nicety the exact measure of his defensive action. Due to circumstances of great stress, even the reasonable man cannot be expected to judge the minimum degree of force required to a nicety.¹¹⁴ The principle of proportionality plays a restrictive role in the realm of private defence, yet it does not mean that the force used in defence must necessarily be equal to the assault.¹¹⁵ The principle requires a rough approximation between the gravity of the harm and the quantum of defensive force.¹¹⁶ A jeweller's scale should not be used to determine reasonable force.¹¹⁷

The shortcomings of excitable human nature and the necessity for prompt action should be taken into account and the concept of reasonable force should not be confined too closely. If the defender is under attack and reaches for the first object that comes to his hand, use of that object to inflict injury is more likely to be reasonable than if he

¹⁰⁹ Williams, Glanville, 1983, op. cit. p.506.

Ashworth, Andrew, 1999, op. cit. p.143.

¹¹⁰ C.L.R.C., *Felonies and Misdemeanours* (7th Report. Cmnd. 2659, HMSO, London, 1965) Para. 23.

¹¹¹ Williams, Glanville, 1983, op. cit. p.506.

¹¹² Blackstone, 1809, op. cit. Vol. IV, p.180.

¹¹³ Fletcher, George P., 1978, op. cit. p.870.

¹¹⁴ Smith, J.C., 1996, op. cit. F.N. 84. p.262.

¹¹⁵ Per Lord Oaksey in *Turner v. M.G.M. Picture Ltd* [1950]1 All ER. 449 at 471.

¹¹⁶ Ashworth, A. J., 1975, op. cit. p.296.

¹¹⁷ Per Geoffrey Lane J. in *Reed v. Wastie* [1972] Crim. LR. 221; Reported in 'The Times' Feb. 10, 1972.

deliberately chooses a deadly weapon when others were available.¹¹⁸ Private defence, otherwise proved, would only fail if the prosecution proves beyond doubt that what the accused did was not by way of defence.¹¹⁹

Right of private defence does not necessarily imply a right of attacking; instead the victim can have recourse to the proper tribunal.¹²⁰ He does not possess a right to punish his assailant because in a civilised society punishment may only be carried out by official agencies.¹²¹ For an individual to take law into his own hands by inflicting summary punishment on the assailant is rightly regarded as a crime in itself.¹²² A serious assault that puts the victim in immediate danger gives rise to a legitimate right of private defence. However, if the assault is all over, application of any force by the defender may be treated as punishment, by way of revenge or as an aggression.¹²³

10.6.2.5 Imminent Danger and Reasonable Force

Use of force is not reasonable if it is not necessary to prevent a crime.¹²⁴ For use of force to be necessary it is required that the danger or threat apprehended by the accused must be sufficiently specific, imminent and must be such that it could not be reasonably met without resorting to force.¹²⁵ However, the act of private defence need not be spontaneous, the defender can make preparations to repel an expected attack.¹²⁶ There is a right at common law to use reasonable force in private defence and the right extends to immediately preparatory acts necessary to exercise that right.¹²⁷ It is required that the standard of reasonableness should be determined by taking into account the nature of crises in which the necessity to use force arises.¹²⁸ A person attacked or threatened with attack has to decide how to protect himself. In some cases an instant reaction and immediate commitment will be called for; in others there will be time for preparation.¹²⁹

¹¹⁸ Carter, Peter & Harrison, Ruth, 1991, op. cit. p.48.

¹¹⁹ *Palmer v. The Queen* [1971] AC. 814 at p.832.

¹²⁰ Blackstone, 1809, op. cit. Vol. IV, p.183.

¹²¹ Ashworth, A. J., 1975, op. cit. p.288.

¹²² *Ibid.*

¹²³ *R v. Shannon* (1980) 71 Cr. App. R. 192 at 195.

¹²⁴ Smith, J.C., 2002, op. cit. F.N. 77. p.279.

¹²⁵ Mousourakis, G., 1998, op. cit. p.180.

¹²⁶ Jefferson, Michael, 1997, op. cit. p.279.

¹²⁷ *Ibid.* p.267.

R. v. Georigiades [1989] Crim. LR. 575 (commentary on p.575); *Attorney-General's Reference* (No. 2 of 1983) [1984] QB 456.

¹²⁸ Smith, J.C., 1996, op. cit. F.N. 84. p.262.

¹²⁹ Ashworth, A. J., 1975, op. cit. p.294.

10.6.2.6 Is Private Defence Available to Future Threats?

Is the right of private defence available only against imminent violence? Is it not available against a threat of violence which will occur some time in future? The questions may affect reasonableness of the accused's action. Allen Reed & Peter Seago have given an illustration to explain this situation. If 'A' kidnaps 'B' and he knows that 'A' will kill him if a ransom is not paid, it should be permissible for 'B' to use force against 'A' to prevent the future killing.¹³⁰ However, the illustration is not appropriate and does not reflect the true spirit of the rule because kidnapping itself is an offence and 'B' is entitled to use force to prevent it, he need not to know the intention of the assailant whether he will kill him in future.

The idea can better be illustrated in the form of preparations made by the defender to repel an attack immediately prior to what he believes to be an imminent threat. For example, if the assailant threatens to kill and takes measures to execute his threat, the defender has a right to make preparations to repel the apprehended attack without breach of criminal law.¹³¹ It implies that preparatory activities to justifiable acts of private defence may be permissible in certain appropriate circumstances.¹³² It is good for both, law and good sense that a man who is attacked may defend himself but he may do only what is reasonably necessary. Every thing will depend upon the particular facts and circumstances.¹³³

Right of private defence commences as soon as the reasonable apprehension of danger arises. It is not necessary that the defender should wait the actual infliction of harm by the assailant.¹³⁴ There may be situations in which it will be justified to use reasonable force by way of pre-emptive action against an apprehended attack.¹³⁵ If the assailant attacked the victim but missed his attack, the defender is entitled to use force in his defence and to inflict injury on the assailant.¹³⁶ If no more force is used than is reasonable to repel the attack, such force is not unlawful and no crime is committed.¹³⁷

¹³⁰ Reed, Alan & Seago, Peter, 1999, op. cit. F. N. 19. p.209.

¹³¹ Allen, Michael J., 1997, op. cit. p.174.

¹³² *Ibid.*

¹³³ *R. v. Shannon* (1980) 71 Cr. App. R. 192 at 195.

¹³⁴ Ashworth, A. J., 1975, op. cit. p.293.

Card, Richard, 1998, op. cit. p.626.

¹³⁵ *R. v. Driscoll* (1841) C & M 214; 174 ER. 477, *Beckford v. The Queen* [1988] 1 AC. 130 at 144.

Ashworth, A.J., 1975, op. cit. p.293.

¹³⁶ *R. v. Deana* (1909)2 Cr. App. R. 75.

¹³⁷ *R. v. Shannon* (1980) 71 Cr. App. R. 192 at 195.

10.6.3 Third Condition: Duty to Retreat

In English law criminal liability is founded on a subjective notion of fault that the offender chose to cause harm when he had both the capacity and a reasonable opportunity to do otherwise.¹³⁸ The application of the principle requires that before a person can avail himself of the defence of private defence, he must satisfy the jury that the defence was necessary, he did all he could to avoid the incident, and that it was necessary to prevent death or serious bodily harm.¹³⁹ No killing can be justified, upon any ground, which was not necessary to secure the desired and permitted result; and it is not necessary to kill in private defence when a peaceful though often distasteful method of withdrawing to a place of safety is available.¹⁴⁰ When an individual's purpose in a threatening situation is to prevent an injury or death, it is not necessary to inflict harm on the assailant if there is a safe avenue of withdrawal open.¹⁴¹

10.6.3 1 *Duty to Retreat and Early English Law*

Early English law was very rigid and the defender was under a strict duty to retreat.¹⁴² It denied the defendant's right of private defence if he used deadly force against the assailant, where he could have avoided it by retreat.¹⁴³ The law required that retreat should be a real one and not fictitious nor it be with an intention to take a better opportunity to attack.¹⁴⁴ However, it was admitted that retreat does not mean that a person should refrain from going where he may lawfully go because he knows he is likely to be attacked.¹⁴⁵ No duty to retreat could arise until the parties are in sight of one another and the threat is imminent.¹⁴⁶

Another opinion suggests that a true man who is without fault, is not obliged to fly from an assailant who by violence or surprise maliciously seeks to take his life or to do him grievous bodily harm.¹⁴⁷ The logic behind the opinion might be that if a defender is obliged to retreat, he is forced to give way to the wrong.¹⁴⁸ In addition, a show of

¹³⁸ Hart, H. L. A., *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) p.102.

¹³⁹ Per Bosanquet J. in *R. v. George Smith* (1837) 8 C & P 160 at 162; 173 ER 441 at 443.

¹⁴⁰ Beale, Joseph H., 1902-03, op. cit. p.580.

¹⁴¹ Ashworth, A.J., 1975, op. cit. pp. 284-85.

¹⁴² *Dakin's Case* (1828) 1 Lew. C.C.166; 168 ER 999.

¹⁴³ Holdsworth, W. S., 1923, op. cit. Vol. III, p.313.

Beale, Joseph H., 1902-03, op. cit. p.570.

¹⁴⁴ Blackstone, 1809, op. cit. Vol. IV, p.184.

¹⁴⁵ Allen, Michael J., 1997, op. cit. pp.176-77.

¹⁴⁶ *R. v. Field* [1972] Crim. LR. 435.

¹⁴⁷ Beale, Joseph H., 1902-03, op. cit. p.567.

¹⁴⁸ Fletcher, George P., 1978, op. cit. p.865.

courage by the victim may often discourage the commission of crime against him.¹⁴⁹ The conclusion of those who deny the duty to retreat is rested upon two grounds. Firstly, that no one can be compelled by a wrong doer to yield his rights, and secondly that no one should be forced by a wrong doer to make a dishonourable and cowardly retreat.¹⁵⁰

The opinion can be criticised on the ground that though it is true that an honourable man would perhaps regret the apparent cowardice of retreat, yet after calming down it would be ten times more regrettable for him that he killed someone.¹⁵¹ Another argument may be advanced that it is not the question of honour or dishonour in retreating but it concerns the right of one man to take life of another. If the choice is between the actor's honour and the aggressor's life, contemporary sentiment would obviously favour saving the aggressor's life.¹⁵² However, if the retreat would not diminish the danger he may defend himself.¹⁵³ This approach implies a general duty to avoid use of force where other non violent means of private defence are reasonably available.¹⁵⁴ In order to determine what is reasonable, all the circumstances must be taken into account and a retreat *ispo facto* proves that the defendant did not want to cause unnecessary harm.

10.6.3.2.1 Is Retreat Obligatory in all the Cases?

Duty to retreat may differ with the nature of interest to be defended. For example, an officer who is endeavouring to prevent a crime or affect an arrest is not obliged to retreat, but may press forward against resistance.¹⁵⁵ His act shall be dealt under the normal rules of private defence except that he is clearly under no duty to retreat.¹⁵⁶ The exception can be justified on the ground that prevention of crime and arrest of offenders involves aggressive acts for a positive purpose, whereas private defence typically involves defensive acts for negative one.¹⁵⁷ An individual entitled for the right of private defence might be able to avoid violence by retreat but a police officer has a duty to go forward and intervene.¹⁵⁸

The duty may also be determined by taking into account the nature of the attack. In certain circumstances, a person may act without retreating, temporising or withdrawing

¹⁴⁹ Ashworth, A.J., 1975, op. cit. p.289.

¹⁵⁰ Beale, Joseph H., 1902-03, op. cit. p.580.

¹⁵¹ *Ibid.* at p.581.

¹⁵² Fletcher, George P., 1978, op. cit. p.865.

¹⁵³ Beale, Joseph H., 1902-03, op. cit. p.579.

¹⁵⁴ Ashworth, A. J., 1975, op. cit. p.289.

¹⁵⁵ Beale, Joseph H., 1902-03, op. cit. p.574.

¹⁵⁶ Williams, Glanville, 1983, op. cit. p.510.

¹⁵⁷ Ashworth, A. J., 1975, op. cit. p.302.

¹⁵⁸ *Ibid.* 303.

and he should have a good defence.¹⁵⁹ The defendant must retreat as far as he conveniently can or as far as the fierceness of the assault permits him; for it may be so fierce as not to allow him to move a step, without obvious danger of his life, or grievous harm.¹⁶⁰ It is necessary in this condition that the defendant must know that he can retreat in complete safety. If he did not know it, he would be under no duty to retreat rather than use deadly force.¹⁶¹ There might be another reason not to require retreat even if the actor knows that he can retreat safely because it is very difficult for an outsider to judge whether the actor realised that retreat would be safe.¹⁶²

Similarly, in case of defence of property retreat means leaving the assailant in possession of the booty. Defence of property is justified not only because the rightful possession of the owner is endangered, but also the general stability and vitality of the rule of private possession.¹⁶³ The object of law would not be achieved had the defender liable to retreat.¹⁶⁴ The major difference between self-defence and the defence of property is that the defendant needs not to retreat before the use of force in defence of his property for that would be giving up his property to his adversary.¹⁶⁵ Likewise, if a person is assailed in his own dwelling, he is not obliged to retreat and leave himself in that respect defenceless.¹⁶⁶ There is no place to retreat once one has been forced out of his own house.¹⁶⁷ The same rule is also maintained by certain other jurisdictions.¹⁶⁸ The rationale for the rule is that a person who has fled into the sanctuary of his own home, or is attacked in his own home, is considered to have his back already to the wall and therefore is under no further duty to retreat. However, he has the option to avoid conflict by temporising.¹⁶⁹

The old authorities on duty to retreat should be regarded as repealed and it should now be simply a question whether it was reasonable in the circumstances for the accused to

¹⁵⁹ *R. v. Bird* [1985] 1 WLR. 816.

¹⁶⁰ Blackstone, 1809, op. cit. Vol. IV., p.184.

Turner, J. W. Cecil, 1966, op. cit. p.144.

¹⁶¹ Loewy, Arnold H., 1975, op. cit. p.67.

¹⁶² Greenawalt, Kent, "Distinguishing Justifications from Excuses" 49 (1986) *Law and Contemporary Problems* 89 at 106.

¹⁶³ Robinson, Paul H., 1984, op. cit. Vol. I, section 27, p.84.

¹⁶⁴ Beale, Joseph H., 1902-03, op. cit. p.574.

¹⁶⁵ *R. v. Hussey* (1924) 18 Cr. App. R. 160.

¹⁶⁶ Ashworth, A. J., 1975, op. cit. p.294.

Beale, Joseph H., 1902-03, op. cit. p.579.

¹⁶⁷ Loewy, Arnold H., 1975, op. cit. p.67.

¹⁶⁸ Under U.S laws the defender can use deadly force to defend himself in his home even if he could retreat with perfect safety. (Greenawalt, Kent, 1986, op. cit. p.106)

¹⁶⁹ Ashworth, A. J., 1975, op. cit. p.294.

stand his ground for defence.¹⁷⁰ Retreat does not require that the person threatened should run away. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal to show that he does not want to fight.¹⁷¹ Confirming the rule, the House of Lords made it perfectly clear that an expression by the defendant that he did not want to fight is the best evidence that he was acting reasonably and in good faith in private defence.¹⁷² This is a more reasonable approach, for if there was a duty to retreat a person would never be able to use pre-emptive force.¹⁷³ However, it should be remembered that an aggressor is not entitled to the defence of private defence even if he retreated after the beginning of the contest.¹⁷⁴

It can be concluded that, the intentional infliction of death or bodily harm is not a crime when it is done in the exercise of private defence or prevention of a crime provided that the object for which death or harm is inflicted cannot otherwise be accomplished.¹⁷⁵ If someone is unlawfully assaulted and there is immediate and obvious apprehension of instant death or grievous bodily harm or the person assaulted was in his own home or in execution of a duty imposed upon him by law, he may defend himself on the spot and may kill or wound the assailant without retreating.¹⁷⁶

10.7 Private Defence and Prevention of Crime

Until 1967, all the cases of private defence were governed under the principles of common law.¹⁷⁷ In 1967, Criminal Law Act was enacted to regulate the cases of use of force in prevention of crime. Section 3 of the Act entitles a common man to use reasonable force in prevention of crime or effecting or assisting in lawful arrest of the offenders. The section requires the jury to ask themselves whether, in the circumstances the defendant believed to exist, he has used reasonable force to prevent a crime.¹⁷⁸ The

¹⁷⁰ Smith, J.C., 1996, op. cit. F.N. 84. pp.263-64.

R. v. Julien [1969] Crim. L.R. 381 (Commentary at pp.382-83).

¹⁷¹ *R. v. Julien* [1967] 1 WLR. 839 at 843. The same view was affirmed in *R. v. McInnes* [1971] 1 WLR 1600. Ashworth, A. J., 1975, op. cit. p.286.

¹⁷² Per Lord Lane C.J., *R. v. Bird* [1985] 1 WLR. 816.

¹⁷³ Allen, Michael J., 1997, op. cit. p.176.

¹⁷⁴ Hale, Mathew, Sir, 1759, op. cit. p.42.

Hawkins Williams, 1728, op. cit. Vol. I, Ch.29, s.12, p.81

McAllen, Ian & Morrish, Peter, *Harris's Criminal Law* (22nd ed., Sweet & Maxwell, 1973) p.439.

Beale, Joseph H., 1902-03, op. cit. p.575.

The principle was affirmed in *Malnik v. D.P.P* [1989] Crim. L.R. 451.

¹⁷⁵ Stephen, J. F., 1950, op. cit. Article 304, p.250.

¹⁷⁶ *Ibid.* Article 305, pp.251-54.

¹⁷⁷ Card, Richard, 1998, op. cit. p.624.

¹⁷⁸ Seago, Peter, *Criminal Law* (4th ed., Sweet & Maxwell, London, 1994) p.187.

circumstances relevant for the purpose of the section are only the immediate circumstances in which the force was used.¹⁷⁹

One reason for the enactment of section 3 may be that at common law rules relating to use of force in prevention of crime or in effecting or assisting in lawful arrest of offenders or persons unlawfully at large were not altogether clear and appear to have varied according to the situation in which the force was used.¹⁸⁰ Under the present law the use of reasonable force is applicable to all cases and the common law rules are to that extent superseded.¹⁸¹

10.7.1 Section 3 of Criminal Law Act and Common Law

The relationship of section 3 with the common law principles is controversial.¹⁸² One view is that it has superseded the common law where force is used to prevent the commission of indecent exposure or to prevent a person making off without payment, but not the common law defences of private defence, prevention and termination of breach of the peace and unlawful imprisonment or trespass.¹⁸³ The other point of view suggests that defence of a person, whether his own or that of another is still regulated by the common law, defence of property by the Criminal Damage Act 1971 and arrest and prevention of crime by section 3 of the Criminal Law Act 1967.¹⁸⁴ As the section made no reference to the right of private defence under common law, it, therefore, means that the right of private defence still exists at common law so far as it differed in effect from the section. However, it should be remembered that a person acting in private defence is usually engaged in the prevention of crime and in such a case the situation is governed under section 3.¹⁸⁵ Since both these, private defence and prevention of crime, are some time indistinguishable and overlapping in a set of facts, it would be ridiculous to have two sets of criteria for the two defences.¹⁸⁶ It is, therefore, desired that the cases of private defence should be decided according to the general test of reasonableness laid

¹⁷⁹ *Farrell v. Secretary of State for Defence* [1980] 1 All. ER. 166 at 167.

¹⁸⁰ Hailsham, Lord of ST. Marylebone, 1990, op. cit. Vol. 11(1) Para.455.

¹⁸¹ *Ibid.*

¹⁸² Harlow, Carol, "Self-defence: Public Right or Private Privilege" [1974] *Crim.L.R.*528 at 528.

¹⁸³ Card, Richard, 1998, op. cit. p.625.

