

JUSTIFICATIONS AND CONCEPT OF CRIMINAL LIABILITY IN SHARI'AH

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This paper aims at investigating possible dimensions of justifications and excuses from criminal liability stemming from the Shari'a law, including categories of criminal intent, issues relating to mental illness and intoxication, problem of necessity, the matter of age, duress, and right to self-defence. Thus, the main research questions must be formulated as follows: What are the unique characteristics of justifications and excuses from criminal liability? What are the major similarities and critical discrepancies of the right to self-defence under the Shari'a law and the law of the Australian state of South Australia?

A series of research objectives were devised as follows: to provide insight into the concept of criminal liability and its justifications under Islamic law; to expatiate on justifications and excuses from criminal liability under the law of Shari'a, and to compare and contrast the specificities of self-defence under the Shari'a law and the criminal law of South Australia.

Keywords: South Australia, Shari'a law, criminal liability.

Introduction

The overall aim of this research was to conduct an all-embracing research of justifications and concept of criminal liability under the law of Shari'a. To that end, the present paper aimed at investigating all possible dimensions of justifications and excuses from criminal liability under the law of Shari'a by laying a special emphasis upon the categories of criminal intent, issues relating to mental illness and intoxication, the problem of necessity, the matter of age, duress and the right to self-defence. In addition to this, the present paper was conceived to make parallels between the justifications and excuses of criminal liability in the Islamic law and law of South Australia.

To that end, the main research question of this study was formulated as follows: What are the peculiar characteristics of justifications and excuses from criminal liability under the law of Shari'a? The secondary question of the current study was expressed as follows: What are the major similarities and critical discrepancies of the right to self-defence under the Shari'a law and the law of the Australian state of South Australia?

The current article consists of several logical elements. The first logical constituent of the study combines findings concerning the legal characteristics of such concepts as criminal liability and justifications from criminal liability under the Islamic law.

The second logical constituent of the article encircles findings on various justifications and excuses from criminal liability under the law of Shari'a, including the criminal intent, age, necessity, duress, self-defence, etc.

The third logical constituent embraces compare and contrast of self-defence under the Shari'a law and the criminal law of the Australian state of South Australia.

A Critical Analysis of the Concept of Criminal Intent (Mens Rea)

First and foremost, the concept of criminal intent, also known as 'mens rea', constitutes an undeniable part of criminal responsibility. Thus, Peters is disposed to view the requirement of 'mens rea', or, that is, the 'guilty mind', is one of several important elements which must be determined for the purposes of criminal liability.¹ On other hand, in Western common law, this concept is known as the "problem of unknown justification".²

Before making insight into the peculiarities of criminal intent in the framework of Islamic law, it is vital to first provide a comprehensive definition of the term 'mens rea'. Thus, the Black's Law Dictionary defines the concept of mens rea as a specific state of mind of the defendant, at the moment of committing an offence, which must be proven by the prosecution in order to find the defendant guilty for the offence.³ In other words, the notion of mens rea implies a peculiar state of mind that links a person to a crime that has been committed by this person.

To elaborate further, Peters highlights the pertinence of mens rea in terms of the Islamic criminal law, in view of the fact that the law of Shari'a recognises the principle of individual liability. This means that the emphasis of Islamic law on the doctrine of individual liability highlights the pertinence of mens rea to the framework of Shari'a, because the concept of a 'guilty mind' applies to every individual separately rather than collectively.

Islamic criminal law clearly articulates that individuals are sentenced and punished for their personal acts. Nonetheless, there are specific circumstances under which an individual who has committed an offence is not liable for the harmful consequences. A number of such circumstances are tightly linked with the absence of mens rea.⁴ The reasoning of Peters underlies the inference that ascertaining mens rea will help to better understand both the nature of criminal liability and justification under the law of Shari'a.

Wasti is in agreement with Peters and writes that the examination of criminal intent is crucial for the subsequent analysis of criminal liability for specific types of offences.⁵ In addition, Sidahmad, el-Awa, and Mallal are disposed to think that the significance of criminal intent as a concept of Shari'a stems from the fact that the presence of mens rea is connected with the issue of what acts must be judged and what acts must not be punished.⁶

In order to better understand the relevance of mens rea to the framework of the Islamic criminal law, it is prudent to investigate the place of the 'guilty mind' concept among other requirements for criminal liability under the law of Shari'a. Thus, Rudolph Peters writes that

¹ R Peters, "Crime and punishment in Islamic law: theory and practice from the Sixteenth to the Twenty-First century" (Cambridge University Press, 2005) 19 [3].

² R A Duff, *Answering for Crime Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) 277.

³ B A Garner, *Black's Law Dictionary* (WEST, 2009) 1075.

⁴ Peters, *op.cit.*, 1, 20 [1].

⁵ T Wasti, "The application of Islamic criminal law in Pakistan: Sharia in practice" (BRILL, 2009) 65 [3].

⁶ M A A Sidahmad, *The Hudud* (Muhammad 'Ata al-Sid Sid Ahmad, 1995); M S El-Awa, *Punishment in Islamic law: a comparative study* (Markazi Maktaba Islami Publication, 2001); C Mallat, *Introduciton to Middle Eastern Law* (Oxford University Press, 2007) 251 [2].

Muslim lawyers distinguish three prerequisites to criminal liability.⁷ First, the offender must have possessed a sufficient amount of power to commit or not to commit the prohibited act (*qudra*). Second, the offender must have been aware of the meaning of his or her act and, importantly, of the fact that the act was an offence (*'ilm*). Third, the offender must have committed it with intent (*qasd*).

Hence, it follows that the concept of criminal intent is one of the three fundamental requirements that concern the imposition of a legal punishment under the Shari'a. In addition, Peters is prone to believe that the concept of intent underlies the theory of *mens rea* with regard to crimes that are punishable with retaliation and *hadd* offences. Moreover, Peters believes that minors and the insane should not be deemed responsible for their offences, because they are assumed to be unconscious of the illegality of their actions and lack criminal intent. The legal status of minors and the insane will be discussed in the next sections of the current research.

Elaborating further, the concept of criminal intent has significance because of the fact that the presence or absence of criminal intent often determines the severity or absence of criminal punishment. Thus, in his investigations of the application of Islamic Criminal Law in Pakistan, Tahir Wasti stresses the capabilities of certain crimes to be committed either with or without criminal intent. The author maintains that if murder, for instance, is committed with criminal intent, then the punishment must be death, whereas the commitment of murder without the criminal intent means that the punishment must be payment of money or other pecuniary compensation.⁸

Wasti substantiates his findings with the provisions of the Holy Quran, which associates the stringency of punishment with the presence or absence of criminal intent. The fact is that the concept of criminal intent is recognised in the framework of the Islamic law as a very important criterion for the differentiation among various types of offences, such as intentional homicide, homicide by mistake, accidental homicide, and quasi-deliberate forms of homicide. For instance, quasi-deliberate homicide (*qatl shibh-i-amd*) can be defined as the infliction of death with the intent to cause harm to body or mind of any person by such means, which in the ordinary course of nature is not likely to cause death. Such actions imply that the perpetrator is liable to *diyat* and may also be imprisoned.⁹

From a contrasting point of view, the law of Shari'a prescribes that the person guilty of accidental homicide is liable to *diyat* and *kaffara* (penance).¹⁰ In the context of quasi-deliberate homicide, the perpetrator has the criminal intent to cause harm through the use of a non-dangerous instrument, but does not aim to cause death, because of the fact that he chooses a weapon that is not lethal. On the other hand, the offence of accidental homicide (*qatl-i-khata*) can be defined as the infliction of death by rash or negligence, rather than intention.¹¹ All of this evidence helps to arrive at the conclusion that the concept of criminal intention plays a crucial role in ascertaining the seriousness of a crime in order to choose the type and amount of punishment.

After the legal peculiarities of criminal intent under the law of Shari'a have been discussed, it is the right time to provide insight into the specificities of criminal intent under

⁷ Peter, *op.cit*, 20 [2].

⁸ Wasti, *op.cit*, 65 [3].