¹⁸⁴ Smith, J.C., 1996, op. cit. F.N. 84. p.259.

¹⁸⁵ Jefferson, Michael, 1997, op. cit. p.278.

Harlow, Carol, 1974, op. cit. p.529.

¹⁸⁶ Elliott, D.W., "Necessity, Duress and Self-defence" [1989] *Crim. L.R.* 611 at 620.

Smith, J.C., 1996, op. cit. F.N. 84. p.263.

down by section 3.¹⁸⁷ In this sense the section has completely replaced the complex common law rules on the subject.¹⁸⁸

The circumstances under which the force used is not in the prevention of crime, such as where the accused is defending an attack by a minor, insane or one in a state of automatism or acting under a material mistake of fact, section 3 (1) cannot be applied and consequently there is not a total overlap between the principles of common law and the statutory provision.¹⁸⁹ To allow the private defence in the above mentioned circumstance shows that law does not consider it reasonable that one should be killed by the mistaken belief of another, or by an unjustified and aggressive act of a mentally abnormal or immature person.¹⁹⁰ The same defence and degree of force is allowed in these circumstances as if the attacker were responsible and culpable for it.¹⁹¹

However, a person, who used force to repel an attack, is entitled to avail the common law defence of private defence and the defence provided under section 3, provided in both the cases the force used was reasonable in the circumstances.¹⁹² Private defence covers both the common law right to defend oneself against invasion of person and property, and the public right to use reasonable force in prevention of crime.¹⁹³ The view can be supported by the refusal of the Criminal Law Revision Committee to provide any specific provision for the use of force in the presence of general provision contained in section 3 for the prevention of crime.¹⁹⁴

10.7.2 Private Defence, Prevention of Crime and English Courts

How did the English courts see both the conditions? Some decided cases can be taken into account to understand it. In *R. v. Cameron*,¹⁹⁵ the defendant was charged with wounding. The defence expressly raised was prevention of crime, yet the judge summed up on the basis of private defence with out any mention of section 3. The Court of Appeal also passed over without apparent comments that the defence as framed by the

¹⁸⁷ Ashworth, A. J., 1975, op. cit. p.285.

Williams, Glanville, 1983, op. cit. p.503.

¹⁸⁸ Harlow, Carol, 1974, op. cit. p.528.

¹⁸⁹ Jefferson, Michael, 1997, op. cit. p.278.

Card, Richard, 1998, op. cit. p.625.

¹⁹⁰ Williams, Glanville, 1983, op. cit. p.502.

¹⁹¹ Bayles, Michael D., 1987, op. cit. p.334.

¹⁹² Card, Richard, 1998, op. cit. p.625.

¹⁹³ Lacy, N. & Wells, C., *Reconstructing Criminal Law: Text and Materials* (Butterworths, 1998) p.597.

¹⁹⁴ C.L.R.C., Cmnd. 2659, 1965, op. cit. Para. 22.

¹⁹⁵ *R. v. Cameron* [1973] Crim. L.R. 520.

defendant had never been put to the jury at all.¹⁹⁶ It shows that the trial court and the Court of Appeal regarded the substance of the two defences alike.¹⁹⁷ A similar approach was adopted in *R. v. Julien*,¹⁹⁸ *Devlin v. Armstrong*,¹⁹⁹ *R. v. McInnes*,²⁰⁰ and *R. v. Cousins*²⁰¹ that the quantum of force for both the defences is similarly limited.²⁰² The decisions lead to the conclusion that the right of private defence overlaps with the defence provided under section 3 (1) of the Criminal Law Act 1967.²⁰³

However, in 1977 Lord Diplock while differentiating between the two defences said that the force used in prevention of crime and in private defence is quite different and a person who uses excessive force in private defence is more blameworthy than one who uses it in prevention of crime.²⁰⁴ Rejecting the views Lord Lloyd said that, "I do not think it possible to say that a person who uses excessive force in preventing crime is always, or even generally less culpable. It would not be practicable to draw a distinction between the two defences since they so often overlap."²⁰⁵ These contradictory views created an ambiguity whether there is any difference between the two or not.

The Law Commission has proposed resolving the ambiguity by consolidating the provisions of private defence and prevention of crime in its report.²⁰⁶ Though the proposed reform consolidates private defence and prevention of crime, it has restricted the defence of another's person or property. The defender cannot defend any other person or his property without his authority.²⁰⁷ There seems no justification for this restriction because in majority of the cases the right of defence arises in emergency situations and it is neither possible for the victim of unlawful assault to give authority or consent nor for the defender to obtain the same. Had it been an unconditional defence under necessity, it would have been more appreciable. The proposals expressly

¹⁹⁶ Harlow, Carol, 1974, op. cit. p.535.

¹⁹⁷ *Ibid.* at p.535.

R. v. Cameron [1973] Crim. L.R. 520. (Commentary on the case).

¹⁹⁸ *R. v. Julian* [1967] 1 WLR. 839.

¹⁹⁹ *Devlin v. Armstrong* [1971] N.I. 13

²⁰⁰ *R. v. McInnes* [1971] 1 WLR. 1600.

²⁰¹ *R. v. Cousins* [1982] 1 QB 526.

²⁰² Jefferson, Michael, 1997, op. cit. p.278.

²⁰³ Allen, Michael J., 1997, op. cit. p.173.

²⁰⁴ *Reference under s.48 A, of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975)* [1977] AC 105 at 139.

²⁰⁵ *R. v. Clegg* [1995] 1 AC 482 at 496.

²⁰⁶ Law Com. No. 218, 1993, op. cit. Clause 27.

²⁰⁷ *Ibid.* Clause 27 (1) b & d.

recognise the right of an innocent person to defend against a non culpable aggressor, like minor, insane, or a person acting under duress or under the influence of intoxication.²⁰⁸ In each of these cases the “attacker” is not responsible for the attack; he could not be convicted for it, so that in a sense the attack is non-criminal yet the person attacked can defend himself.²⁰⁹ The recommendations if accepted and legislated accordingly may resolve the prevailing ambiguity in the principles of private defence.

10.8 Mistake in Private Defence

The Common law principle since the recognition of the right of private defence is that the defendant may only do what is reasonably necessary.²¹⁰ Until 1983 it was consistently stated that an honest but mistaken belief by the defendant as to the fact or nature of assault could be no answer to a criminal charge unless it was based on reasonable grounds.²¹¹ A number of cases support the proposition.²¹² Though the statutory provision under section 3 of the Criminal Law Act 1967 does not specifically mention whether an objective or subjective approach to be adopted by the court to determine the reasonableness of the belief of the defendant, nevertheless the words in the section “such force as is reasonable in the circumstances” can be interpreted that the legislature intended to prefer an objective approach. Though the C.L.R.C. recommended that a person should be entitled for the defence of private defence if he uses such force as is reasonable in the circumstances as he believe them to be²¹³ yet this recommendation has never been implemented.²¹⁴

In 1983 the Court of Appeal, in *Williams*,²¹⁵ making a landmark decision boldly rejected the Common law principle by stating that a defendant in a case of private defence is to be judged on the facts as he honestly believed them to be, whether his belief was reasonable or not. Thus the court preferred a subjective test instead of an objective one. Since then it has been followed in a number of cases. The Privy Council approved the principle in *Beckford v. R.*²¹⁶ In *R. v. Scarlett*²¹⁷ the Court of Appeal extended the

²⁰⁸ *Ibid.* Clause 27 (3).

²⁰⁹ Williams, Glanville, 1982, op. cit. p.732.

²¹⁰ Watson, Michael, “Self-defence, Reasonable Force and Police” 147 (1997) *NLJ* 1593 at 1593.

²¹¹ Smith, J.C., “Using Force in Self-defence and the Prevention of Crime” 47 (1994) *Current Legal Problems* 101 at 105.

Smith, J.C., 1989, op. cit. p.104.

²¹² *Rose* (1884) 15 Cox. C.C. 540; *Chisam* (1963) Cr. App. R. 130; *Palmer v. R* [1971] AC 814; *R. v Fennel* [1971] 1 QB. 428.

²¹³ Criminal Law Revision Committee, Cmnd. 7844, 1980, op. cit. Part. VII, Para. 284.

²¹⁴ Smith, J.C., 1989, op. cit. p.106.

²¹⁵ *Gladstone Williams* [1984] 78 Cr. App. R. 276; [1987] 3 All. ER. 411; [1984] Crim. LR. 163.

²¹⁶ *Beckford v. R* [1987] 3 All. ER. 425.

subjective approach to the quantum of force used in private defence. The decision has facilitated the use of extreme force against the assailants and now it is possible for the defendant to use deadly force against petty crimes.²¹⁸ At present an individual does not commit an offence by using force which, he believes, is reasonable in the circumstances as he, reasonably or unreasonably, believes them to be in the exercise of right of private defence. The accused is entitled to be acquitted if he mistakenly believed that he was justified in using force as he used.²¹⁹ However, this approach has been rejected by the European Court of Human Rights and in a number of cases like, *McCann & Others v. UK*²²⁰ and *Jordan v. UK*,²²¹ declaring that the killings by the law enforcing agencies in UK were in violation of Article 2 of the European Convention of Human Rights.

A person who mistakenly believes that the assailant is about to attack him undergoes a mistake of fact, for the question of existence of circumstances of necessity is question of fact, whereas a mistaken belief in the quantum of force necessary to defend is a mistake of law, for the reasonableness of the defensive force is question of law.²²² It means that an objective approach shall be applied to determine the existence of the circumstances of defence while a subjective one to determine the reasonableness of the force used. The approach can be criticised on two grounds. Firstly, determining reasonableness of the force resting entirely upon the beliefs of the defender would have the effect of depriving the assailant of legal protection of his basic human rights.²²³ Secondly, it is not logical to adopt two different parameters in one case, a person ought to avail the defence only where he reasonably apprehended the attack and used reasonable force for repulsion.

While dealing with the cases of private defence English courts have neglected the rule of reasonableness. In order to save human life from unreasonable aggression, the conduct of the person may be declared as negligent. From criminal point of view negligence is not a subjective state of mind rather an objective standard of fault. The liability of the accused can be proved by his failure to perceive the situation and to

²¹⁷ *R v. Scarlett* (1994) 98 Cr. App. R. 290.

²¹⁸ Watson, Michael, 1997, op. cit. p.1593.

²¹⁹ Reed, Alan, "Self-defence-Applying the Objective Approach to Reasonable Force" 60 (1996) *JLC*. 94 at 95.

²²⁰ *McCann & Others v. U.K.* (1996) 21 E.H.R.R. 97.

²²¹ *Hugh Jordan v. United Kingdom* (<http://www.echr.coe.int/Eng/Judgments.htm>) Application No. 24746/94 Judgement 4 May 2001.

²²² Ashworth, A. J., 1975, op. cit. p.304.

²²³ *Ibid.* at p.305.

behave in a reasonable manner. In the cases of negligence the offender is punished for his failure to see the risk, rather for intentional wrong doing. He may be held criminally liable if his conduct falls below the reasonable person. The accused may be mistaken about the nature of threat but that mistake must be based upon reasonable grounds. To hold the defendant belief to be the decisive factor would add a new and unacceptable degree of subjectivity to the test of reasonableness.²²⁴

10.9 Necessity and Private Defence in English law

The doctrine of necessity is closely associated with the right of private defence. In some jurisdictions, like U.S.A., private defence is indiscriminately treated as a form of necessity and the defendant's conduct is justified on the ground that the harm he inflicted was necessary to preserve his legally protected and thus superior interest.²²⁵ In English law the situation is different, private defence is considered as a general defence where as necessity in general is no defence²²⁶ or at least the extent of its prevailing is uncertain²²⁷ and ambiguous.²²⁸ This approach can be criticised on the ground that there are certain well established areas where necessity is considered as defence. Some statutes expressly prove this proposition; for example, fire-brigade, ambulance and police vehicles are exempted from observing the speed limits if such vehicles are being

²²⁴ Smith, J.C., 1994, op. cit. F.N. 210. p.109.

²²⁵ Hall, Jerome, *General Principles of Criminal Law* (2nd ed., Bobbs Merrills, Indianapolis, 1960) p.435.

²²⁶ Jefferson, Michael, 1997, op. cit. p.232.

²²⁷ Smith, J.C., 1996, op. cit. F.N. 84. p.251.

Dudley and Stephens [1884] 14 QB D. 273. {From past until recently the courts have been reluctant to admit the existence of a general defence of necessity *per se* (Reed, Alan & Seago, Peter, 1999, op. cit. F.N. 19. p.205) Hale said, "If a person, being under necessity for want of victuals, or cloths, shall upon that account clandestinely steals another man's goods, it is a felony and a crime by the laws of England punishable with death."(Hale, Mathew, Sir, 1778, op. cit. Ch. 9, p.54) Confirming the proposition it is asserted that the doctrine of necessity must be carefully restricted otherwise it would open to many an excuse. The courts must, for the sake of law and order, and protection of the rights of all the citizens, take a firm stand and must refuse to admit plea of necessity to the hungry and homeless.(Per Lord Denning in *Borough of Southwark v. Williams* [1971] 2 All. ER. 175 at 179 There are certain other cases in which defence of necessity was denied like *R. v. Willer* (1986) 83 Cr. App. R. 225 and *R v. Denton* (1987) 85 Cr. App. R. 246. However, in certain other cases, like *R. v. Martin* [1989] 1 All ER. 652 and *R. v. Conway* [1989] QB 290, the defence was allowed)}

²²⁸ The uncertainty and ambiguity is highlighted by the fact that in 1974, a working paper of the Law Commission recommended that there should be a general defence of necessity in UK's laws. *Codification of the Criminal Law: General Principles Defences of General Application* (Working Paper No. 55, 1974) Para. 40. However, very strangely the Law Commission rejected the proposal and asserted that no attempt should be made to establish the defence of necessity by legislation and for the avoidance of doubt, if any such defence exists in common law, it should be expressly abolished. The Commission while rejecting the proposal of its working party admitted that the defence of necessity in English law is confused and uncertain. *Criminal Law: Report on Defences of General Application* (Law Com. No. 83, 1977) Part IV, Para. 4.33 and Para. 4.1. Once again disregarding the proposal of abolishing any general defence of necessity, in 1985, the commission proposed not only that the judges should continue to have power to develop and clarify the defence so far as it exists at common law, but also that the criminal law code should contain a specific defence of necessity analogous to duress. *Codification of Criminal Law* (Law Com. No. 143, 1985) Paras 13.25 and 13.26, Clause 46 of Draft Criminal Code.

used for their specified purposes and speed limits are likely to hinder the purpose.²²⁹ Similarly, in order to protect property that is in immediate need of protection, it is permissible to destroy the property of another person.²³⁰ Despite the denial of the defence of necessity there is an overlap between private defence and necessity because in both the cases the defendant commits an offence in order to avoid another greater evil.²³¹ It can be suggested that many a cases of defences stems out of necessity hence its denial leads to anomaly apparent in English criminal law.

10.10 Defence of Property

The provisions related to defence of property are designed to protect possession and not the ownership only. When a person uses force to prevent another from dispossessing him of property, or in order to regain possession immediately after dispossession, he is acting in defence of property.²³² Similarly, he is justified in using force against a would-be dispossessor if he reasonably believes that such force is necessary to prevent its imminent and unlawful dispossession.²³³ The special limitation imposed on the right of defence of property is that the defendant must have its possession and the assailant must not be legally entitled to it.²³⁴ This does not mean that the defence of the property is restricted to the cases of dispossession only. It extends to the situations where the aggressor threatens physical harm, trespasses, commits a crime involving danger to premises, unlawfully carries away or commits criminal mischief, burglary, tortious interference or any other unjustified encroachment on the defender's property.²³⁵

The word property includes all types of property whether moveable, immovable, real, personal, premises, property that is temporary and adopted for human residence, a habitation or any other tangible thing.²³⁶ By allowing defence of property, society considers not only the immediate physical harms but also the societal interest in the maintaining a right to hold personal property.²³⁷

²²⁹ Road Traffic Regulation Act 1984. Section 87.

²³⁰ Criminal Damage Act 1971. Section 5 (2) b.

²³¹ Williams, Glanville, *Criminal Law: The General Part* (2nd ed., Stevens & Sons, 1961) p.732.

²³² Dressler, J., 1995, op. cit. p.235.

²³³ *Ibid.* p.236.

²³⁴ *Ibid.*

²³⁵ Robinson, Paul H., 1984, op. cit. Vol. II, p.107.

²³⁶ *Ibid.*

²³⁷ *Ibid.* Vol. I, p. 84.

10.10.1 Reasonable Force in Defence of Property

English criminal law justifies use of force in defence of property only if it is necessary for the purpose of defence.²³⁸ In *R v. Scarlett*,²³⁹ the Court of Appeal held that where an accused was justified in using some force and could only be guilty if the force used was excessive, the jury ought to be directed that he could not be guilty unless the prosecution proved that he had applied force intentionally or recklessly. The jury ought not to convict the accused unless they are satisfied that the degree of the force used was plainly more than was called for by the circumstances as he believed them to be, even if that belief was unreasonable. According to this decision, the defendant can justify the most extravagant action provided he believes the circumstances warranted it.²⁴⁰ It is also contrary to an already settled rule that use of extreme force for the protection of property, even if necessary for that purpose, is not justifiable unless it is the only means or there is a direct risk to human life or safety.²⁴¹

One thing is settled that the accused is entitled for the defence only if he has used reasonable force. But it is not appropriate to interpret “such force as is reasonable in the circumstances” in section 3 of Criminal Law Act 1967 as “such force as he believed to be reasonable in the circumstances,”²⁴² because use of force cannot be justified unless it is both necessary and reasonable.²⁴³ Whether the force used was necessary and reasonable is to be determined by the jury. In *R. v. Scully*,²⁴⁴ the defendant shot dead a trespasser to his master’s garden. Garrow, B., said that a guard is not justified in shooting any one who comes to it in the night unless from the conduct of the party he has fair ground for believing his own life in actual and immediate danger. He ought first to see if he could not take measures for his apprehension. If he rashly shoots the man, who is only a trespasser, he would be guilty of manslaughter.

10.10.2 Defence of Property and Use of Deadly Force

In certain circumstances the right of private defence of property may extend to cause death of the assailant. A struggle between the possessor and a trespasser can lead to violence and a threat to property may turn into a threat to human life or safety. Where the defender of the property reasonably believes that his own life is at stake he will be

²³⁸ Lanham, David, “Defence of Property in the Criminal Law” [1966] *Crim. L.R.* 426 at 371.

²³⁹ *R. v. Scarlett* [1993] 4 All. ER. 629; (1994) 98 Cr. App. R. 290; [1994] *Crim. L.R.* 288.

²⁴⁰ Hogan, Brian, “Defence of Property” (1994) *NLJ* 466 at 467.

²⁴¹ *R. v. Hussey* (1925) 18 Cr. App. R. 160.

²⁴² *Ibid.*

²⁴³ *R. v. Owino* [1995] *Crim. L.R.* 743. Commentary at 744.

²⁴⁴ *R. v. Scully* (1824) 1 C. & P. 319; 171 ER 1213.

justified in taking the life of the assailant.²⁴⁵ The best exposition of the principle is the case of Mr. Lambert, who killed one of the two robbers who entered his home and attempted a robbery and for the purpose put a knife on his wife's throat. The Crown Prosecution Services and the judge unanimously decided not to prosecute him because no blame can be attached to him for what he did.²⁴⁶ However, where there is a threat to property but no clear threat to a person's safety, though, it may be more difficult to assess when or if ever, use of deadly force should not be justified. It implies that stress should be laid on the element of personal danger while allowing use of deadly force.