⁹ *Ibid* 323.

¹⁰ F B Hakeem et al, "Policing Muslim communities: comparative international context" (Springer, 2012) 15 [2].

¹¹ Wasti, *op.cit*, 178 [3].

the law of South Australia. One of the cases that showcase the predicaments of criminal liability under common law as well as the significance of mens rea in the qualification of harmful behaviour, is *R v Archer and Saunders*. According to the case, a man had intent to kill his wife by way of giving her a poisoned apple. However, the wife gave this apple to her child who died after having eaten the apple. The evidence showed that the man had no intent to kill his daughter. Nevertheless, the court decided that the man was guilty of murdering his daughter, while his wife was found not guilty, because she was ignorant of the poison in the apple.¹² This case shows that everyone who acts with the ‘guilty mind’ must be liable for the harmful consequences inflicted as the result of such conduct. In *R v Archer and Saunders*, the husband acted with a ‘guilty mind’ aiming at murdering his wife, and therefore he was correctly characterised as a guilty person. Nonetheless, the victim of the husband’s guilty mind was his daughter. To that end, the case speaks about the transferred intent – that is, the criminal intent which was transferred from one victim to another.

In the context of *R v Archer and Saunders*, the man had criminal intent, but achieved a different criminal consequence. In considering the man guilty, the court of justice correctly deduced that, irrespective of the consequences, the man was guilty of a crime because he intended to commit the crime and his intent transferred from his wife to his daughter.

In the criminal law of South Australia, the concept of transferred intent is called the doctrine of transferred malice. Transferred malice takes place when the intent to harm one individual inevitably leads to the infliction of harm on another individual. In *Attorney General’s Ref (No 3 of 1994)*, the court found that the infliction of harm on a pregnant woman leading to the death of her child must be recognised as a double transfer of intent.¹³ This means that the criminal intent first transfers from the mother to the foetus, and then from the foetus to the child when it was born.

The aforesaid legal situation involving transferred intent may be juxtaposed with a case of murder by mistake under the law of Shari’a, as discussed above. Both in the criminal law of South Australia and under the prescriptions of Islamic law, accidental homicide or homicide by mistake are punishable.

In that vein, it is possible to deduce that the criminal intent determines whether the person is liable or not for a particular offence, whereas the harmful consequences determine the type and level of punishment. However, this is a very rough inference, because a wide range of other circumstances must be taken into consideration before making definite conclusions concerning the criminal liability of a person.

The Scrutiny of Issues Relating to Mental Illness and Intoxication

As the foregoing discussion must suggest, the notion of mens rea implies a specific state of mind of the offender that ties him or her to the committed crime. The preceding discussion has shown that mens rea, also known as criminal intent, is one of the fundamental principles of Islamic criminal law that determines the type and amount of criminal punishment. In the current section of the research, it is necessary to examine how the law of Shari’a regulates the question of criminal intent in the context of mental illness and intoxication.

First and foremost, Rudolph Peters expresses confidence that there is no criminal intent in a case when the perpetrator lacks the required amount of intellectual capacity to fully realise

¹² *R v Saunders and Archer* (1573) 75 ER 706.

¹³ *Attorney-General’s Ref* (No 3 of 1994) [1996] 2 All ER 10.

the implications of his conduct.¹⁴ The fact is that insane and unconscious persons are those individuals who are devoid of the possibility of fully realizing the implications of their actions. Notwithstanding the fact that insane and unconscious persons cannot be convicted for the harm inflicted as the result of their actions, the law of Shari'a does not preclude the possibility of peculiar liability, because the principle that the liability stemming from torts requires only causation and it is not necessary for harm to have been inflicted by fault.¹⁵ In other words, mental illness may become a justification for the act which otherwise would have been recognised as a crime, whereas tort law does not justify a person's actions on the ground of psychological illness. Similar to Peters, Mallat also investigates the relationship between the criminal law and the law of torts. According to the researcher, the law of torts is totally discrepant from Islamic criminal law. In the researcher's opinion, liability in Islamic law is based on the fundamental theory of harm. This theory particularly prescribes that liability rests on the concept of harm and findings from the analysis of the harmful act, notwithstanding such notions as fault, illegality, or negligence.¹⁶ Hence, it follows that the main objective of jurists in the field of Islamic criminal law is to prove the existence of harm and, afterwards, to look for possible exceptions and justifications.