Second important element is the nature of property to be defended. A home is considered to be a man's castle;²⁴⁷ if an assailant intends to evict him or break into it with intent to commit burglary or homicide the defender is entitled to use deadly force.²⁴⁸ A man may kill a trespasser, who would forcibly dispossess him, in the same manner as defending his body.²⁴⁹ In *Hinchliffe's*²⁵⁰ case, Holroyd J. stated that the defendant "had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing."

Although the same principles of defence of persons are applicable to the defence of property but because of its less value than human life, deadly force is no more permissible to defend property than it is to defend against minor assaults.²⁵¹ It is not reasonable to use deadly force merely for protection of the property.²⁵² Killing of mere a trespasser cannot be excused;²⁵³ unless it amounts to a violent felony such as robbery, arson or burglary and the extreme step of causing death of the trespasser was absolutely necessary.²⁵⁴ Apart from a home, the nature and value of property and all surrounding

²⁴⁵ Lanham, David, 1966, op. cit. p.370.

R. v. Scully (1824) 1 C. & P. 319; 171 ER 1213; *R. v. Moir* (1825) 7 C & P 179, Referred in *R. v. Charles Price* (1835) 7 C & P 178 at p.179; 173 ER 78 at 79.

²⁴⁶ Wright, Oliver, "Homeowner who killed Burglar acted Lawfully" 'The Times' June 18, 2002.

²⁴⁷ Lanham, David, 1966, op. cit. p.378.

Semayne's Case (1604) 5 Co. Rep. 91 a; 77 ER 194.

²⁴⁸ *Cooper's Case* (1639) Cro. Car. 544; 79 ER 1069.

²⁴⁹ Per Hewart L.C.J. in *R. v. Hussey* (1925) 18 Cr. App. R. 160.

²⁵⁰ *Hinchliffe* (1823) 1 Lew. C.C. 161; 168 ER 998.

²⁵¹ Bayles, Michael D., 1987, op. cit. p.336.

²⁵² Smith, J.C., 1996, op. cit. F.N. 84. p.266.

Hailsham, Lord of ST. Marylebone, 1990, op. cit. Vol. 11(1) Para. 457, p.351.

²⁵³ *Jones v. Tresilian* (1670) 1 Mod 37; 86 ER 713

²⁵⁴ Warmington, L. Crispin, 1950, op. cit. Vol. IV, p.38.

R. v. Sullivan (1841) Car. & M 209 at p.211; 174 ER 475 at 476.

circumstances must be taken into account before determining the quantum of force required for the defence.²⁵⁵ A threat to property may, in certain circumstances, be so potent to permit the use of deadly force as against physical harm.²⁵⁶ Thus a person does not commit a crime by causing death or bodily harm while defending his property or property of another provided that he inflicts no more harm than he in good faith and on reasonable grounds believes to be necessary.²⁵⁷

10.11. Defence of Property and New Trend in English Law

The conventional view of the common law in the defence of property is that the defendant should use reasonable force; however, he can use deadly force in the prevention of a forcible and atrocious crime like robbery, burglary or homicide²⁵⁸ and even causing death of the assailant was justified in the above mentioned crimes.²⁵⁹ The principle, that a person can use reasonable force to defend his property, seems to be changing by the decisions of English courts. In *Revill v. Newberry*,²⁶⁰ a 76 years old man shot and injured a burglar who was trying to break into his garden shed at night. Though the defendant was acquitted of malicious wounding but the judge awarded damages on the basis that he had used force beyond the reasonable limits of private defence. The case suggests that the defenders of property ought to measure the force required for defence or opt between the damage to their property or conviction.

In *R. v. Tony Martin*,²⁶¹ the defendant, living alone in a remotely situated farm had been the victim of a series of burglaries. One night he shot dead one burglar and injured the other who had entered his house after smashing a window. He was charged with murder, causing grievous bodily harm with intent and keeping firearm without a certificate. He was convicted for all the three counts and was sentenced accordingly. The decision of the court signals that those, whose houses are being burgled, are supposed to shout and not shoot at the burglars.²⁶² Owner J. said that “the case serve as a dire warning to all burglars who broke into the houses of other people.”²⁶³

²⁵⁵ Lanham, David, 1966, op. cit. p.373.

²⁵⁶ Per Lord Simon in *Lynch* [1975] AC 653 at p.686.

²⁵⁷ Stephen, J.F., 1950, op. cit. Article 306, p.254.

²⁵⁸ Blackstone, 1809, op. cit. Vol. IV, p.179.

Semayne's Case (1604) 5 Co. Rep. 91 a; 77 ER 194;

Cooper's Case (1639) Cro. Car. 544; 79 ER 1069.

²⁵⁹ 1532 (24. Hen.-8) c.5.

²⁶⁰ *Revill v. Newberry* [1996] 1 All ER 291; [1996] QB 567; [1996] 2 WLR 239.

²⁶¹ ‘*The Times*’ April 20, 2000.

²⁶² ‘*The Times*’ April 21, 2000.

²⁶³ ‘*The Times*’ April 20, 2000.

The statement of the judge suggests contrary to the decision because it is more a warning to house holders that if they use force against criminals in defence of their property they may be convicted for serious offences. If we look upon this particular decision in the light of previous record of the deceased, the injured and the situation prevailing in the area, the decision turns to be more dreadful.²⁶⁴ The decision reflects that the citizens are not entitled to protect themselves even though they could not get police help. The case illustrates the risks taken by the defendant if he uses force for the defence of his property.²⁶⁵

However, the public and the politicians took a serious notice of this decision because, at the most, he exceeded the necessary force required for the defence of his property.²⁶⁶

“The public out-cry over Tony Martin’s conviction for murder would have been lessened considerably had the option of a manslaughter conviction been available.”²⁶⁷

Here once again, it has been proved that the rule to substitute a conviction of manslaughter for murder in the cases of use of excessive force where use of some force was permissible is more reasonable. It has also been alleged that some jurors were threatened that they would be harmed if Martin was acquitted.²⁶⁸ This may be a factor for the conviction of the accused but the statements of the trial judge and the crown prosecutor clearly point towards the changing trend to deal with the cases of defence of property. The decision of the court also shows that the test of reasonable force in English law is unacceptably vague and gives insufficient guidance to the defenders regarding their legitimate right to protect themselves and their property against intruders but the problem with refining the test of reasonable force is that the alternatives all look worse than the present law.²⁶⁹

²⁶⁴ *The Times*’ April 22, 2000. (It has been reported that there were 58,904 recorded crimes in Norfolk between February 1, 1999 and January 31, 2000 compared to 56,329 in the same period previous year. All the three men involved in the crime were habitual offenders. The deceased had already 29 convictions, the injured had 33 convictions and their third accomplice had 52 convictions. In the presence of such facts chief crown prosecutor stated outside the court that “actions such as taken by Martin cannot be tolerated in a civilised society. When people break the law, it is for the law to punish them, not for the individuals to take the law into their own hands. Whether acting out of revenge or their own system of justice.”) The situation shows the failure of the law to provide protection to the law abiding citizen either due to inadequacy of punishments for the crime or inefficacy of the law enforcing agencies to control the incidences of crimes.

²⁶⁵ Watson, Michael, “Self-Defence and the Home” 167 (2003) *JP* 486 at 486.

²⁶⁶ Yeo, Stanley, “Killing in Defence of Property” 150 [2000] *NLJ* 730.

²⁶⁷ *Ibid.* at p.743.

²⁶⁸ *The Times*’ April 21, 2000.

²⁶⁹ Editorial, “What Should be done about the Law of Self-defence?” [2000] *Crim. L.R* 417.

Though the Court of Appeal substituted his conviction for murder to manslaughter yet this was done on a totally new plea of diminished responsibility raised by the defendant in appeal.²⁷⁰ However, it has been reported that the injured burglar has been granted permission to sue for damages.²⁷¹ The case poses a very interesting question whether the legal heirs of the deceased burglar can also sue for damages.

10.12 Use of Excessive Force in Private Defence

The principle of English law is that where a person, being under no mistake of fact, uses force in the exercise of right of private defence, he either has a complete defence or if he uses excessive force, no defence.²⁷² It means that the defence of private defence either succeeds so as to result in acquittal or if it fails will result into conviction of murder.²⁷³

Where a plea of private defence to a charge of murder failed because the force used was excessive and unreasonable the homicide could not be reduced to manslaughter.²⁷⁴ The House of Lords declared that the reduction of otherwise murder to manslaughter in the case of private defence is the matter for decision by the legislature and not by the House in its judicial capacity.²⁷⁵

In *R. v. Hassin*,²⁷⁶ in an appeal against conviction of murder it was submitted that the judge should have directed the jury that if 'H' exceeded the bounds of private defence, proper verdict was manslaughter. The Court of Appeal held that the submission was a novelty in present times, although the principle may have existed in the days of chance medley. There is no rule that a defendant who has used greater force than was necessary in the circumstances should be found guilty of manslaughter rather than murder.

10.12.1 Is the Idea of Reducing Murder to Manslaughter a Novelty?

The discussion above implies that if private defence is pleaded in answer to a charge of murder and fails for the use of excessive force, the plea affords the defendant no protection at all and the conviction cannot be reduced into manslaughter. However, the idea of conviction for manslaughter instead of murder in the cases of excessive force is not novel in English criminal law. In *R. v. Cook's*,²⁷⁷ it was held that use of excessive force in the defence of property, which resulted into death of the assailant was

²⁷⁰ *R. v. Martin (Anthony)* [2003] QB 1; [2002] 2 WLR 1; [2002] Crim. LR. 136.

²⁷¹ 'The Times' June 14, 2003.

²⁷² *Palmer v. The Queen* [1971] 1 All ER 1077; [1971] AC 814.

²⁷³ *Palmer v. The Queen* [1971] AC. 814 at 832.

Smith, J.C., 1996, op. cit. F.N. 84. p.268.

²⁷⁴ *R. v. Clegg* [1995] 1 AC.482.,[1995] 1 All. ER. 334

²⁷⁵ Per Lord Lloyd in *R. v. Clegg* [1995] 1 AC. 482 at p. 495; [1995] 1 All. ER. 334 at pp.346-47.

²⁷⁶ *R. v. Hassin* [1963] Crim. LR. 582.

²⁷⁷ *R. v. Cook's* (1639) Cro. Car. 537; 79 ER 1063.

manslaughter and not murder. The same rule was affirmed in *R. v Whalley*,²⁷⁸ and *R. v. Patience*,²⁷⁹ in the second quarter of the 19th century. In *R. v. Harrington*,²⁸⁰ the court held that private defence is ground upon which the offence of murder might be reduced to manslaughter. In another case of the last quarter of the 19th century *R v. Weston*,²⁸¹ it was held that use of deadly force against a serious violence or its apprehension is justifiable.

In a case of the early 20th century *R. v. Biggin*,²⁸² the rule was reaffirmed and seemed to be remained in force up till the middle of the 20th century. In *Mancini v. D.P.P.*,²⁸³ the House of Lords held that in case where the plea of private defence was raised in defence on the trail of a person charged with murder it is the duty of the judge in his summoning up to deal adequately with any view of the evidence given which might reduce the crime to manslaughter.²⁸⁴

The cases cited above fairly suggest that where the accused has been justified in using some degree of force in private defence or to resist an unlawful execution or arrest but used more force than which would have served his purpose has had the effect of reducing the conviction to manslaughter. The principle can be supported by the argument that if a person responds to an assault and does no more than he believes to be necessary in the circumstances, it would not be justified that he should be convicted of murder because on an objective view the degree of force used is judged to have been excessive.²⁸⁵ The law does not tolerate such killings by refusing to grant the accused a complete acquittal despite the fact that the deceased was at fault in having attacked the accused in the first place. However, it permits the accused to escape from liability of murder for a less serious offence of manslaughter.²⁸⁶ Apart from these cases, however, the English common law has made no positive contribution to the recognition and development of excessive private defence.²⁸⁷ The courts have refused to regard the rule for some inexplicable reason. The English judges appear to have played an

²⁷⁸ *R. v. Whalley* (1835) 7 C & P 245; 173 ER 108.

²⁷⁹ *R. v. Patience* (1837) C & P 775; 173 ER 338.

²⁸⁰ *R. v. Harrington* (1866) 10 Cox. C.C. 370.

²⁸¹ *R. v. Weston* (1879) 14 Cox. C.C. 346.

²⁸² *R. v. Biggin* [1918-19] All. ER. 501.

²⁸³ *Mancini v. D.P.P.* [1942] AC.1.

²⁸⁴ *Ibid.* at p. 7

²⁸⁵ The Law Commission, *Partial Defences to Murder*, Consultation Paper No. 173, 2003. Para. 1.61.

²⁸⁶ Yeo, Stanley, *Unrestrained Killing and the Law* (Oxford University Press, Delhi, 1998) p.1.

obstructionist rather than a contributory role in the recognition of excessive private defence doctrine in English law.²⁸⁸

The Privy Council in *Palmer's case*²⁸⁹ rejected the authority of all the cases mentioned above, concluding that they deal either with the execution of an illegal warrant or executing process unlawfully hence bearing no impact on the law of private defence.²⁹⁰

This might be a reason for rejecting the doctrine of excessive use of force in private defence.²⁹¹ However, this approach is unsatisfactory. Apparently the objection is based upon the concept that the right of private defence can only be exercised against an assault. But the council did not mention name of the act done against the execution of unlawful warrant and resisting unlawful arrest.²⁹² As discussed earlier every one is allowed to exercise right of private defence against any unlawful act affecting human body, so the objection is illogical and of no value.

The Privy Council was not persuaded by the *Weston*²⁹³ and *Biggin*²⁹⁴ being clear cases on private defence where the courts held that if the accused used more force than necessary in the exercise of his right of private defence a verdict of manslaughter would be justified. The cases were dealt along with the others and regrettably the Privy Council did not expressly stated reasons for its views and rejecting the principle.²⁹⁵ The council also considered the Australian cases on the point²⁹⁶ but did not find them convincing and rejected them for less clear reasons.²⁹⁷ These decisions are by no means clear and unambiguous. The cases prove that the doctrine was not an innovation rather it already existed in English law. This can be supported by the evidence that the penal code drafted for India, by English men in 1837 and implemented in 1861, contained the doctrine of use of excessive force in private defence in the form of an exception to the offence of murder, indicating the presence of the principle.²⁹⁸

²⁸⁷ *Ibid.* p.118.

²⁸⁸ Yeo, Stanley, 1998, op. cit. p.118.

²⁸⁹ *R. v. Palmer* [1971] 1 All ER 1077; [1971] AC 814.

²⁹⁰ *Ibid.* at p. 1083 and 825 respectively.

²⁹¹ Smith, P., "Excessive Defence-A Rejection of Australian Initiative?" [1972] *Crim. LR.* 524 at 529.

²⁹² *Ibid.*

²⁹³ *R. v. Weston* (1879) 14 Cox. CC. 346.

²⁹⁴ *R. v. Biggin* [1918-19] All. ER. 501.

²⁹⁵ Yeo, Stanley, 1998, op. cit. p.136.

²⁹⁶ *R. v. Palmer* [1971] AC 814 at pp.827-833.

²⁹⁷ Smith, P., 1972, op. cit. p.530.

²⁹⁸ Exception 2. Section 300, I PC and PPC.

The principle that murder cannot be reduced into manslaughter, where the defendant has used excessive force, without a new legislation seems to be an unreasonable excuse counterfeited by the courts. It can be criticised on a number of grounds. Firstly, the courts, without requiring any legislation by the parliament, divided crimes into basic/specific intent in the cases where the defence of intoxication to a criminal charge is raised. If the law is to be altered by the parliament rather than the courts, the same principle would have been applied there. Similarly, the liability for unlawful wounding has been substituted for tortious liability on the instance of the court without having recourse to the new legislation.²⁹⁹

Secondly, where use of some force is justified and the defender in good faith exercising his right exceeded the limit allowed, there is no justification of abandoning the defence completely. In order to hold him liable for use of excessive force it is sufficient to convict him of manslaughter rather than murder. In 1993, in *R. v. Scarlett*,³⁰⁰ the prosecution charged the accused with manslaughter on the ground that he used excessive force in the defence of his premises. If the use of excessive force does not reduce murder into manslaughter, this charge was not proper and the court would have asked to reframe the charge.

The jurists are also of the opinion that homicide, committed under mistake as to how much force is needed for private defence, is excusable and the offender is not liable for murder.³⁰¹ Denying this defence to the offender is the denial of a recognised defence of mistake of fact. One might envisage an analogy between the use of excessive force in private defence and mistake while exercising the right. In the latter case the accused believes mistakenly that he is being attacked and uses force, in private defence, which was not permitted at all. Whereas in the former case the accused could not make out the exact degree of force needed to defend and exceeds the permissible limits.³⁰² It seems to be more reasonable and logical to give him some allowance in the circumstances. However, it is argued that a change in the present law would be unnecessary and overcomplicated because if the defendant does no more than he instinctively believe to

²⁹⁹ *Revill v. Newberry* [1996] 1 All ER 291; [1996] QB 567; [1996] 2 WLR 239.

³⁰⁰ *R. v. Scarlett* [1993] 4 All. ER. 629.

³⁰¹ Robinson, Paul H., 1984, op. cit. Vol. I, p.110.

³⁰² Mousourakis, G., 1998, op. cit. p.187.

be necessary his conduct would be reasonable and therefore lawful, however if he overreacts angrily the partial defence of provocation is available.³⁰³

The psychological pressure experienced by the defender when his life or limb is at stake should be taken into account in considering whether he should be excused for exceeding the limits of necessary force. Stress, fear, mistake, or a combination of these factors may provide a good reason for excusing the accused for employing more force than is actually necessary to repel an unlawful attack.³⁰⁴ One can generally adjust one's conduct in ordinary life by taking steps to avoid harm to others, whereas a person who finds himself without warning in what seems to be a very dangerous situation may have no time to take verifying steps before defending himself.³⁰⁵ In the circumstances of great stress, even a reasonable man cannot be expected judging to a nicety the minimum degree of force required for defence.³⁰⁶ It seems to be quite logical that a person may, while exercising his right of private defence, go beyond the reasonable limits of the force required. If the defender is to measure the force necessarily required for his defence, it is an implied denial of his right of defence. The approach adopted by the English courts, not reducing murder to manslaughter in case of excessive force, is rather negative, seemingly motivated by an unwillingness to make any move away from a comfortable view of the defence of private defence.³⁰⁷

The principle that the use of excessive force may defeat the defence of private defence is also contrary to the rule laid down by the English courts that a person exercising his right of private defence cannot weigh to nicety the exact measure of his action and it is not reasonable to use jeweller's scale to measure reasonable force.³⁰⁸ The opinion of the courts in these cases suggests that a plea of private defence may be accepted even if the accused used more force than was in fact necessary and in the circumstances he was unable to calculate correctly the amount of force actually needed.³⁰⁹

Taking into account the illogicality of the existing law, C.L.R.C. recommended that if a defendant kills in a situation where use of some force is reasonable in private defence or

³⁰³ The Law Commission, Consultation Paper No. 173, 2003, op. cit. Para. 1.62.

³⁰⁴ *Ibid.* p.188

³⁰⁵ Williams, Glanville, "Offences and Defences" 2 (1982) *S. L.* 233 at p.243.

³⁰⁶ Smith, J.C., 1996, op. cit. F.N. 84. p.262.

³⁰⁷ Smith, P., 1972, op. cit. p.528.

³⁰⁸ For example see *Palmer v. The Queen* [1971] AC 814 and *Reed v. Wastie* [1972] Crim. L.R. 221.

³⁰⁹ Mousourakis, G., 1998, op. cit. p.186.

prevention of crime but he uses excessive force, he should be liable for manslaughter and not murder if he honestly believed that the force used was reasonable in the circumstances.³¹⁰ The recommendation has duly been accepted by the Law Commission³¹¹ and subsequently incorporated into draft criminal code for England and Wales.³¹² House of Lord's Select Committee³¹³ has also recommended the abolition of present law and proposed that a new special defence to the offence of murder should be introduced and a person who kills using excessive in private defence or prevention of crime should be convicted of manslaughter rather than murder.