The state of mental illness (insanity) is one of the justifications under Islamic criminal law. This position is acknowledged in the publication by Farhad Malekian. According to Malekian, if the accused person suffers from total insanity or mental disorder, this fact should be deemed a mitigating condition that either mitigates or eliminates the criminal responsibility of the perpetrator under the law of Shari'a.¹⁷ Following the reasoning of Malekian, it is necessary to explain that the fact of insanity will eliminate criminal liability only if the lawyers prove that the factor has prevented the perpetrator to fully realise the implications of their actions. Otherwise, if the state of insanity or any other mental illness has not prevented the perpetrator from being fully aware of the implications of his or her action, this means that the perpetrator has acted with criminal intent in the mind. If the perpetrator has acted with criminal intent, then this means that he or she is liable for the inflicted harm.

The concept of intoxication (*Shurb al-Khamr*) is another category of the Shari'a that determines the peculiarities of criminal liability. The Quran makes specific references to the concept of intoxication in Chapters II: 219 and V: 93.¹⁸ According to this prominent source of Islamic criminal law, strong drink is recognised as a great sin for men. Nevertheless, Malekian states that intoxication sometimes may be viewed as a mitigating factor that diminishes the amount of criminal liability. However, this takes place only in cases when the intoxication is nonvoluntary and does not originate from personal intentions.¹⁹ To that end, Malekian differentiates between two types of intoxication – voluntary and involuntary intoxication. The second form can be used as a mitigating condition of criminal liability under Islamic criminal law, whereas the first form cannot be used as such.

To elaborate further, Una Au et al are disposed to think that both the concept of mental illness and intoxication are excuses under Islamic criminal law, rather than justifications. The authors make attempts to explain the differences between excuse and justification. According

¹⁴ Peters, *op.cit.*, 21 [1].

¹⁵ *Ibid* 21 [2].

¹⁶ C Mallat, *Introduction to Middle Eastern law* (Oxford University Press, 2007) 289 [2].

¹⁷ F Malekian, "Principles of Islamic international criminal law: a comparative search" (BRILL, 2011) 397 [1].

¹⁸ Quran, Chapter II: 219, Chapter V: 93.

¹⁹ Malekian, *op.cit.*, 17297 [1].

to the authors, a valid excuse implies that the defendant is not liable for his unlawful conduct, whereas justification means a vindication or demonstration of justice in the particular conduct.²⁰

Taking into consideration the aforesaid arguments, it is possible to agree with the authors that intoxication as well as mental illness is an excuse rather than a justification. The research shows that both intoxication and mental illness can be posed as mitigating conditions that are purposed to either diminish the amount of criminal liability or eliminate the criminal responsibility for an unlawful act. Moreover, neither intoxication nor mental illness can substantiate the arguments of jurists that an excused act is just and lawful.

A more circumstantial analysis of intoxication as an excuse under the Islamic criminal law can be found in the publication by Azhar Javed. According to the researcher, the law of Shari'a provides a comprehensive definition of intoxication. This term is defined as the dominant condition that has been caused by consumption of some substance preventing an individual from acting according to the rule of intellect without destructing it.²¹ Based on this definition, intoxication does not lead to either the loss or diminishment of human intelligence, such as in the case with mental illness. The fact is that intoxication suspends human intelligence for a certain period of time. The concept of intoxication is explored in the framework of different schools of Muslim thought. Muslim jurists have elaborated a system of different conditions under which an intoxicated individual may act to prove the condition of intoxication.