10.12.2 Advantages of the Rule: Reduction of Murder into Manslaughter

The major advantage of such legislation is that the law would be more adequately equipped to deal with the situation of defence where the assailed over-reacted and the courts would have a much free hand in selecting the appropriate sentence for the convicted.³¹⁴ An objection may be raised that the introduction of this rule would probably result in conviction for manslaughter where a conviction for murder would have been proper.³¹⁵ But it is also correct to say that it would equally probable to result in the conviction of manslaughter of persons who would otherwise have been acquitted of murder.³¹⁶ On the other hand the absence of such a partial defence may result not only in harsh convictions but in over-sympathetic acquittals as well.³¹⁷ It is quite reasonable that a man ought neither to go wholly free if he has defended himself beyond the necessity of the occasion and thereby killed someone, nor at the other extreme to be convicted of murder for an error of judgement in a difficult situation which was not caused by him.³¹⁸ The proposed legislation may also be justified on the ground that a homicide committed in lawful exercise of right of private defence is morally less blameworthy than in other circumstances.³¹⁹

10.13 Proposed reforms in the law of private defence in English law

The common law principles on private defence were complicated and unsatisfactory which resulted into an artificial distinction between justifiable homicide and homicide in private defence; a blameworthy element was purported to be attached with the later

³¹⁰ Criminal Law Revision Committee, Cmnd. 7844. 1980, op. cit. Para. 288, p.122.

³¹¹ The Law Commission, *Codification of Criminal Law* (Law Com. No. 143, 1985) Para 13.30.

³¹² Law Com. No. 177, 1989, op. cit. Clause 59.

³¹³ House of Lords, *Select Committee on Murder and Life Imprisonment*, HL. Papers, 78-1 (Parliamentary Papers HL, 1988-89 Vol. XIII (HMSO, London, 1989).para.118, p.35.

³¹⁴ Smith, P., 1972, op. cit. p.533.

³¹⁵ *Ibid.* p.534.

³¹⁶ *Ibid.*

³¹⁷ The Law Commission, Consultation Paper No.173, 2003, op. cit. Para. 12.84.

³¹⁸ Howard, Colin, 1968, op. cit. p.360.

instance.³²⁰ Because of its haphazard growth the law contains some inconsistencies and anomalies.³²¹ It was desired that the common law of private defence should be replaced by statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person. The defence should be confined to cases where the defendant feared an imminent attack and there should be no specific provision relating to retreat rule or the refusal to comply with an unlawful demand.³²² It was also desired that there should be a statutory definition of private defence, separate from section 3 of the Criminal Law Act 1967, for the section does not allow exercise of private defence against someone who is not committing a crime like a minor, insane, under a state of automatism or mistake of fact.³²³

Taking into account the prevailing unsatisfactory condition, the C.L.R.C. and a Select Committee of the House of Lords recommended the change of existing law to encompass the above suggestions.³²⁴ On the basis of these recommendations, the provisions of statutory law on the prevention of crime and the principles of common law on private defence have been consolidated and restated by the Law Commission in a draft criminal code.³²⁵ Clause 44(1) states that a person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable, to prevent a crime, to effect or assist in lawful arrest, to prevent or terminate a breach of peace or to exercise right of private defence. The proposed clause would replace existing statutory and common law principles on the point. The provisions mainly consolidate and restate the existing law. However, the major difference between the existing provisions on the subject and the Draft Criminal Code is that if the accused kills by using excessive force, the crime will be no longer murder but manslaughter.³²⁶

The common law and the statutory provisions undoubtedly contributed to make the law obscure and difficult in the administration of justice. Obscurity and mystification may in

³¹⁹ The Law Commission, Consultation Paper No.173, 2003, op. cit. Para. 12.84.

³²⁰ Turner, J. W. Cecil, 1966, op. cit. p.144.

³²¹ Smith, J.C., 1996, op. cit. F.N. 84. p.259.

³²² Criminal Law Revision Committee, Cmnd. 7844, 1980, op. cit. Part. IX, Para, 72, p. 137.

³²³ *Ibid.* Part. VII., Para, 283, p.119.

³²⁴ Criminal Law Revision Committee, Cmnd. 7844, 1980, op. cit. Part. VII, Para. 288; House of Lords, Report of the Select Committee, Papers, 78-1 (Parliamentary Papers HL, 1988-89, op. cit. Vol. XIII (HMSO, London, 1989).para.118, p.35.

³²⁵ Law Com. No. 177, 1989, op. cit.

turn lead to inefficiency. The cost and length of trials may be increased because the law has to be extracted and clarified and there is a greater scope for appeals on misdirection on points of law. Moreover, if the law is not perceived by the jury to be clear and fair, there is a risk that they will return incorrect or perverse verdicts through misunderstanding or a deliberate disregard of the law. It can be concluded that the present law on private defence is unsatisfied, unclear, and in need of reform.³²⁷ Codification will remove all the ambiguities and will provide a single, clear agreed upon test, published under the authority of the parliament.³²⁸

Conclusion

Homicide cannot be justified upon any ground unless it was essential to secure an equal interest of the defender. It is not permissible to commit homicide in private defence when the object can be achieved by any peaceful means including retreat or temporising the situation. However, retreat is merely one of the circumstances that should be considered with all others in deciding whether the defendant exceeded the reasonable limits. The victim of an unlawful assault is allowed to use reasonable force for private defence but reasonableness of the force should not be measured in jeweller's scale, rather application of an objective test would be more appropriate and sensible.³²⁹ If he has caused death of the assailant, he should not be convicted of murder provided that the force was not unreasonably excessive in the circumstances. The moral culpability of a man who honestly believes it necessary to use lethal force in private defence is definitely much less than a man who commits homicide deliberately and in cold blood. Though the present English law on the subject is unsatisfactory, however, the proposed reforms suggesting reduction of murder into manslaughter where excessive force was applied by the defender are in conformity with the principles of justice.

In the next chapter principles of *Shari'ah* regarding the right of private defence shall be discussed. In order to evaluate their value a comparison, where possible, with the corresponding principles of English law shall also be made.

³²⁶ Clause 55 and 59.

³²⁷ Watson, Michael, 1997, op. cit. p.1594.

³²⁸ Law Com. No. 177, 1989, op. cit. Para. 2.5 & 2.6 at p.6.

³²⁹ Smith, P., 1972, op. cit. p.531.

Chapter-11 Right of Private Defence in *Shari'ah*

11.1 Introduction

The right of private defence has been recognised by the laws of all civilised societies for very long time.¹ *Shari'ah* being stricter than secular laws in protecting interests of individuals recognises that under certain conditions an individual is entitled to defend his own interests and interests of others. Though the major aim of this chapter is to explore the nature of private defence in *Shari'ah* yet we'll see how does this right resemble with or differ from public defence? The criteria for using force in private defence shall also be ascertained. A comparison of *Shari'ah's* provisions on the subject with English law, and evolving the efficacy of both the systems will also be given due consideration.

11.2 Legal Defences in *Shari'ah*

Shari'ah is more concerned with the duties of a person than his rights, by this way everyone gets all that for which he is entitled. It prohibits the believers to go astray and transgress the legally recognised rights of others. In the Holy *Qur'an* it has been enjoined, "Begin not hostilities. Lo! Allah loveth not aggressor."² To avoid aggression, and to show respect for rights of others, has been declared as the duty of every one. Every member of society is allowed to defend his rights against all kinds of unlawful aggression. *Shari'ah* does not preach the idealistic doctrine of the other cheek; instead, it prefers private defence tempered with compassion.³ It affords protection and guarantees that the rights of individual to life, liberty and property shall not be abridged without the due process of law. Violation of right to life, property and chastity has been expressly declared unlawful.⁴ Right of private defence is an exception to the general principle of prevention of use of force by an individual to protect his own interests.⁵ It is an exception to another well known rule of laws of all the civilised societies that no one can be the judge of his own cause.⁶

11.2.1 Public and Private Defence

In *Shari'ah*, defence of legally protected rights has been divided into two kinds.⁷ The first kind, named as right of public defence is meant to defend the moral, social and

¹ Bhansi, Ahmad Fathi, *Al-Masoolia-al-Jinaya* (Dar Al-Sharq, Beirut, Lebanon, 1984) p.194.

² *Al-Qur'an* 2:190.

³ Ahmad, Khurshid, *Islam: Its Meaning and Message* (Islamic Council of Europe, London, 1976) p.106.

⁴ Ibn Majah, Muhammad bin Yazid, *Sunan ibn Majah* (Cagri Yayinlari, Turkey, 1981) Vol. II. p.1016.

⁵ Al-Toori, Muhammad bin Hussain bin Ali, *Takmila Al-Beher Al-Raiq Sharah Kanaz al-Daqaig* (Maktaba Majidia, Quetta, Pakistan) Vol. VIII, p.302.

Qazi Zada Afandi, *Takmila Fateh Al-Qadeer* (Al-Maktaba al-Rasheedia, Quetta, Pakistan) Vol. IX, p.166.

⁶ Abdul Tawwab, M., Sayed, *Al-Difah al-Shar'hi fi Fiqh al-Islami* (Alam al-Ktub, Cairo, 1983) p.114.

⁷ Oudah, Abdul Qadir, *Al-Tashrih al-jinai al-Islami* (Research Publishing, Beirut, 1997) Vol. I, p.472.

legal values of an Islamic society by inviting people to do good and forbid from committing evil. The right is so important that it may be declared as the foundation of all the revealed religions. Prevention of crime and propagation of goodness in society is the object, all the Prophets were deputed to achieve. If its knowledge is forgotten and its practice is given up, the very object of prophet-hood is totally defeated; its absence from society will lead to degeneration and disintegration of conscience, indolence and dullness of mind, destitution of morality, breaking up of human relationships, flourishing of corruption, deterioration and diminution of civilisation, destruction of property, damage to human life and declination of the society.⁸

Taking into account importance of the defence it has not been left to the discretion of individual either to stand for it or leave it; everyone is bound to discharge his duty to his capacity for the promotion of peace and stability in the society.⁹ A failure to discharge the duty has been linked with the torment of Allah.¹⁰ However, Muslim jurists have imposed certain conditions for the exercise of this right. Among these conditions are, that there should be a conduct prohibited by *Shari'ah*, defender should prevent it during its continuation; anything done after its completion would be treated as punishment, which is the exclusive right of public authorities. The prohibited conduct should have been adopted publicly, for the defender is not allowed to inquire into the private affairs of individuals and finally he should not use more force than required for prevention.¹¹

This kind of defence is equivalent to the prevention of crime in English law but it is more comprehensive and has a much wider scope. It provides a sound base for elimination of crime and promoting peace and stability. On one hand it includes propagation of goodness in society and on the other its provisions extend beyond the prevention of crime to the suppression of moral sins. It falls within the peculiar characteristics of *Shari'ah* that it not only protects the rights of individuals, rather it also emphasises safeguarding the collective moral standards and values of society.

Abdul Tawwab, M., Sayed, 1983, op. cit. p.85.

⁸ Al-Ghazali, Al-Imam Abu Hamid Muhammad bin Muhammad, *Ahya Uloom ud din* (Maktaba Mustafa al-Babi al-Halbi, Egypt, 1939) Vol. II, p. 302

⁹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.493.

¹⁰ Al-Novi, Zakariya Yahya ud din bin Sharf, *Riyadh Al-Salheen* (Dar Al-Fiker, Beirut, 1993) Vol. I, p.98.

¹¹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, pp.501-5.

The other kind, termed as private defence, is the right of a person to defend his body, property, chastity of a woman amongst his relatives or the same interests of any other person, against any unlawful assault, by use of reasonable force.¹² The technical word used by the Muslim jurists for the right of private defence is "*Dafeh Al-Saa'il*" or warding off the assailant. The word *Al-Saa'il* in Arabic is simultaneously used in two different meanings. First one stands for the aggression caused by a person,¹³ in this sense it has been defined as an aggression on an innocent person without any justification.¹⁴ The second meaning of the word denotes the assailant himself.¹⁵ In this sense it stands for a transgressor without any authority or justification.¹⁶ It makes no difference whether we mean by the word *Al-Saa'il* the aggressor himself or the act of aggression, in both the situations the defender is entitled to ward off the evil. Private defence is not restricted only to the assault of death or bodily injury rather it extends to any act affecting physical integrity and freedom of a person,¹⁷ like kidnapping, abduction and unlawful detention or any other offence affecting human body. In this regard the principles of *Shari'ah* are compatible with the criminal statutes of certain countries.¹⁸

11.2.2 Distinction between Public and Private Defence

In some situations, both the defences overlap because major aim of the both is to prevent the violation of rights of someone, a victim while warding off an evil is preventing the violation of his rights.¹⁹ Nonetheless, both of them can be distinguished on the ground that right of private defence is exercised to repel an unlawful assault against body, property, or chastity, whereas right of public defence can be exercised against the violations of the general commandments and prohibitions of *Shari'ah*.²⁰ It can be said that in the cases of public defence it is the violation of right of Allah or the

¹² *Ibid.* p.473.

Ibn Qadama, *Al-Mughni* (Maktaba al-Riyadh al-Haditha, Al-Riyadh) Vol. VIII, p. 332.

Al-Rammali, *Nihayat al-Mohtaj* (2nd ed. Dar Ahya al-Taras al-Arabi, Beirut, 1992) Vol. VII, p.239.

Abdul Tawwab, M., Sayed, 1983, op. cit. p.158.

¹³ Ibn Manzur, *Lissan Al-Arab* (Dar Sader, Beirut, 1955) Vol. XI, p.387.

Ibn Faras, *Mu'jam Maqayis Al-Lugha* (Al-Dar Al-Islamia, Ghadeer, 1990) Vol. II, p.322.

Al-Johri, *Al-Sihhah Taj Al-Lugha wa Sihhah Al-Arbia* (Dar Al-Kutb Al-Ilmia, Beirut, 1999) Vol. IV, p.572.

¹⁴ Al-Dimyati, Ibn Arif Billah, *Aana-al-Talbeen* (Dar Ahya al-Taras Al-Arabi, Beirut) Vol. IV, p.171.

¹⁵ Ibn Manzur, 1955, op. cit. Vol. XI, p. 387.

Ibn Faras, *Mu'jam Maqayis Al-Lugha* (Al-Dar Al-Islamia, Ghadeer, 1990) Vol. II, p.322.

Al-Johri, 1999, op. cit. Vol. IV, p.572.

¹⁶ Ibn Taymiyyah, Taqi ud din, *Al-Siyassa al-Shari'ah* (Dar al-Ktub al-Arabi Egypt, 1969) p.87.

Al-Asmi, Abdul Rehman, *Majmooh-al-Fatawa* (Idarah Masah Al-Askeria, Cairo) Vol. XXVIII, p.319.

¹⁷ Al-Shaf'hi, *Al-Umm* (Dar Al-Tabahat Al-Muneeria, Bolak, Egypt, 1326 A.H) Vol. VI, p.27.

¹⁸ Right of Private Defence, Indian Penal Code and Pakistan Penal Code Sections 96-105.

¹⁹ Ibn Taymiyyah, Taqi ud din, 1969, op. cit. p.87.

²⁰ *Ibid.*

society, whereas in private defence rights of individuals are violated. Another distinction may be that in cases of private defence there is always an unlawful assault and the assailed acts under the command of *Shari'ah* and the natural instinct, whereas, in cases of public defence a person acts only under the command of *Shari'ah*.

The distinction may further be clarified by the example of a person who defends his own body against an unlawful assault, he exercises his right of private defence, however if he prevents someone to commit suicide, it will be in the public defence because there is no assailant in this particular case.²¹ Similarly, in a case where a woman defends an assault to rape her, she is acting in private defence but if the unlawful intercourse was with the consent of woman, prevention of this act will fall in the purview of public defence. It looks that, in *Shari'ah*, unlike English law, there is no ambiguity regarding the province of right of private defence and the prevention of crime.

11.2.3 Private Defence against Minor and Insane

As mentioned earlier right of private defence is available against any unlawful assault endangering life, property, or chastity of a person. Is the same right available against the conduct of persons who are incapable of committing crimes? According to *Hanfite*, except Abu Yousaf, it is a requirement for exercise of right of private defence that the assailant must be criminally liable and the act must be an offence punishable by law. However, if the assailed kills a minor or insane in the exercise of right of private defence, he shall not be liable to *Qisas* rather his liability is reduced to pay *Diyat*.²² The reason being that the acts of a minor or insane are not offences because of their incompetence; the assailed was acting under necessity to defend his right, he is liable to pay damages because necessity does not affect the civil liability.²³ The situation is akin to the case where a person is attacked by an animal and in order to save his life he killed it; he will be liable to pay value of the animal.²⁴

Abu Yousaf, amongst the *Hanfite* jurists, agreed with the majority opinion that though it is necessary that the act of the assailant should be an offence but it is not essential that

²¹ *Ibid.*

²² Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

Nizam, Shaikh & a Group of Scholars, *Fatawa Alamgiri* (Matba Almajidi, Kanpur, India) Vol. IV, p.177. Oudah, Abdul Qadir, 1997, op. cit. Vol.1, p.476.

Schacht, Joseph, *An Introduction to Islamic Law* (The Clarendon Press, Oxford, 1964) p.182.

²³ Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

Nizam, Shaikh & a Group of Scholars, op. cit. F.N. 22. Vol. IV, p.177.

²⁴ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.485.

he himself should also be criminally liable. According to them, the act of a minor and insane fulfils all the requirements of an offence. However, they are exempted from criminal liability on account of their lack of rational understanding of the fact.²⁵ By initiating an unlawful assault and endangering the life of an innocent man they lose the right of sanctity to their own life. An unlawful assault entails a duty to defend; no liability, civil or criminal, accrues in discharging that duty.²⁶ They opined that for the exercise of right of private defence, there is no difference between assaults of a legally competent person and that of a minor or insane.²⁷ In this particular situation they take into account the unlawful assault and the danger caused by it rather than its source.

The fundamental difference between the opinions is that according to the opinion of *Hanfite* if the assailant was a minor or insane and the victim of the assault caused his death, while defending, he is liable to pay *Diyat* because their act was not an offence and neither of them was criminally liable. In this condition, the defender has not exercised right of private defence but he was acting under necessity, so his act is not justified rather excused, which entails a civil liability to pay damages. However, according to the opinion of majority, if a man, while exercising his right of private defence causes death of an animal, minor, or insane he will incur no liability at all neither criminal nor civil.²⁸

While dealing with the right of private defence, the criminal laws of almost all the civilised societies separately and expressly provide that a person can exercise this right against a minor or insane in the same manner as against a legally competent person. Had there been no difference between the two situations there would have been no need to mention it separately. The difference has been clarified by the opinion of *Hanfite* that if

²⁵ Al-Khatib, Al-Sharbini, *Mughni Al-Mohtaj* (Maktaba Mustafa Al-babi Al-halbi, Egypt, 1958) Vol. IV, p.194.
Ibn Farhoon, *Tabssarat al-Hukkam* (Matba Mustafa Al-babi Al-halbi, Egypt, 1958) Vol. II., p.356.
Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.329.
Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.
Nizam, Shaikh & a Group of Scholars, op. cit. F.N. 22. Vol. IV, p.177.
Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.476.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Al-Shaqeti, Ahmad bin Mukhtar, *Mawahib al-Jalil* (Idara Ahya al-Tarasal-Islami, Qatar, 1987) Vol. VI, p.323.
Ibn Farhoon, 1958, op. cit. Vol. II, p.356.
Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p. 172.
Al-Sherazi, Abi Ishaq Ibrahim Bin Ali, *Al-Mohazzib* (Matbah Isa Al-babi Al-halbi, Egypt) Vol. II, p.225.
Al-Khatib, Al-Sharbini, *Al-Iqnah* (Dar Al-Marfa Litabbah wa Al-Nasher, Beirut, 1979) Vol. II, p.199.
Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.329.

the defender, while exercising his right of private defence, causes death of a minor or insane he shall be liable to pay *Diyat*, whereas the same result, if achieved against a legally competent person shall not entail any liability.

11.3 Provisions Related to the Right of Private Defence in Shari'ah

The right has been bestowed by the Holy *Qur'an*, "And one who attacketh you, attack him in like manner as he attacked you."²⁹ The verse not only proves the existence of right of private defence rather it also sets its boundaries. It imposes a condition on the exercise of such a right that the means applied and the manners adopted for the defence must correspond with that of the aggression. The verse has been considered by the Muslim jurists as the base of private defence in all forms of unlawful assaults and entitles the victim to ward it off whenever he is subject to it.³⁰ Another verse states that, "the guerdon of an ill-deed is an ill the like thereof."³¹ The verse implies that the force applied for the defence must be necessary, reasonable, and proportional to the harm intended by the aggressor. In any case the defender is not allowed to go beyond the limits of necessity.³² His intention must be to give the assailant his due and not to revenge or punish him. There are a number of other verses enjoining upon the Muslims to co-operate in good deeds, to combat mischievous, and to suppress the evil.

A number of traditions of the Holy Prophet, some of them have been discussed in 4.2, conform to the same effect. Y'ala bin Omayya reported that one of his servants was involved in a brawl with a man. One of them took the hand of other in his mouth and bit it. The latter drew his hand with force, extracting two of his teeth. The victim raised the matter to the Holy Prophet, who declared that the man was justified in drawing his hand, with force, from the mouth of the complainant. Addressing the complainant the Holy Prophet said, "Do you think that he should have left his hand in your mouth to be bitten by you like a camel."³³ The tradition proves that a man is entitled to cause injury to other in order to save himself from an unlawful harm.

A saying of the Holy Prophet narrates, "Help your brother whether he is an aggressor or a victim. He was asked, "To help the victim is understandable but how to help the

²⁹ *Al-Qur'an* 2:194.

³⁰ Al-Rammali, 1992, op. cit. Vol. IV, p.23.

³¹ *Al-Qur'an* 42:40

³² Raza, Muhammad Rashid, *Tafseer Al-Minar* (4th ed., Dar Al-Minar, Egypt, 1954) Vol. II, p.213.

³³ Al-Bukhari, Muhammad bin Ismail, *Saih al-Bukhari* (Cagri Yayinlari, Turkey, 1981) Vol. IV, p.48. Muslim bin Hijaj, *Saih Muslim* (Cagri Yayinlari, Turkey, 1981).Vol. II, p.1300.

wrongdoer?” “Prevent him from committing the wrong.” He replied.³⁴ It suggests that in all the cases of private defence, the right is not restricted to one’s self only but every one is allowed to defend others also.³⁵ Anyone who sees a wrong being committed against others is allowed to help the victim and prevent the wrong doer from causing harm and he will be acting in private defence.³⁶ Another tradition describing the characteristics of believers states that the believers are those who co-operate with each other in combating the mischievous.³⁷ In addition, helping the weak by physical force against the wrongdoer has been declared as charity.³⁸ These provisions might be particularly beneficial to the weak and the disadvantaged members of society.

Beside the provisions in the Holy *Qur’an* and *Sunnah*, there is a maxim in *Shari’ah* saying “Necessity renders prohibited permissible.”³⁹ In normal circumstance it is strictly prohibited to cause harm to any body but the necessity of defence permits it to defend one’s rights. The maxim above is governed by another maxim which states that the necessity should be kept within its boundaries.⁴⁰ It means, where a person is allowed to violate the general rules under the doctrine of necessity, he is bound to remain within the minimum possible limits. The combined effect of the two maxims leads to the conclusion that a man is allowed to exercise right of private defence and will incur no criminal liability provided that he does not use more force than necessary for defence.

Though the necessity and private defence are similar as far as the call of emergency is concerned, yet both of them differ in the origin of the danger, in the cases of private defence the eminent danger arises out the unlawful acts of a human being, whereas, in predominant cases of necessity the danger arises out of some natural cause.⁴¹ An opinion in *Shari’ah* states that the base for the private defence is duress rather than necessity, the defender has been coerced to commit an unlawful act.⁴² However, this point of view is questionable because under duress the accused was left without any

³⁴ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. III, p.98.

³⁵ Ibn Qadama, *Al-Mughni* (Maktaba Al-Mustafa Al-babi Al-Halbi, Egypt) Vol. VIII, p.332.

³⁶ Al-Qalubi, *Hashyat al-Qalubi ala Sharah Minhaj* (3rd ed., Maktaba Al-halbi, Egypt, 1956) Vol. IV, p.207. Ibn Farhoon, 1958, op. cit. Vol. II, p.356.

³⁷ Abu Daoud, 1981, op. cit. Vol. III, p.452.

³⁸ Ahmad bin Hanbal, *Masnad Imam Ahmad bin Hanbal* (Cagri Yayinlari, Turkey, 1981) Vol. V, p.154.

³⁹ Ibn Nujaym, *Al-Ashbah Wa Al-Nazair* (Idara Al-Qur’an Wa Al-Uloom Al-Islamia, Karachi) Vol. I, p.118.

⁴⁰ *Ibid.* p.119.

⁴¹ Abdul Tawwab, M., Sayed, 1983, op. cit. p.119.

⁴² Al-Baberty, Akmal ud din Muhammad bin Mehmood, *Sharh Al-Ina’yah ala AL-Hidiya* (Published at the foot margin of *Takmila Fateh Al-Qadeer*) (1st ed., Al-Matbah al-Kubra Al-Ameeria, 1418 AH) p.269.

option to do except the act coerced, whereas in the cases of private defence it is a condition the defender should chose the most appropriate means of defence. Similarly, a person shall be considered under duress if there was a threat to cause grievous bodily harm, whereas in the cases of private defence the defender is allowed to ward off any evil with a reasonable force.

In order to ensure the safety of life, chastity and property of every one *Shari'ah* strictly prohibits the violation of protected rights of any member of society.⁴³ To achieve the object, violation of the sanctity of right to life of an assailant is permissible. The assailant loses his right to sanctity of life and integrity of body by causing an unlawful assault and endangering the legally protected interests of others. Any member of society, if causes death of the assailant while defending such protected interests, shall not be liable for any offence provided he has not breached the limits of his necessity.⁴⁴ As discussed in 4.7.2 the basic aim of all the revealed religions is to protect and preserve five fundamental interests of man. *Shari'ah* permits an individual to defend them in the cases where state fails or is unable to protect due to emergency. It implies that *Shari'ah* recognised right of private defence for fifteen hundred years as compared to English criminal law where it finds its place in the present form only since the 19th century when the punishment of forfeiture, for justifiable homicide, was abolished in 1870.

11.3.1 Defence of Body and *Shari'ah*

Life is indisputably the greatest possession of a man. It is common sense that he should be allowed to defend this possession within reasonable limits. In *Shari'ah* defence of body is such a sacred duty that the Holy Prophet said, "Anyone if attacked unlawfully and killed while defending is a martyr."⁴⁵ Preservation of life is such an important duty that in order to preserve his life a man is permitted to consume prohibited commodities in the condition of dire necessity, without incurring any criminal liability.⁴⁶ Likewise, if he is under an apprehension of death or serious bodily injury he is permitted to use reasonable means to preserve his life from unlawful assault of the offender.

⁴³ Abdul Tawwab, M., Sayed, 1983, op. cit. p.141.

⁴⁴ Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

Qazi Zada Afandi, op. cit. F.N. 5. Vol. IX, p.166.

Al-Tahavi, *Hashyat Al-Tahavi Ala Dur Al-Mukhtar* (Al-Matabah Al-Ameeria, Boulak, Egypt, 1382 A.H.) Vol. IV, p.265.

⁴⁵ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.861.

Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. IV, p.48.

Al-Nissai, Ahmed bin Shoaib, *Sunan Al-Nissai* (Cagri Yayinlari, Turkey, 1981) Vol. IV, p.61.

⁴⁶ *Al-Qur'an* 2:173.

Moreover, in *Shari'ah*, it is unlawful for a man to commit suicide.⁴⁷ It is more logical that he should not allow someone else to cause his death. He is allowed to save his life and repel the attack by a reasonable force. This right of defence can extend to cause death of the assailant if survival of defender is at stake. It is interesting to mention here that though the English criminal law has abolished the offence of suicide however, it is contended that a man is not entitled to do with his body as he wants because his self destruction might affect well being of his family and relatives.⁴⁸

11.3.1.1 *Defence of Body: Is it Merely a Right or an Obligation?*

As discussed above *Shari'ah* recognises right of private defence like the laws of all civilised legal systems of the contemporary world. Muslim jurists agreed that it is lawful for a person to use reasonable force for private defence. However, they differ as to the nature of the defence, whether it is a duty that must be discharged reasonably or merely a right that may or may not be exercised? The question of right or duty has been determined by taking into account the nature of interest to be defended, whether it is life, chastity, or property of the defender. There is a difference of opinion on the question whether defence of a particular interest is merely a right or duty of the defender, failure to which may entail some liability, if not in this world in the Hereafter.

According to *Hanfite*, in a preferable opinion of *Shafite* and *Malkite*, it is duty of the victim of deadly assault to defend his body.⁴⁹ The opinion is supported by the verse of The Holy *Qur'an*, "And be not cast by your own hands to ruin;"⁵⁰ If a person does not defend himself against the unlawful aggression of the assailant he casts him self to the ruin and hence violates the command of Allah. In another verse it has been enjoined upon the Muslims, "And fight them until persecution is no more."⁵¹ It has been declared the duty of every believer to fight mischievous to put an end to the harassment. One who fails may be guilty of breach of duty.

⁴⁷ *Al-Qur'an* 2:195.

⁴⁸ Ormerod, David, "Consent and the Offences Against the Person: Law Commission Consultation Paper No.134" [1994] 57 *MLR* 928 at pp. 938-39.

⁴⁹ Ibn Abdeen, *Hashia Ibn Abdeen* (Maktaba Majdia, Quetta, Pakistan, 1399 A.H) Vol. V, p.351.

Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

Al-Dasooqi, Shamas al din Muhammad Arafa, *Hashyat Al-Dasooqi Ala Sharah al-Kabir* (Dar al Ahya Al Kutab al Arabia Isa al-Babi al-Halbi, Egypt) Vol. IV, p.357.

Al-Rammali, 1992, op. cit. Vol. VIII, p.24.

Alish, Shaikh M, *Sharah Manah al-Jalil ala Mukhtasar Khalil* (Dar al-Baz, Makkah) Vol. IV, p.562.

⁵⁰ *Al-Qur'an* 2:195.

⁵¹ *Al-Qur'an* 8:39

Defence of body is such an important duty that it has been linked with martyrdom,⁵² the status acquired by a Muslim if killed while defending his religion or his country. It is admitted that defence of religion and country at the time of necessity is the duty of everyone; likewise it is a duty to defend his body. Another tradition of the Holy Prophet narrates, "One who assaulted a man with a weapon, intending to kill him, should be killed."⁵³ The tradition not only emphasises the obligatory nature of the right of defence of body rather it proves another important recognised principle of civilised criminal laws, that the victim is not liable to wait for the attack of the offender, he is allowed to use pre-emptive force to save his life.

There is a legal maxim in *Shari'ah* stating that repulsion of a mischief is the duty.⁵⁴ The act of offender is truly a mischief and the victim is under a duty to avoid it by all the possible means. The evidences above suggest that every man is under a duty to defend his body and not to allow anyone to take his life or cause injury to him. The concept of duty has been attached to the defence of body to show its symbolic value. *Shari'ah* gives such an importance to human life that it urges man to protect it from any unlawful aggression at all costs by using all possible means within his power.

According to preferable *Hanblite* opinion which concurs with an opinion of *Malkite* and *Shafite*, it is not a duty rather merely a legal right to defend one's body.⁵⁵ The opinion is supported by the saying of the Holy Prophet "Remain in your homes, and when you see the shining of swords cover up your faces."⁵⁶ It means, where a person is in peril of his life he is liable to avoid the situation rather to face it. There is another tradition to the same effect, "Be murdered servant of Allah and not the murderer servant."⁵⁷ The tradition prefers that man be killed rather to kill. However, the traditions have been cited in the wrong context. Had it been the principle there would have been no room for the right of private defence. The traditions are more an evidence to prohibit unlawful killing

⁵² Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.861.

Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. IV, p.48.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. IV, p.61.

⁵³ Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. VII, p.117.

⁵⁴ Ibn Nujaym, op. cit. F.N. 39, Vol. I, p.118.

Al-Suyuti, *Al-Ashbah Wa Al-Nazair* (Dar al-Kutub al-Ilmia, Beirut, 1979) p.83.

⁵⁵ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.329.

⁵⁶ Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.1309.

Abu Daoud, 1981, op. cit. Vol. IV., p.459.

⁵⁷ Ahmad bin Hanbal, 1981, op. cit. Vol. V, pp.110 & 292.

Al-Sana'ni, *Subul Al-Salam* (2nd ed., Maktaba Mustafa Al-babi, Egypt, 1950) Vol. IV, pp.40-41.

of an innocent during mayhem and mischief rather to prevent the use of reasonable force in private defence.⁵⁸ They enjoin upon the Muslims not to join mischievous at the time of chaos and mischief.

The opinion is also supported by the evidence that Othman (the third rightly guided caliph) did not defend the attack of rebels when they killed him, although he knew that they were determined to take his life and he possessed the power to defend and if he chose he could have fought them.⁵⁹ The argument can be rebutted on the ground that Othman himself said that he does not like bloodshed in the Holy city of the Prophet. The rebels wanted just to take his life and in consideration of avoiding the violation of sanctity of the holy city and further spread of mischief in the community, he denied to use force against them.⁶⁰

Some of the *Hanblite* jurists differentiate between the circumstances of the exercise of such a right. According to them defence of body is merely a right in the mayhem and chaos, whereas it is a duty in normal conditions.⁶¹ The reason for the differentiation might be that in the circumstances of disorder and chaos, if it is declared as a duty, it may lead to further worsen the situation. The defence in such a condition has been left at the discretion of the victim of the unlawful assault and if he refrains to exercise his right he shall not be considered to cast himself to ruin by himself.⁶²

The effect of the differentiation leads to a conclusion that if a person does not exercise his right of private defence, he will be a sinner, owing to his breach of duty, in the opinion of those who consider private defence as a duty. Whereas, according to second opinion an abstinence to exercise right of private defence does not entail any liability or censure.⁶³ However, both the opinions may be combined by declaring defence of body as a duty in the normal circumstances, whereas it will be only a right in the times of chaos and mayhem, where the defence may lead to further mischief.

⁵⁸ Al-Sana'ni, 1950, op. cit. Vol.IV, pp.40-41.

Al-Bahooti, *Kasshaf al-Qannah* (Maktaba Al-Nasar al-Hadisa, Riyadh) Vol. VI, p.155.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.331.

⁵⁹ Al-Sana'ni, 1950, op. cit. Vol. IV, pp.40-41.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p. 331.

⁶⁰ Abdul Tawwab, M., Sayed, 1983, op. cit. p.302.

⁶¹ Al-Bahooti, op. cit. F.N.58. Vol. VI, p.155.

Al-Fatoohi, Taqi-ud-din Muhammad, *Muntahi Al-Iradat* (Alam al-Kutab, Beirut) Vol. II, p.387.

⁶² Ibn Farhoon, 1958, op. cit. Vol. II, p.356.

Taking into account the provisions of *Shari'ah* regarding protection of life, it becomes evident that, the first opinion, declaring defence of body as a duty is preferable. Logic also leads to the conclusion that private defence may be treated as a duty. If it is admitted that defence of body is merely a right then declaring commission of suicide as an offence will make no sense. The major difference between English law and *Shari'ah* is that the former declares defence of body as a right, depending upon the discretion of the person. If he is not willing to preserve his life no one can compel him to do so whereas, the latter considers it a duty, the failure to discharge entails liability.⁶⁴ It suggests that *Shari'ah* is a step ahead in this regard and stresses more on the protection and preservation of human life.

11.3.2 Defence of Property in *Shari'ah*

Shari'ah recognises sanctity of private property and belongings of individuals. Taking property of any other by unlawful means has been strictly prohibited. The Holy *Qur'an* enjoins, "O you who believe! Eat up not your property among your selves unjustly except it be a trade by mutual consent."⁶⁵ Very severe punishments, in the case of theft and highway robbery, have been provided for the violation of right of possession. Defence of property is not restricted to the personal property; a man is liable to defend the property of others in the same manner as his own because he owes a duty to other fellow men to protect their rights.⁶⁶ To assist other people in defending their property is the duty of every citizen because if there was no such co-operation the wrong doer would have taken the property of everyone without any manifest problem.

Under Islamic principles of social morality no one is entitled to enter the house of others without permission. The Holy *Qur'an* admonishes believers, "Enter not houses other than your own until you have asked permission and saluted those in them."⁶⁷ The verse prevents all types of unlawful trespasses into or on the property of another. The privacy of the person has also been protected. The Holy Prophet said, "If any one (deliberately) peeps in to your house and you pelt him with a stone and injure his eye, no guilt will be

⁶³ Al-Aamadi, *Al-Ahkam Fi Usul al-Ahkam* (Dar Al-Hadith, Egypt) Vol. I, p.138.

⁶⁴ Khallaf, *Ilm Usul al-Fiqh* (8th ed. Dar Al-Ilm Lil Taba Wa Al-Nasher, Kuwait, 1956) p.105. A person entitled for a right has an option either to exercise or relinquish it, whereas a person under a duty does not have such an option and if he fails to discharge his duty it will be a sin for him.(Al-Ghazali, *Al-Mustasfa min Ilm Al-Usul* (Dar al-Fiker, Beirut) Vol. I, p.76)

⁶⁵ *Al-Qur'an* 4:29.

⁶⁶ Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.

⁶⁷ *Al-Qur'an* 24:27

on you.”⁶⁸ The provisions guarantee the peaceful possession and uninterrupted enjoyment of the private property.

Shari'ah allows defence of property against any offence affecting it or disturbing its peaceful possession. The defender is bound to use the most appropriate means, under the circumstances, and reasonable force for defence. However, if it is not possible to defend property without causing death of the assailant, like if the assailant resists and causes a danger to the life of the defender, the defender can kill him.⁶⁹ This opinion mixes up both the rights i.e. defence of body and property, in this particular situation where the assailant offers a resistance and causes apprehension of danger to the body of the defender, right of defence of property merges in to the right of defence of body and now the defender is defending his body and not property. English criminal law, as discussed in 10.10.2, adopted the same view and allowed causing death of the assailant in defence of property where there is a direct risk to human life. However, some Muslim jurists do not differentiate between the defence of body, chastity of woman, and property, if the only way to defend the interest at stake is to cause death of the assailant; the assailed is allowed to cause it.⁷⁰ Nevertheless, in all the cases of defence the defender is liable to use non fatal means before application of deadly force.⁷¹

11.3.2.1 Defence of Property: Is it a Right or a Duty?

Like defence of body, defence of property has been considered such an important right that while defending it if someone is killed by the assailant he will embrace martyrdom.⁷² However, there is a great deal of differences among the Muslim jurists on the question whether defence of property is merely a right or a duty? According to *Hanfite* and *Hanblite*, the victim has a right to defend his property without taking into account its monetary value and unlike defence of body it is not a duty.⁷³ They support

⁶⁸ Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. VIII, p.40.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. IV, p.61.

⁶⁹ Abdul Tawwab, M., Sayed, 1983, op. cit. p.211.