Thus, Hanfite and Malkite write that an intoxicated person is an individual who is incapable to discern earth from sky or a man from a woman and his manner of walking and speech lack coordination. Alternatively, jurists from Shafite claim that an intoxicated person is an individual whose speech is indistinct and uncoordinated, while his secrets are revealed.²²

Hanblite is also of the opinion that an intoxicated person is an individual who is not knowledgeable of his utterances. Suffice it to say that the position of Hanblite with regard to the issue of intoxication completely corresponds with the Quranic definition of intoxication. Thus, the Quran clearly articulates that an intoxicated person is not aware of his utterances.²³ From another perspective, intoxication is determined not through the incapability of a person to discern a man from a woman or earth from sky, but rather through his incapability to differentiate between his personal shoes or clothes if mixed with those of other people.²⁴

As far as the Kingdom of Saudi Arabia is concerned, Muslim scholars define several physical defects that create impediments to legal capacity and criminal liability. In particular these physical defects include insanity. In the context of Saudi Arabia, actions of insane people should be deemed null and void. Saudi lawyers determine that mental derangement is a weakness of mental faculties causing an individual to have a limited ability of understanding,

²⁰ U Au et al, "An introduction to the criminal law of Afghanistan" (2011) 42 [3] (29 March 2013) <<http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-CRIMINAL-1ST-EDITION.pdf>>

²¹ A Javed, 'Intoxication & self-defence: a comparative study of principles of English law and Shari'a' The University of Leeds (2004) 222 [3], (29 March 2013) <http://theses.whiterose.ac.uk/526/1/uk_bl_ethos_416550.pdf>

²² J Al-Sauti, *Al-Ashbah Wa Al-Nazair* (Dar al-Ktub Al-Ilmia, Beirut, 1979) 217.

²³ Quran 4:43. See also, , King Fahd Complex for the Printing of the Holy Quran' (13 March 2013) <http://www.qurancomplex.org/Quran/Targama/Targama.asp?nSora=4&l=eng&nAya=42#4_42>.

²⁴ A A Al-Bahli, *Al-Qawaid wal Fawaid al-Usulia* (Matba al-Sunnah, Cairo, 1956) 38; I Qadama, *Al-Mughni* (Dar Al-Hadith, Cairo, 1996) Vol. XII, 450.

defective ability of execution, and mixed reasoning. They continue that mental derangement can be severe, similar to insanity, and in this situation a mentally deranged individual will have the legal status of an insane individual.²⁵

The question of intoxication is also discussed in the framework of Saudi law. Saudi lawyers stick to the general rule that an individual under the effect of drugs or alcohol loses his legal capacity as long as he is under its influence. Similar to lawyers from other Islamic countries, Saudi jurists associate an intoxicated person with an individual who is incapable of distinguishing the earth from the sky.²⁶ In Saudi Arabia, various schools of Islamic law offer different interpretations of the criminal liability of intoxicated persons. Thus, Hanafies express confidence that the legal competence and, thus criminal liability, is not influenced when intoxication results from a voluntary act. From a contrasting point of view, Malikies provides believes an intoxicated individual has the option to approve his action after regaining consciousness. Alternatively, the Shafi'ees and the Hanbalies reject the legal competence of an intoxicated individual to disregard his acts.²⁷

After the positions of the main legal schools of Islamic criminal law have been unfolded, it is the right time to sum everything up. Javed contends that the law of Shari'a uncompromisingly prohibits intoxicants. According to the scholar, the discrepancy in opinions on the usage of the term 'Khamr' for designating a particular substance, Muslim jurists are completely unanimous on the idea that the consumption of any intoxicating substance is contrary to law. This position can be underscored with the articulation of the Holy Prophet, which states, "All intoxicants are Khamr and all types of Khamr are forbidden".²⁸

The Expatiation on the Problem of Necessity

The category of necessity is interpreted by Muslim jurists in line with such categories as insanity, minority, duress, intoxication (involuntary), and an emergency situation. Similarly, Au et al consider the concept of necessity to be an excuse of criminal liability rather than a justification. However, before making any conclusions on whether necessity is an excuse or justification, it is essential to provide insight into the Shari'a's regulation of the phenomenon.