Ibn Farhoon, 1958, op. cit. Vol. II, pp.185-86.

⁷⁰ Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.27.

Al-Bahooti, op. cit. F.N.58. Vol. VI, p.155.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.332.

⁷¹ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.329.

⁷² Ibn Majah, Muhammad bin Yazid, 1981, op. cit. Vol. II, p.861.

Al-Bukhari, Muhammad bin Ismail, 1981, op. cit. Vol. IV, p.48.

Al-Nissai, Ahmed bin Shoaib, 1981, op. cit. Vol. IV, p.61.

Muslim bin Hijjaj, 1981, op. cit. Vol. II, p. 1300.

⁷³ Ibn Abdeen, 1399 A.H., op. cit. Vol. V, p.482.

Ibn Nujaym, *Al-Beher Al-Raiq* (Al-Maktaba al Majidia, Quetta) Vol. VIII, p.302.

Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.156.

their opinion by a logical argument that it is not permissible for a person to allow someone to kill him or to indulge in unlawful sexual intercourse with him. A wilful failure to defend body or chastity will result in the violation of command, whereas in the case of property the owner has an absolute right to allow someone to take it. If he has a right to gift it or deliver it, he can withdraw his right to defend it. If the victim desires to defend, he can, however an abstention to defend will not lead to breach of any legal duty. It is opined that avoiding defence of property to save life of the assailant is better than to cause his death or injure him.⁷⁴ The opinion is a manifestation of a general principle that human life and safety should always take priority over property.

According to another opinion of *Hanblite* jurists, the assailed is under a duty to defend property where he believes that his defensive acts would not lead to destruction of life or limbs of the offender.⁷⁵ The opinion imposes a restriction that the defender while using force in defence of property is allowed to use only such force that should not cause any serious harm to the assailant. The concept of private defence in English law is very near to this opinion which emphasises on measure of force in private defence to the nicety. However, it is obvious that a condition to use jeweller's scale to measure the force required for defence is an implied denial of the right.

Shafite dealt with the question from two different perspectives. Firstly, they take into account the person of the assailant. According to an opinion in the school if the assailant was a public servant then the defence of property does not reach the height of a duty, however, in the case of assault by a common man defence of property is an absolute duty.⁷⁶ It will be a duty to defend the property, subject of unlawful assault, provided that it does not lead the defender to unnecessary fatigue, undue fiscal loss, or injure the social status of the defender. If he can defend without the apprehension of any of the above, it will be a breach of duty on his part to abstain.⁷⁷

Secondly they take into account the nature of the property to be defended. According to the majority opinion within the school, defence of property is a duty if it is livestock or any right of third party is attached to it. In all other cases the defence will be merely a

⁷⁴ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.331.

⁷⁵ Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.156.

⁷⁶ Al-Qalubi, 1956, op. cit. Vol. IV, p.206.

⁷⁷ Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.

right as is the opinion of *Hanfite* and *Hanblite* schools.⁷⁸ The opinion is based upon the argument that it is the obligation of the owner to save the life of animals and the protection of rights of third party in the capacity of a bailee, mortgagee, or trustee. The opinion also suggests that it is the lawful possession of the property and not merely the ownership that has been given legal protection.

However, they prohibit defending property in two exceptional conditions.⁷⁹ Firstly, if the assailant is in dire necessity e.g. where he apprehends death due to starvation and intends to take the edibles of another man. The owner has no right to defend provided that he was not also in the same condition of necessity. The reason for the opinion might be preference of human life over property. Secondly, if the assailant was under duress to destroy the property, the owner should sacrifice his property to save the life of the person coerced. In this particular condition both of them, the coerced and the owner of the property, are allowed to proceed against the person responsible for coercion.

Malkite have a different approach to the problem. According to them defence of property will be a duty if its dispossession or destruction leads to extraordinary hardship or apprehension of death.⁸⁰ If the victim apprehended his own death or death of any of his kin due to the destruction of property or any severe damage was imminent as a result of such destruction or taking, it is his duty to defend.⁸¹ For example, if a person is travelling in a desert and has very scarce quantities of food and water and someone assaults to dispossess him of this water and food. He is under a duty to defend because unavailability of food and water may endanger his life. This situation of defence of property is akin to the defence of body because a failure to defend will lead to the death of the assailed and there is no difference of opinion as to obligation to defend body.

The opinion, that the defence of property is a duty, is supported by the saying of the Holy Prophet "Fight for your property."⁸² The tradition confers a duty to defend

⁷⁸ Al-Rammali, 1992, op. cit. Vol. VIII, p.24.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.195.

⁷⁹ Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.

⁸⁰ Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

⁸¹ Al-Khirshi, Abu Abdullah Muhammad bin Abdullah bin Ali, *Al-Khirshi Ala Mukhtasar Syedi Khail* (Dar Al-Fiker Liltabah wa Al-nasher, Beirut) Vol. VIII, p.12.

Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

⁸² Al-Shoukani, Muhammad bin Ali, *Neil Al-Aoutar* (Dar Al-Ktub al-Ilmia, Beirut, 1999) Vol. V, p.367. Al-Sana'ni, 1950, op. cit. Vol. IV, p.40

property without any reference to its value or imposing any other condition for the exercise of right. It also indicates that the defence is allowed against any actual or threatened destruction, damage, unlawful taking, dispossession or any other offence against property.⁸³

A comparison of the opinions reveals that the general rule regarding defence of property is that it is absolute right of the victim of unlawful assault to defend his property, however this right is converted into a duty where an abstinence to defence leads to unnecessary hardship or endangers the life of the assailed. The victim is bound to use reasonable force in the defence of property and if he believes that the defence is not possible without causing death of the assailant, he is entitled to cause his death.⁸⁴

11.3.3 Defence of Chastity of a Woman in *Shari'ah*

There is consensus of opinion of Muslim jurists that every one is under a duty to defend chastity of his family or the family of any other person.⁸⁵ It can not be allowed, in any case, to commit fornication, adultery or other indecent sexual acts. In this case if the defence is not possible without causing death of the assailant, it is allowed to cause his death.⁸⁶ Similarly, if someone threatens to commit adultery or fornication with someone's wife or daughter or to satisfy unnatural lust with his son, it becomes his duty to defend. In this particular condition he is acting to prevent the commission of a crime and defending his own right.⁸⁷

If a man finds his wife in a compromising condition with a stranger he should use minimum possible force, if the offender is not prevented the defender is allowed to kill him and he will not be criminally liable.⁸⁸ It is pertinent to mention here that the Muslim jurists do not justify causing death merely on the ground that the deceased was in

⁸³ Abdul Tawwab, M., Sayed, 1983, op. cit. p.211.

⁸⁴ Ibn Farhoon, 1958, op. cit. Vol. II, pp.185-86.

Ibn Al-Hamam, *Al-Feth Al Qadeer* (Dar Ahya al-Taras al-Arabi, Beirut) Vol. IV, p.276.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.332.

Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.155.

Al-Mahalla, Jalal ud din Muhammad bib Ahmad, *Sharah Al-Mahalla Ala Minhaj Al-Talbeen*

(published at the foot margin of Hashyat al Qalubi) (Maktab Mustafa Al-babi Al-halbi, Egypt, 1956) Vol. IV, p.206.

Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.27.

⁸⁵ Abdul Tawwab, M., Sayed, 1983, op. cit. p.302.

⁸⁶ Al-Fatoohi, Taqi-ud-din Muhammad, op. cit. F.N. 61. Vol. II, p.493.

Abdul Tawwab, M., Sayed, 1983, op. cit. p.302.

⁸⁷ Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.154.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.194.

Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

seclusion with a woman unless the commission of unlawful sexual intercourse was proved.⁸⁹ They suggest that in all the cases of defence of chastity the defender is bound to use the lowest possible degree of force and avoid causing death.⁹⁰

Shafite say that a man is under a duty to defend the chastity of a woman provided that he is not under an apprehension of death or grievous bodily harm at the hands of the offender i.e. if the offender is equipped with a deadly weapon and there are chances that he may cause death of the defender, it will be merely a right and not a duty to defend. It depends upon the choice of the defender to take the risk of his life and defend or to bear the situation. Logic behind the opinion is that life is preferred over the chastity.⁹¹ According to them the order of preference in defending the interests would be the body first, then chastity and property.⁹² As far as the victim of rape is concerned, it is her duty to defend her chastity if she can. If she kills the assailant in the course of defence she is not liable at all. Consent for unlawful sexual intercourse is an offence and intentionally not defending is the best circumstantial evidence to prove consent.

Hanblite, differentiate between the two conditions of unlawful sexual intercourse, whether it was being committed with the consent of the women or without her consent. If it was a non consensual act and she was killed, the defender shall be liable for *Qisas*. But if she was a consenting party to the unlawful sexual intercourse the defender shall not be liable for any punishment.⁹³

English criminal law recognised the right of a man to defend the chastity of a woman. In this regard, some opinions of English jurists and legal historians have been discussed in section 10.2 along with some decided cases.⁹⁴ Here is some further evidence from the

⁸⁸ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.331.

⁸⁹ Ibn Farhoon, 1958, op. cit. Vol. II, p.185.

⁹⁰ Abdul Tawwab, M., Sayed, 1983, op. cit. pp.263-64.

⁹¹ Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.195.

⁹² *Ibid.* p.194.

⁹³ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.332. {The view that a man who, finds his wife committing adultery, kills one or both of them is not liable for any punishment is based upon the conduct of Omar (the second rightly guided caliph). One day while he was taking lunch, a man came with a blood stained sword and joined him. He was followed by a group of people who accused him of murder of his wife and their friend. Omer asked him about the claim of the persons. The man replied that he found them indulged in adultery and killed them. The statement of accused was not rebutted by the complainants. Omar confirmed the act of the person by saying "If they repeat it, do the same."(Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.332)}

⁹⁴ Holdsworth, W. S., *A History of English Law* (3rd ed., Methuen & Co., London, 1923) Vol. II, p.44. Blackstone, *Commentaries on the Law of England* (15th ed., A. Starhan, London, 1809) Vol. IV, p.180.

writings of classical Common law jurists and decided cases to prove the fact. Until 1957 a husband could kill both adulterous wife and her lover taken in the act of adultery under the influence of provocation.⁹⁵ The Homicide Act adhered to the principle that a defendant charged with murder could be provoked either by the things done or spoken or both together and whether this provocation was sufficient to make a reasonable man to do as he did was a question to be determined by the jury.⁹⁶ Before this enactment it was a rule of law that words could not constitute provocation.⁹⁷ Provocation may reduce a murder into manslaughter and a man may be provoked by finding another man raping his wife.⁹⁸ In *Maddy's case*⁹⁹ and in *R. v. Pearson*¹⁰⁰ it was held that the act of adultery causes such a serious kind of provocation which reduces murder into manslaughter. In *R. v. Millward*,¹⁰¹ it was declared that it would be sufficient provocation to reduce the charge to manslaughter, not only if there had been adultery, but even if the circumstances were such that the husband reasonably inferred that adultery had just taken place or was about to take place. The essence of this defence was passion leading to the loss of self-control and this would apply if the husband's inference from what he saw was subsequently found to be incorrect, provided that it was reasonably drawn. However, it was admitted that mere suspicion of adultery by a wife is not sufficient to reduce killing by husband from murder to manslaughter. Likewise, a confession by one spouse could not constitute sufficient provocation to justify a verdict of manslaughter.¹⁰²

Some other cases of the 20th century, like *Davies*,¹⁰³ confirm the same principle that where a man finds his wife in the act of adultery and kills her under the provocation he is only guilty of manslaughter. It was also admitted that if a father witnesses a person in the act of committing an unnatural offence with his son and instantly kills him it will be manslaughter of lowest degree.¹⁰⁴ In 1978, a homicide committed by a 15 years old boy

R. v. Wheeler [1967] 1 WLR. 1531.

⁹⁵ Bresler, Fenton, *Sex and the Law* (Frederick Muller, London, 1988) p.8.

⁹⁶ Homicide Act 1957, section 3.

⁹⁷ The Law Commission, *Partial defences to Murder*, Consultation Paper No. 173, 2003, Para. 1.33.

⁹⁸ *Halsbury's Law of England* (4th ed. Butterworths, London, 1990) Vol. XI (1) Para.438-439pp.336-37.

Per Viscount Simon in *Holmes v. DPP* [1946] 2 All ER 124 at 127.

⁹⁹ *Maddy's Case*, (1671)1 Ventr. 158., 2 Keb 829; 86 ER 108.

¹⁰⁰ *R. v. Pearson* (1835) 2 Lewin 216; 168 ER 1133.

¹⁰¹ *R. v. Millward* (1932) 23 Cr. App. Rep. 119.

¹⁰² *Holmes v. DPP* [1946] 2 All ER 124 at 127.

¹⁰³ *Davies* [1975] QB 691; [1975] 1 All. ER 890.

¹⁰⁴ *R. v. Fisher* (1837) 8 Car. & P.182; 173 ER 452.

Robertson, A.J., *The Laws of the Kings of England* (Cambridge University Press, 1925) p.269.

who had been buggered by the deceased was declared to be manslaughter.¹⁰⁵ The rule that adultery can sufficiently provoke a person can further be supported by the fact that if the crying of a 17 days old baby can suffice for provocation to reduce murder into manslaughter,¹⁰⁶ will it not be more reasonable to allow the same defence to a person who finds his spouse in adultery?

The above shows that English law was so strict in defending the chastity of a woman that murder was reduced into manslaughter where, in the opinion of a husband, the circumstances prove that the offence of adultery had taken place or is about to take place,¹⁰⁷ and it was considered to be the highest degree of provocation.¹⁰⁸ A man provoked by seeing his wife indulged in adultery is acting either in the prevention of crime or defending his protected interests. It is worth mentioning here that though the sexual offences under English law are governed by the Sexual Offences Acts of 1956, 1976, and 1993 but the enactment do not deal with the offence of adultery which suggests that adultery is still an offence to be dealt under the principles of Common law.

These provisions are identical to the provisions of *Shari'ah* on the same point. However, the major difference is that if the unlawful sexual intercourse was being done by the mutual consent of both the parties, there is no right of private defence in English law.¹⁰⁹ Whereas, consent of the parties for unlawful sexual intercourse is of no importance in *Shari'ah* and in such cases if the defender causes death of both the parties he will not be liable. Further the dicta of *Millward* suggest that a man will be excused of murder if in his opinion the act of adultery has taken place but in *Shari'ah* the act shall not be justified unless he has witnessed the offence himself. This difference is based upon the fact that English criminal law consider the situation under provocation, whereas in *Shari'ah* it is dealt under the general principles of private defence.

In English criminal law, the opinion that mutual consent of the parties for unlawful sexual intercourse negates the right of private defence is strange because the law admits that, a man, who finds his wife or even girlfriend¹¹⁰ indulged in adultery, if caused death

¹⁰⁵ *DPP v. Camplin* [1978] AC 705.

¹⁰⁶ *R. v. Doughty* (1986) 83 Cr. App. R. 319.

¹⁰⁷ *R. v. Millward* (1932) 23 Cr. App. Rep. 119.

¹⁰⁸ Blackstone, 1809, op. cit. Vol.IV, p.192.

¹⁰⁹ *Ibid.* p.180.

¹¹⁰ *Twine* [1967] Crim. LR 710.

of either one or both of them shall be entitled for the defence of provocation resulting in his conviction of manslaughter instead of murder. Had the mutual consent of the parties any effect on the right of exercise of private defence, there would have been no defence of provocation available. The decided cases suggest that the consent of woman for adultery is of no significance because in all the cases it would be an aggression on the rights of the husband. The English law expressly treats the defence of chastity under provocation and defence of body under private defence, which suggests that the both are different kinds of defences. However, it may be argued that in such cases of provocation the defender is defending his legally protected rights and the condition of provocation is akin to the private defence and both the defences overlap.¹¹¹

Now a question may arise that whether a wife can kill her husband if she finds him indulged in the act of adultery? In English law there is no recorded case to prove positively or negatively.¹¹² However it is asserted that the rule must apply to either spouse alike, contrary to the traditional Common law view of subjection of wife to her husband.¹¹³ In *Shari'ah* it can be argued that a woman is entitled to react in the same fashion as a husband because the command to prevent the commission of crime is general for both men and women.¹¹⁴

11.4 How to prove that the Accused was acting in Private Defence?

In cases of private defence a situation may arise where the accused, without any evidence to prove, claims that he killed in exercise of right of private defence but the heirs of the murdered refused to accept his claim. The issue would be how to proceed the case? Generally speaking, the burden of proof lies upon the prosecution to prove the guilt of the accused beyond any reasonable doubt but if the accused claims that his case falls under any exception, he is required to prove the existence of the circumstances which entitle him for the exception.¹¹⁵ The opinion is based upon the saying of Ali when he was asked about a person who enters his house, finds his wife in a

¹¹¹ *R. v. Porritt* [1961] 1 WLR 1372.

¹¹² Bresler, Fenton, 1988, op. cit. p.9.

¹¹³ Per Viscount Simon in *Holmes v. DPP* [1946] 2 All ER 124 at 128.

¹¹⁴ *Al-Qur'an* 9: 71-72.

¹¹⁵ Al-Novi, *Al-Majmooh Sharah Al-Mohazzib* (Dar Al-Fiker, Beirut) Vol. IXX, p.252.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, pp.332-33.

Al-Bahooti, op. cit. F.N. 58. Vol. IV, pp.129-30.

Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.28.

Al-Khirshi, Abu Abdullah Muhammad bin Abdullah bin Ali, op. cit. F.N. 81. Vol. VIII, p.112.

Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

compromising condition with a man and killed both of them. "He is bound to prove his claim otherwise he is liable for murder" replied Ali.¹¹⁶

The opinion can be supported by the logic that there are certain circumstances so peculiarly within the knowledge of the accused that the prosecution is not required to give even prima facie evidence on the point. In addition, in *Shari'ah*, there is a maxim saying that plaintiff is bound to prove his claim by evidence, whereas the defendant may deny the claim on oath.¹¹⁷ In the absence of any admissible evidence the claim of plaintiff shall fail. In this particular case, claiming that he acted in private defence, he is liable to prove it or to face the charge of murder as proved by the prosecution. There is almost the same situation in case of defence of property. If the owner of a house kills someone in his home and claims that the deceased attacked his home, the burden of proof lies upon him. If he has no evidence and the deceased was not a notorious thief or wrongdoer, the owner of the house is liable for *Qisas*. However, if the deceased was a notorious one but the owner of the house cannot prove an assault on the part of the deceased he shall be liable to pay *Diyat* to the heirs of the deceased.¹¹⁸

Hanbalite, have adopted more strict view in this situation. They say that the claim of the owner of the house is not admissible without evidence regardless of the fact whether the deceased was notorious for theft and mischief or not. If the evidence proves that the deceased was equipped with a deadly weapon and he attacked the defender, his death is justified. However, mere proof of his entrance in the house of defender either without any weapon or with a non dangerous weapon does not justify his killing; he may have entered for certain other reason.¹¹⁹ According to *Malkite*, if the owner of the house fails to prove his claim by evidence, he is liable for *Qisas*, provided that he was not living at a far off place hardly visited by common man. If he was living at such a place where it is not possible for him to produce witnesses, then his claim is admissible on oath.¹²⁰ It means that in order to be entitled for the defence of private defence, the accused is liable to prove that he caused death of the assailant in the lawful exercise of his right; failure to prove will result into conviction of murder.¹²¹

¹¹⁶ Al-Novi, op. cit. F.N. 113. Vol. IXX, p.252.

¹¹⁷ Ibn Nujaym, op. cit. F.N. 39. Vol. I, p.89.

¹¹⁸ Ibn Abdeen, 1399 A.H., op. cit. Vol. III, p.221.

¹¹⁹ Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.333.

¹²⁰ Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

¹²¹ Ibn Qadama, *Al-Mughni* (1st ed., Dar Al-Hadith, Cairo, 1996) Vol. XI, p.344.

The principles are compatible with the principles of criminal laws of civilised societies that the plaintiff is liable to prove his claim by evidence and a plaintiff is one whose claim shall fail if no evidence was introduced at all. In cases of private defence the accused claims that he acted in the exercise of private defence, the burden lies upon him to prove the claim. The English criminal law followed the same principle for centuries; and there is ample authority to prove the assertion.¹²² It was not until 1935, that the law in this area was changed. House of Lords took the first step in *Woolmington v. DPP*¹²³ by stating that once the accused had given evidence that homicide committed by him falls within any exception, the onus was on the prosecution to prove beyond any reasonable doubt that it was not. However, their Lordships recognised that the new principle shall not be applicable in case of defence of insanity and any statutory exception.¹²⁴ The approach can be criticised on the ground that no reason has been given by the House of Lords for the exclusion of insanity from the scope of the rule that burden is on the prosecution to prove the guilt.¹²⁵ At the moment there are various statutory provisions expressly casting burden of proof on the accused e.g. proof of diminished responsibility, suicide pact, lawful authority or the excuse for the possession of an offensive weapon and lack of knowledge or belief that a substance in possession of the accused was a controlled drug.¹²⁶

Similarly, in a summary trial, if the accused relies for his defence on any exception, proviso, excuse or justification the burden of proving such circumstances is on him.¹²⁷ It means in less serious offences legal burden of proof lies on the defendant as opposed to more serious ones.¹²⁸ In *R v. Edwards*¹²⁹ and *R. v. Hunt*¹³⁰ the courts held that section 101 of the Magistrate Courts Act 1980 restates an earlier rule of common law applicable to all criminal trials including indictments. Though the decisions are contrary to the express statutory provisions yet they are important to ensure consistency between

¹²² Blackstone, 1809, op. cit. Vol. IV, p.201; *Mackalley's Case* (1611) 9 Co. Rep. 65b; 77 ER 828; *R v. Smith* (1837) 8 C.& P. 160; 173 ER 440; *R. v. Fisher* (1837) 8 Car. & P.182; 173 ER 452; *The King v. Oneby* (1898) 2 LD. Raym 1485; 92ER 465.

¹²³ *Woolmington v. DPP* [1935] AC 462.

¹²⁴ *Ibid.* at pp. 481-82.

¹²⁵ Dennis, I. H., *The Law of Evidence* (2nd ed., Sweet & Maxwell, London, 2002) p.377.

¹²⁶ Homicide Act 1957 s (2) 2 and (4) 2; Prevention of Crime Act 1953 s (1) 1; Misuse of Drugs Act 1971 s (28) 2.

¹²⁷ Magistrates Courts Act 1980, s 101.

¹²⁸ Fitzpatrick, Ben, "Reverse Burden and Article 6(2) of the European Convention on Human Rights: Drink in Charge" (2003) 67 *The Journal Of Criminal Law* 193 at 195.

¹²⁹ *R. v. Edwards* [1975] QB 27.

¹³⁰ *R. v. Hunt* [1987] AC 352; [1986] 3 WLR 1115; [1987] 1 All ER 1.

two modes of trials. Lord Griffiths stated “the law would have developed on absurd lines if in respect of the same offence the burden of proof today differed according to whether the case was heard by the magistrates or on indictment”¹³¹ There is an obvious contradiction between the statutory provision and practice of the courts, however the attitude of English courts in the late 20th century is in conformity with the opinion of Muslim jurists that the proof of existence of any defence or exception is the duty of the accused.

11.5 Conditions for the Exercise of Right of Private Defence.

The discussion above proves that *Shari'ah* recognises right of private defence in all its forms and manifestations. However, exercise of this right is subject to certain conditions.¹³² The conditions and their description is as under:

1. An unlawful assault by the assailant.
2. The assault must be imminent.
3. Impossibility of private defence by any other means.
4. Use of reasonable force.

11.5.1 First Condition: Unlawful Assault

Right of private defence arises as a result of an unlawful assault. Punishment by parents, teachers or an act done in discharge of public duty does not amount to an unlawful assault and hence there is no right of private defence against such acts. These persons are either exercising their right to reform the child or discharging their duty under the law.¹³³ However, if they clearly go beyond their authority and cause unjustifiable harm they will be liable.¹³⁴ English law also recognises the same principle in respect of parents and teachers to use reasonable force to discipline the children.¹³⁵

There is a directly proportional relationship between unlawful assault and right of private defence.¹³⁶ It is the commencement of the assault that gives birth to the right of private defence. There is no right to defend before apprehension of a danger and there will be no such right after its cessation.¹³⁷ Where the assault ends due to one reason or

¹³¹ *R v. Hunt* [1987] AC 352 at 373.

¹³² Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.478.
Bhansi, Ahmad Fathi, 1984, op. cit. p.195.

¹³³ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.479.

¹³⁴ Al-Fatoohi, Taqi-ud-din Muhammad, *Muntahi Al-Iradat* (Edited and researched by Shaikh Abdul Ghani Abdul Khaliq, Maktab Dar Al-Urooba, 1962) Vol. II, p.427

¹³⁵ Ashworth, Andrew, *Principles of Criminal Law* (3rd ed., Oxford University Press, 1999) p.151.
Ormerod, David, 1994, op. cit. p.929.

R. v. Smith [1985] Crim. LR. 42.

¹³⁶ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.478.

¹³⁷ Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.27.

the other the right ceases to exist, for what is permitted under necessity is valid only so long as the necessity lasts. Anything done after the cessation of assault shall not be governed under the doctrine of necessity.¹³⁸ The defender shall be treated under the normal rules of criminal liability because he was not acting in private defence rather punishing the assailant.¹³⁹ Similarly, where the object of defence can be achieved without having recourse to use of force there is no justification for use of force.¹⁴⁰

There is an opinion that if the defender initially uses excessive force in private defence he may be treated as an aggressor and the assailant can lawfully exercise right of private defence against him.¹⁴¹ The opinion is based upon an un-realistic approach; the assailant cannot take the place of the victim, because he is responsible to cause the circumstances of private defence to exist. He cannot take the defence of the victim as an aggression and use right of private defence against him. However, if the circumstances prove that the original assault was not sufficient to give rise to the right of private defence and the defender used a force that was totally unnecessary; reasonable force used by the initial assailant in his defence may be justified.

An accused who provokes the victim and then resorts to use force in private defence is not entitled for defence even if the victim overreacts in his retaliation and use excessive force but within reasonable limits. This can be proved by the verdict of Ali in a case where a woman having illicit relationship with a man was married to another man. On the bridal night her paramour entered the room; on arrival of her husband there started a fight between them and the husband killed the man. The woman in turn killed her husband and later on pleaded private defence. Ali decided that the woman is liable for the murder of her husband because she was an accomplice of her paramour, hence not entitled for private defence.¹⁴² The detail above suggests that private defence is available only against unlawful assaults and any person responsible for causing the

Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.487.

¹³⁸ Ibn Farhoon, 1958, op. cit. Vol. II, p.186. (For example, if a thief made his way with the stolen property and after some time he comes across the victim of the theft, having no stolen property in his possession, if the victim of the theft attacks and kills him, he shall be liable for murder because he was not acting in private defence of his property.)

¹³⁹ Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

¹⁴⁰ Al-Bahooti, Mansoor bin Yousaf, *Sharah Muntahi Al-Iradat* (Matbah Ansar, 1947) p.378.

¹⁴¹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.488.

¹⁴² *Ibid.* p.480.

circumstances of private defence to exist is not entitled to claim the benefit of the defence. The provisions of *Shari'ah* in this regard are on a par with the English law.

11.5.2 Second Condition: The Assault must be Imminent

A person shall not be entitled to exercise his right of private defence unless he feels an imminent danger of attack. Imminence of the danger can be computed by taking into account the time and the opportunity to have recourse to the assistance of public authorities.¹⁴³ If the assailant cannot execute his threat imminently, merely the threat will not give rise to a right to defend. For instance, if there was a river, trench or any other such obstacle, between the assailant and the assailed, which provides a shield for the assailed, the assault shall not be considered imminent. Likewise, merely an intention of the offender to cause an aggression or harm in future will not give rise to right of private defence.¹⁴⁴ For example, if a person intends to assault the victim in future but presently he is not in a position to act upon his intention, the victim is not allowed to attack him and claim exercise of right of private defence because the defence was allowed to repel an aggression and there was no aggression at the moment.

The concept of use of pre-emptive force in private defence, in the contemporary law, is not a novelty. Muslim jurists have dealt with the idea centuries ago. It is suggested that a defender is not bound to wait for the actual assault from the assailant rather allowed to use pre-emptive force in his defence if he reasonably apprehends an attack.¹⁴⁵ He must have some grounds to believe that he will be subject to an unlawful assault, if failed to use pre-emptive force.¹⁴⁶ However, it should be kept in mind that that the right to use pre-emptive force shall not be available merely on suspicious grounds.¹⁴⁷ In order to believe in the existences of certain circumstances there must be certain causes which lead to such a belief. For example, if a person rushed at him or enters his home having a weapon in his hand the defender may reasonably believe the existence of circumstances giving rise to right of private defence.¹⁴⁸ An unreasonable belief that the assailant was to attack him will not suffice a ground for private defence.¹⁴⁹

¹⁴³ Abdul Tawwab, M. Sayed, 1983, op. cit. p.188.

¹⁴⁴ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.482.

¹⁴⁵ Al-Bahooti, Mansoor bin Yousaf, 1947, op. cit. p.349.
Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.481.

¹⁴⁶ Al-Shibramlsi, Abu Zia Noor ud din Ali bin Ali, *Hashyat Al-Shibramlsi Ala Sharah Al-Minhaj* (Published with *Nihayat al-Mohtaj*-Maktaba Mustafa Al-babi Al-halbi, Egypt, 1967)Vol.VIII, p.21.

¹⁴⁷ Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.27.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

Al-Fatoohi, Taqi-ud-Muhammad, op. cit. F.N. 61. Vol. III, p. 228.

11.5.3 Third Condition: There is no Other Way to Defend

As mentioned earlier use of force in private defence is an exception to the general prohibition of use of force by a private person against another. A defender is allowed to use the lowest possible degree of force in inevitable circumstances if other reasonable means for defence are not available.¹⁵⁰ If he uses force where it was not required at all, he will not be entitled for the defence.¹⁵¹ The most important among the other reasonable means is retreat to avoid assault.

11.5.3.1 Duty to Retreat and Shari'ah

As mentioned above *Shari'ah* allows private defence with the lowest possible degree of force. Now a question arises if the defender is in a position to defend without use of force, whether use of force in that condition will be justified? Muslim jurists differed in opinion on the question. According to majority opinion if it is possible for the defender to save his life by retreat, taking protection of some place or to have recourse to the assistance of public authorities, he is under a duty to adopt any of the ways available.¹⁵² They opined that the object of right of private defence is to save his life and not to punish the assailant. He is bound to use the mildest means for that end. In the presence of a milder means he is not entitled to use force, as he is not allowed to use more force than required.

Shafite impose a condition that if the defender believes that he can successfully save his life by retreat it becomes his duty. However, where he is doubtful he is allowed to stay and face the assault.¹⁵³ According to *Malkite* if retreat does not cause any harm to him he is under a duty to retreat otherwise not.¹⁵⁴ Here, the harm also includes any social harm to the reputation of the person beside any material harm.¹⁵⁵ The opinion is compatible with the opinions in English and American laws, as discussed in 10.6.3.2,

Ibn Abdeen, 1399 A.H., op. cit. Vol. V, p.351.

¹⁵⁰ Al-Novi, op. cit. F.N. 113. Vol. IXX, p.251.

Ibn Nujaym, op. cit. F.N. 73. Vol. VIII, p.302.

Qazi Zada Afandi, op. cit. F.N. 5. Vol. IX, p.167.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.

Al-Rammali, 1992, op. cit. Vol. VIII, p.27.

Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.486.

¹⁵¹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.482.

¹⁵² Qazi Zada Afandi, op. cit. F.N. 5. Vol. IX, p.166.

Ibn Farhoon, 1958, op. cit. Vol. II, p.357.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.197.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, pp.331-32.

Al-Rammali, 1992, op. cit. Vol. VIII, p.27.

¹⁵³ Al-Qalubi, 1956, op. cit. Vol. IV, pp. 206-07.

¹⁵⁴ Ibn Farhoon, 1958, op. cit. Vol. II, p.357.

¹⁵⁵ Abdul Tawwab, M., Sayed, 1983, op. cit. p.240.

that if it is possible for the victim of unlawful assault to retreat safely; he is bound otherwise not.

Shafite dealt the problem from another viewpoint as well; they say retreat is a duty only where the assailant is a blameless man, where he is an apostate or an alien enemy the defender is not under an duty to retreat rather in such a case retreat is unlawful because it is permissible for him to defend and that what is permitted cannot further be restricted.¹⁵⁶ However, according to a minority opinion of *Shafite* and *Hanblite* jurists, the assailed is not bound to retreat rather to stand and defend because private defence is a right bestowed by *Shari'ah* and the assailed is entitled to exercise it.¹⁵⁷

The analysis of the opinion suggests that the majority opinion is the most appropriate because the major object of the right is to save the protected interests and not to retaliate. If the object can be achieved by avoiding conflict in a reasonable way, the assailed should be liable to avoid it. It suggests that a responsible reaction at individual level is encouraged and a positive behaviour is preferred over a negative or destructive conduct.

What will be the liability of the defender where he was under a duty to retreat, but did not, and caused death of assailant in private defence? *Shafite* have two possible answers for the question. According to their preferable opinion he is liable for *Qisas*, whereas, according to secondary opinion he is only liable to pay *Diyat*.¹⁵⁸ This concept of liability is based upon the duty of the defender to retreat. Where the defender owes a duty to retreat but instead of retreating killed the assailant, he is liable to *Qisas*. In a case where there is no duty to retreat but he uses excessive force and caused death of the assailant his liability is reduced to manslaughter liable to the payment of *Diyat*.¹⁵⁹

Majority opinion of the Muslim jurists suggests that a retreat is not a condition for the validity of the defence of private defence rather it is the best available evidence to prove that the defender did not intend to use excessive force and he adopted reasonable means for the defence. The principle is exactly the same as in the English criminal law. If a

¹⁵⁶ Al-Rammali, 1992, op. cit. Vol. VIII, p.28.

¹⁵⁷ Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.28.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, pp.331-32.

¹⁵⁸ Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.197.

Al-Rammali, 1992, op. cit. Vol. VIII, p.25.

¹⁵⁹ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.487.

man, confronted with a situation where he cannot save his life by taking a shelter or any other available peaceful means, has only a deadly weapon, uses that weapon to protect his life, shall not be liable for anything.¹⁶⁰ It has been established that *Shari'ah* prohibits inflicting of any injury on the assailant that the defender might have reasonably avoided by retreat or withdrawal.

11.5.4 Fourth Condition: Use of Reasonable Force in Private Defence

Shari'ah permits private defence in the hours of necessity. However, it imposes a condition that force used for the defence must be proportional to the criminal force used by the assailant.¹⁶¹ According to *Hanfite* jurists, if the victim of a deadly assault was capable to defend without causing death of the assailant, right of private defence does not extend to cause death; however, in unavoidable circumstances death will be justified because necessity has driven him to it.¹⁶² It is a question of fact whether it was necessary to cause death of the assailant. For example, an unlawful assault in day light or in a city is different from an assault of the same nature at night or in a jungle or desert. The victim may be helped by others in the former condition but not in the latter, so use of deadly force will be permissible in the latter condition and not in the former.

Shafite, say if defence is possible by merely shouting, the defender is not allowed to use physical force, where physical force suffices use of a stick is not allowed, where use of stick does not defend use a weapon will be permissible. If defence can be affected by causing merely an injury or destroying an organ of the body of the assailant, the defender is not allowed to cause his death, if he exceeded with the possibility of defence by a lower degree of force, he shall be liable for compensation.¹⁶³ However, the order of preferences mentioned above is meant for the normal conditions of defence. In the case of a felonious assault where the defender has no option, he is allowed to use any reasonable means for his defence notwithstanding the order of preferences.¹⁶⁴ According to *Hanblite*, in all the cases of private defence the defender is liable to use

¹⁶⁰ Al-Shaf'hi, *Al-Umm* (1st ed., Al-Matbah Al-Ameeria Al-Kubra, Egypt, 1968) Vol. VI, p.172.

¹⁶¹ Al-Kasani, *Al-Badai wa Al-Sanai* (H. M. Saeed Co. Karachi, Pakistan, 1979) Vol. VII, p.93.
Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

¹⁶² Al-Kasani, 1979, op. cit. Vol. VII, p.93.
Ibn Nujaym, op. cit. F.N. 73. Vol. VIII, p.302.

¹⁶³ Al-Sherazi, Abi Ishaq Ibrahim Bin Ali, op. cit. F.N. 28. Vol. II, p. 224.
Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.
Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.29.

¹⁶⁴ Bhansi, Ahmad Fathi, 1984, op. cit. p.209.

the most reasonable and lowest degree of force and if he causes death of the assailant in inevitable conditions he shall not be liable to any punishment.¹⁶⁵

The opinions of the Muslim jurists can be summed up by saying that the force used by the defender must be proportional to the assault. If it was possible to defend the assault by a lower degree of force, the defender shall be liable for his excessive acts. However, a jeweller's scale should not be used to determine the reasonableness of the force. The whole situation of the defence, personality of the defender, time and place of the unlawful assault should be taken into account to determine the quantum of force required for the defence. The opinions are compatible with the case of a Martial Arts expert who faces a deadly assault, yet by the exercise of his skills can disarm the assailant, is not allowed to use deadly force in his defence.¹⁶⁶ *Shari'ah* does not allow infliction of death or bodily harm unless the defender used every reasonable means in his power to avoid the assault and to cause as little harm as possible to achieve the object. The study above suggests that in order to be entitled for the defence of private defence the defender is liable to prove that he used force under necessity; the force used was reasonable and proportionate to the threat caused by the assailant.

The force used will be reasonable if an ordinary prudent person, having the same general characteristics and background as the accused, placed under the same circumstances, would have behaved in the similar way. It means that the circumstances are to be adjudged purely on objective basis. This approach will provide adequate protection to the public because it requires the defender to observe a minimum standard of reasonableness, whereas, a subjective approach fails to require the defender to exercise a measure of reasonableness in perception of the situation. The subjective test as approved by English law might give a greater weight to the perceptions of the accused, by allowing him to assess his own circumstances unreasonably.

11.6 Use of Excessive Force in Private Defence and Shari'ah

The defender is allowed to defend and not to punish the assailant. *Shari'ah* does not consider the act of the defender as punishment.¹⁶⁷ Had it been so, there would have been no liability of the assailant after the victim had successfully defended nor there would

¹⁶⁵ AL-Mardavi, *Al-Insaf Fi Mahrafat-al-Rajeh Min Khilaf* (Dar Ahya al-Tras Al-Arabi, Beirut, 1975) Vol. X, p.303.

Ibn Qadama, op. cit. F.N. 35. Vol. VIII, p.330.

¹⁶⁶ Robinson, *Criminal Law Defences* (West Publishing Co., 1984) Vol. II, Section 133, p.103.

have been any right to defend against the acts of minor or insane because neither of them is liable to punishment under any civilised law. Taking into account the opinions of the Muslim jurists and the evidences from the Holy *Qur'an* and the *Sunnah*, it can be concluded that the victim of an unlawful assault is bound to use only reasonable force for private defence. If he goes beyond the limits and uses force that exceeds the force required for such purpose, he shall be liable.¹⁶⁸ However, it will be logical to mitigate his liability if there was a genuine necessity for the exercise of right of private defence and the defender exceeded in the use of force. In such cases a conviction of murder may be substituted for manslaughter.

However, where the facts of the case lead to the conclusion that the use of force was absolutely excessive and unreasonable, the defender may be held liable for the offence committed by use of such excessive force. For example, if the assailant retreated after being injured by the defender, the defender followed him and injured him again or caused his death, he will be liable either for murder or for intentionally causing subsequent injury.¹⁶⁹ If the force used by the defender was greater to such an extent that it falls within the realm of wanton misconduct, it would not be deemed to be used in private defence. However, if the magnitude of force was greater than which would have been used, it would still be deemed to be reasonable under the circumstances provided that it meets the standards of objective test. The question of reasonableness is a question of fact that can be determined by relying upon common sense and experience. Certain other factors, like the previous conduct of the accused, relationship between the accused and the victim, physical strength of the accused and the victim, imminence of assault caused by the accused and existence of other options for defence may also be taken in to account.¹⁷⁰ The rule can be simplified that a minor assault cannot be met with a deadly defence, whatever the perception of the accused may be.

¹⁶⁷ Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.473.

¹⁶⁸ *Ibid.* at p.487.

¹⁶⁹ Al-Zail'hi, *Tabyeen Al-Haq'iq* (Maktabah Imdadia, Multan, Pakistan) Vol. V, pp. 110-111.

Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.29.

Al-Bahooti, op. cit. F.N. 58. Vol. VI, p. 154.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.196.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.330.

¹⁷⁰ Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.154.

Al-Sarakhsi, *Al-Mabsut* (Idara Al-Qur'an Wal Uloom Al-Islamia, Karachi) Vol. IVXX, pp.50-51.

Muslim jurists also opined that initially a defender is not allowed to form an intention to cause death or grievous bodily harm to the assailant unless he believes in good faith that such death or bodily harm is indispensable for defence.¹⁷¹ It is a general principle that intentional deadly force can never be justified because of the sanctity of human life and inviolability of the body integrity to the maximum extent. However, it would be unjustified to require in all the circumstances that the defender would not exceed the limits. Where in the emergency of the situation and without any explicit misconduct on the part of the defender a more severe injury than necessary was caused or death of the assailant occurred, payment of damages would be the most appropriate remedy.¹⁷²

The English courts have also started to admit the principle of compensation in the cases of private defence where the defender exceeded the limits of reasonable force. In *Revill v. Newberry*,¹⁷³ the court awarded damages and in *R v. Martin (Anthony)*,¹⁷⁴ the injured burglar has been allowed to sue the defender for damages.¹⁷⁵ However, it is very strange that in the case of Summers the court did not take into account the broken wrist, fractured elbow, cracked ribs and fractured skull of a 21 years old burglar as a result of use of excessive force and held that the force used in the defence was reasonable.¹⁷⁶

11.6.1 When Does Right of Private Defence Extend to Cause Death

The right of private defence extends to cause death, if it was the only means to defend provided that the force used by the victim of assault was proportional to the danger caused by the assault. *Shari'ah* allows causing death of the assailant as the last resort to defend. Muslim jurists are of unanimous opinion that the victim of unlawful assault will be justified in causing death of the assailant if he apprehends that death will otherwise be the consequence.¹⁷⁷ Likewise, in the cases of an assault to commit rape the victim or

¹⁷¹ Al-Kasani, 1979, op. cit. Vol. VII, p. 93.

Al-Aabi, Al-Azhari, *Jawaher Al-Aklil* (Dar Ahya al-Ktub Al-Arabia, Egypt) Vol. II, p.293.

¹⁷² Ibn Farhoon, 1958, op. cit. Vol. II, p.185.

Ibn Qadama, op. cit. F.N. 35. Vol. VIII, p.330.

Al-Bahooti, op. cit. F.N. 58. Vol. IV, p.92.

Oudah, Abdul Qadir, 1997, op. cit. Vol. I, p.485.

Abdul Tawwab, M., Sayed, 1983, op. cit. p.323.

¹⁷³ *Revill v. Newberry* [1996] 1 All ER 291; [1996] QB 567; [1996] 2 WLR 239.

¹⁷⁴ *R. v. Martin (Anthony)* [2003] QB 1; [2002] 2 WLR 1; [2002] Crim. LR. 136.

¹⁷⁵ 'The Times' June 14, 2003.

¹⁷⁶ Guardian' May 15, 2000. Referred to by Watson, Michael, "Reasonable Force and the Defence of Property" (2002) 166 *JP* 659 at 659.

¹⁷⁷ Al-Kasani, 1979, op. cit. Vol. VII, p.12.

Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI., p.28.

Ibn Qadama, op. cit. F.N. 12. Vol. VIII, p.329.

Al-Dasooqi, op. cit. F.N. 49. Vol. IV, p.357.

Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.92.

any other person defending can cause death of the assailant.¹⁷⁸ In the defence of property causing death will be lawful if the assault endangers life of the defender.¹⁷⁹

Private defence is quite a wider term to defend various interests. The force required may vary in various circumstances taking into account the nature of assault and the interest at stake. As the value of interests differs in the views of the right thinking members of society, it seems reasonable to allow causing death of the assailant in defending certain interests and not the others. A careful observation of the opinion of the Muslim jurists reveals that they allow causing death in defence of body, chastity and in certain conditions of defence of property. It is worth mentioning here, that the English drafters of Indian Penal Code adopted the same strategy and mentioned ten conditions in which a defendant is entitled to cause death of the assailant while exercising right of private defence. Six of these situations are related to the defence of body, whereas, the rest of four govern the defence of property. These conditions include an assault which reasonably causes apprehension of death, grievous bodily harm, rape, satisfying unnatural lust, kidnapping or abduction with an intention to cause death, wrongful confinement, where the victim apprehends that he will be unable to have recourse to the assistance of public authorities.¹⁸⁰ In the realm of defence of property the conditions include, theft accompanied by an assault to cause grievous harm, house breaking by night, robbery, and mischief by fire.¹⁸¹ In the conditions mentioned above, the defender, bound by all the principles of private defence, if causes death of the assailant will be justified.

This distinction places the court and jury in a better position to understand the circumstances of the case, the interest at stake and to determine whether the force used by the victim of the assault was reasonable under the circumstances. The defendant knows beforehand whether his act to defend is justified. The legal provisions are made simple and understandable for the common-man and the courts as well. Such a simple,

¹⁷⁸ Ibn Abdeen, 1399 A.H., op. cit. Vol. V, p.351.

Al-Khatib, Al-Sharbini, 1958, op. cit. Vol. IV, p.194.

Al-Bahooti, op. cit. F.N. 58. Vol. VI, p.92.

Al-Fatoohi, Taqi-ud-din Muhammad, op. cit. F.N. 61. Vol. II, p.493.

¹⁷⁹ Al-Toori, op. cit. F.N. 5. Vol. VIII, p.302.

Al-Shaf'hi, 1326 A.H., op. cit. Vol. VI, p.27.

Al-Bahooti, op. cit. F.N. 58. VI, p. 92.

Ibn Farhoon, 1958, op. cit. Vol. II, pp.185-86.

¹⁸⁰ IPC and PPC, Section 100.

clear and coherent enactment is preferable as it makes it easier for judges to interpret for the juries and for the juries to comprehend it and apply to the facts of the case.

Conclusion

Private defence is a legally recognised right of everyone, allowing to resist any type of unlawful assault. A person is acting in private defence when his purpose is to defend any legally protected interest or prevention of crime. The major difference between the English law and *Shari'ah* in the realm of private defence is that in English criminal law the accused is guilty either of murder or no offence at all. There is no intermediate way out. The law ignores the emergency situation confronted by the defender, imminent requirement for the use of force and incapability of man to measure the exact amount of force required under such conditions. Conviction of an accused for murder is merely considering the offence ignoring all the circumstances under which it was committed.

Shari'ah takes into account all such factors and presents a more logical, reasonable, moderate and plausible solution. A defender allowed using some force in defending his interests, if used a force that was excessive under the circumstance and caused death of the assailant, will be liable for manslaughter and not murder. While determining the liability of the accused a court is bound to take notice of all the circumstances of the case. The study shows that English law is still in the state of flux and proposed changes are no more than what *Shari'ah* has already proclaimed centuries ago.

¹⁸¹ *Ibid.* Section 103.

Research Findings

The law, either English or Islamic, is not concerned with punishing persons with guilty minds only unless they perform some act of criminal nature. In English law acts are prohibited on ground of social expediency and not because their moral nature, yet the moral aspect cannot be completely ignored e.g. the distinction between murder and manslaughter, defences of minority and insanity are based upon the moral blameworthiness of the accused. In *Shari'ah* every human action carries an ethical quality; religion, ethic and law comprise a unit and the subjects are bound to follow the guidance as a whole. Islam is not merely a religion; it is a complete code of life providing guidance to deal with all the problems of life, individual and social, economic and political, national and international, in accordance with the Divine will.¹

The principles relating to criminal liability in both the systems are identical. Both the systems recognise that the conduct of the offender which is prima facie an offence will not lead to his conviction if he has a valid defence. The court is bound to consider reasonable evidence in this regard and to allow its benefit to the accused because evil of punishing an innocent is greater than the non-punishment of guilty. Despite the similarity in the principles of criminal liability both the systems differ in classification of offences and their punishments.

A prominent difference between the two is that apparently there is no consistency in English criminal law; most of the issues are governed under policy rather than principle hence leading to uncertainty. For example the government is not willing to control alcohol use, for it is considered to be restriction on an individual's freedom of choice, yet wish to control binge drinking and resulting violence. The attitude would have been admissible had the harmful effects of intoxication were restricted to the person of intoxicated only. Alcohol related problems, traditionally taken as personal problems, are now increasingly becoming community issues. It has been proved that intoxication not only damages the health and life of the intoxicated, its harmful effects also extend to the society at large in the form of crimes, violence and overburdening the National Health Services etc. A considerable proportion of taxes paid by the taxpayers go to the treatment of intoxicated hence rendering lesser amount available for the others. It is not

the matter of personal freedom of a person rather it involves the whole society and it is the duty of a state to protect the interests of the society. If the community has to maintain peace and order, good health and sanity, reason and understanding, against the freedom of an individual, it is ridiculous to say that the choice of an individual is so sacred that the interests of the whole community must be sacrificed.²

When it is said that “the government does not wish to discourage the sensible consumption of alcohol, but is committed to reduce alcohol-related harm”³ the authorities neglect a major element that it is the sensible consumption that might lead to insensible one at a secondary stage. In addition, every individual has his own gauge of sensible. A report suggests that about 8.4 million people are drinking more than the recommended limits.⁴ Alcohol has been proved such a dangerous substance for the individual as well as for society that it should not be treated carelessly; its trade and consumption should be dealt under the strong hand of the state. Temptation for it should be reduced by providing other healthy activities to the citizen and its replacement with cheaper and beneficial drinks.⁵ Its sale and sale facilities should be reduced to the smallest possible limits by increasing its price and reducing the number of premises for sale.⁶ It is unreasonable that such an acute problem remain un-addressed. Hardly any sacrifice will be too great which would result in a marked diminution of this evil.

Attractive advertisements in media play a very important role in promoting use of intoxicants, especially in the young. These advertisements use the power and influence of media to convey a positive message for alcohol by glamorising drinking and play directly into the needs of teenagers.⁷ Alcoholic beverages are portrayed as a part of the good life, associated with sex, fun, success, peer acceptance, and independence.⁸ That is why the alcohol consumption in UK has been increasing steadily.⁹ Alcohol industry

¹ Ali, Shaheen Sardar, *Gender and Human Rights in Islam and International Law* (Kluwer Law International, 2002) p.283.

² Reason, Will, *Drink and the Community* (Student Christian Movement, London, 1922) pp.105-106.

³ Lord President's Report, *Action Against Alcohol Misuse* (HMSO, London, 1991) p.1.

⁴ *Ibid.* p.3.

⁵ (A research suggested that in the year 2000, alcohol accounted for 78.7% of the total drink market while soft drinks accounted for 17.5% and hot drinks for 3.8%) *UK Drink Market 2002* (<http://just-drinks.com/store/products>) 2004.

⁶ Contrary to the suggestion reports indicate a steady increase in the number of on and off-licence premises. Whent, Hilary, *Health Update: Alcohol* (2nd ed., Health Education Authority, 1997) p.31.

⁷ American Academy of Paediatrics, *Alcohol Advertising: Fiction vs. Fact* (<http://www.aap.org>) 2003.

⁸ Editorial, “Warning: The Alcohol Industry” *British Journal of Addiction* 87 (1992) 1109 at p.1109.

⁹ Pirmohamed, M., Brown C. “The Burden of Alcohol Misuse” *QJM* 93 (2000) 291.

spent £227 millions a year to advertise its products as against a meagre amount of only £1 million by the government for its prevention.¹⁰ A major step leading towards controlling alcohol would be ban on its advertisement.

It should be kept in mind that prohibition, without any powerful message and a clear object will only drive drunkenness behind closed doors and into dark places and will not cure or even diminish it. The religious institutions can play a very important role in tackling the problem. Religious faith tenders larger and deeper forces affecting the image of alcohol.¹¹ Unfortunately there is no uniformity of opinion in Christianity regarding the consumption of alcohol Roman Catholic Church does not consider it as intrinsically evil, whereas Protestant and certain other religious movements brand it as an evil which no one should use.¹² This difference of opinion might be a major obstacle in developing a religious pressure against alcohol consumption and hence resulting into failure to up root the evil from society.

Shari'ah recognises involuntary intoxication as a defence to a criminal charge provided that the defendant was incapable to form intention and to control his conduct. The same principle prevails in English criminal law. However, both the systems treat cases of voluntary intoxication quite differently. English law takes account of the abnormal mental condition of the offender in specific intent offences ignoring his fault in bringing about the condition but does not apply the same rule in the basic intent offences. The law relating to the defence of intoxication is still in a state of flux and no logical reason can be forwarded for distinction between specific and basic intent. *Shari'ah*, on the other hand, adopted a uniform principle denying any defence in the cases where the accused could be blamed for his intoxication.

English criminal law on the defence of intoxication, taking into account its inconsistencies, has been declared as illogical, irrational and an ass.¹³ The distinction between specific/basic intent has been designated as illogical¹⁴ and indefensible,¹⁵

¹⁰ Alcohol Concern, *New Figures Show Twice as Many People are Hooked on Alcohol than on all Other Drugs* (<http://alcoholconcern.org.uk>) 2003.

¹¹ Plant, M. & Single, E., *Alcohol: Minimising the Harm* (Free Association Books, London, 1997) p.18.

¹² *Ibid.*

¹³ Smith, J. C., *Towards a Rational Criminal Law* (The Holdsworth Club of the University of Birmingham, 1983) p.5.

¹⁴ *R. v. Majewski* [1977] AC. 443 at p.483; 493; 498.

silliness and absurdity,¹⁶ meaningless and unintelligible.¹⁷ It treats the intoxicated person partially sober and partially intoxicated.¹⁸ It is more logical that voluntary intoxication should never be a defence neither to an offence of specific nor basic intent.¹⁹ No social harm would result from abolition of the intoxication defence rather it may lead to prevent misuse of drugs and commission of serious crimes.²⁰ In addition it will be in line with the general principle of criminal law that a defence is not available to an accused who was at fault in creating the condition supporting the defence. An intoxication defence declares that an antisocial behaviour is tolerated if committed under the influence of alcohol or drugs. Allowing intoxication to exculpate or mitigate criminal liability assures the inebriates that law will shield them from severe punishment; they enjoy the benefits of intoxicants while the victim pays the costs.²¹

Both the legal systems recognise the right of private defence. Acts done in private defence are not punishable if they were necessary to resist or avert unlawful assault provided that such acts do not manifestly exceed what is reasonable with regard to the danger inherent in the assault. A person may use force upon another when and to the extent he reasonably believes such to be necessary for private defence. In English law, there were formerly technical rules about duty to retreat before using force in the exercise of right of private defence but now it is simply a factor to be taken into account in order to determine whether it was necessary to use force.²² The view is compatible with corresponding principle in *Shari'ah*. However, there are two major differences between the two systems. Firstly, *Shari'ah* manifestly allows defence of chastity of a woman notwithstanding the fact whether unlawful sexual intercourse was being committed by the consent of the parties or against the will of the woman. Whereas, there is no express provision in English law for the cases of adultery and further consensual sexual relationships between the members of society whether male or female are no offence hence denying a right to react under prevention of crime or private defence. Secondly, *Shari'ah* while granting right of private defence also took account of

¹⁵ *Leary v. The Queen* [1978] 1 SCR 29 at 44.

¹⁶ Parker, Graham, "Criminal Law-Mens rea-General Principles-Intoxication as a Defence" 55 [1977] *Can. Bar. Rev.* 691 at p. 702.

¹⁷ *Leary v. The Queen* [1978] 1 SCR 29 at 42.

¹⁸ Beck, S. & Parker, G. E., "The Intoxicated Offender" 44 [1966] *Can. Bar Rev.* 563 at 588.

¹⁹ The Law Reform Commission, *Consultation Paper on Intoxication as a Defence to a Criminal Offence, 1995* (<http://www.lawreform.ie/publications>) Para 5.33, p.121.

²⁰ Keiter, M, "Just Say No Excuse: The Rise and Fall of the Intoxication Defence" 87 [1977] *JCL* 482 at 483.

²¹ *Ibid.* p.510

the circumstances under which a person exercise this right. Hence allowed reduction of murder into manslaughter where the defender could not exactly weigh the quantum of force required but does not exceed the reasonable limits. On the other hand in the English law refusal to reduce murder to manslaughter in the instances of excessive force led to injustice in certain circumstances. Further, there is no consistent rule in English law to determine whether the force used was excessive. The decisions of the courts in this area seem to create anomaly as seen in the cases of defence of property.

The proposed reforms in English law like reduction of murder into manslaughter in the cases of excessive private defence are already acknowledged by *Shari'ah*. Similarly, the proposal to create a new offence of dangerous intoxication with an equal punishment of the offence committed will be nearer to the concept of liability of intoxicated offender in *Shari'ah*. The study reveals that the principles enunciated by *Shari'ah* centuries ago are compatible with the corresponding principles of any civilized legal system of the present world.

Although, in almost all legal systems, there is some degree of inflexibility, yet they are not equal in this regard. The degree of flexibility in each system depends very much upon the nature of law maker. In man-made laws, the views of law makers are subject to change with the change of time and conditions hence leading to an inevitable change in the laws. In the religious systems like *Shari'ah*, on the other hand, the character of law maker is unchangeable so is the law revealed by Him. However, this characteristic does not render it absolutely inflexible. Flexibility and stiffness exist side by side, specifically in the realm of criminal law. Leaving aside only a few offences, men are allowed to legislate according to their requirements unless this legislation is in contradiction with the injunctions of the *Qur'an* or the *Sunnah*. It can be said that *Shari'ah* is not stagnant but living and developing system capable to meet the social problem of the world. Its vitality and capacity to meet the exigencies of changing patterns of life and social conditions has been demonstrated by the principles of criminal liability enunciated and its rules to deal with the problem of intoxication and private defence. By any definition of law *Shari'ah* is a law; it defines offences, prescribes appropriate punishments for them and recognises various conditions affording defence to an accused.

²² Smith, J.C., *Smith & Hogan Criminal Law* (8th ed., Butterworths, London, 1996) pp. 263-264.

The study in the realm of criminal law in *Shari'ah* suggests its compatibility with the English criminal law in particular and the laws of other civilised states in general. We discussed the principles of criminal liability and one defence each from two major kinds of defences i.e. excuse and justification. The similarities and the differences of both the system have been highlighted. Though in any case it is not possible to create a uniform law for the whole world like the principles of natural sciences, yet one legal system can benefit from the experience of the other. In this regard it can be suggested that English legal system trying its utmost to control alcohol use and resulting criminal behaviour may adopt the strategy of *Shari'ah* to tackle the problem.

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