Thus, Martin Lau assays that the doctrine of necessity was elaborated by Chief Justice Muhammed Munir in 'Reference by H. E. the Governor General. According to Chief Justice Munir, the doctrine states that under the conditions of extremeness, absoluteness, and imminence, any act which will otherwise be unlawful becomes lawful if it is conducted in good faith under the pressure of necessity.²⁹ In light of this idea, the term 'necessity' can be defined as the intention of the perpetrator to preserve the constitution, society, or the state and to prevent them from dissolution.³⁰

²⁵ M Zahraa, 'The Legal Capacity of Women in Islamic Law', 11 Arab Law Quarterly, (1996) 253.

²⁶ S Saleh, Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law (2nd ed., Graham & Trotman, 2006) 28.

²⁷ J Nasir, *The Islamic Law of Personal Status* (2nd edn., Graham & Trotman Ltd, 1990) 47.

²⁸ I Majah, "Muhammad bi Yazid" (1981), Vol. II, 1122; Al-Tirmidhi, Muhammad bin Isa (1981) Vol. IV, 291; A Daoud, Sulaiman bin Ash'ath (1981) Vol. IV, 83-84.

²⁹ M Lau, "The role of Islam in the legal system of Pakistan" (BRILL, 2006) 26 [3].

³⁰ Loc.cit

The author states that the doctrine of necessity under Islamic law originates from English law. This means that the doctrine was initially elaborated in the framework of English law and then incorporated into the system of Islamic law thereafter. To eliminate the exclusiveness of English common law in regulating the doctrine of necessity, the case of Begum Nusrat Bhutto gave rise to a new, Islamic source of constitutional law with the new regime in line with the doctrine of necessity.³¹

In Saudi Arabia, similar to other Islamic countries, the concept of necessity is a justification of criminal liability under Islamic criminal law, rather than an excuse. Therefore, it is impossible to agree with Au et al that necessity is an excuse rather than a justification. The authors have already mentioned that a justification is the statement that the conduct in question is not illegal due to the elimination of the legal elements, whereas the concept of excuse is conceived to show justice for some unlawful conduct. Thus, as far as the concept of necessity is concerned, the doctrine of necessity prescribes that the act, which otherwise would be considered unlawful, must be recognised as lawful if it is conducted in good faith under the pressure of necessity.

However, the Penal Code of Afghanistan offers a rather discrepant interpretation of the concept of necessity. The Penal Code postulates that a person who for the benefit of saving his own good or soul or someone else's good or soul encounters a large or immediate danger, then this person is not responsible for the inflicted harm if he proves that the danger was not caused by his actions.³² The aforementioned definition of necessity makes evident that this is a justification and not merely an excuse of criminal liability. From this definition, it is possible to deduce several essential elements of a necessity justification.

First, it is incumbent on the defendant to show that the harm he was going to avert outweighed the hazard of the unlawful conduct in which the defendant took part. In other words, the perpetrator must prove that his participation in the prohibited activity was spurred by the necessity to avoid a bigger danger. Second, it is incumbent on the defender to demonstrate that he possessed no reasonable alternative precluding him from performing an unlawful act. Third, it is incumbent on the defendant to show that he was not responsible for the creation of the danger he wished to avert. That is, the perpetrator would never escape criminal liability for the harm inflicted as the result of an unlawful act, unless he could prove that the danger spurring him to such an act was far from his will.

The Investigations of Legal Issues Related to the Matter of Age

The matter of age is also discussed as an excuse or justification of criminal liability under the law of Shari'a. Thus, Peters states that mens rea is absent in cases involving minor perpetrators, because, according to the law, minors lacks a sufficient intellectual capacity to fully realise the implications of their behaviour.³³ According to Peters, the minority ends with physical puberty. Nevertheless, the Islamic criminal law has an irrefutable presumption that it

³¹ S H Panhwar, 'Judgment on the Constitutional Petition challenging the validity of martial law', PLD 1977 Supreme Court (657) (29 March 2013) <<http://www.bhutto.org/Acrobat/Judgment%20on%20the%20constitutional%20petition%20challenging%20martial%20law.pdf>>

³² "The Penal Code of Afghanistan" (1976), Article 95 (29 March 2013) <http://aceproject.org/eroen/regions/asia/AF/Penal%20Code%20Eng.pdf/at_download/file>

³³ Peters, *op.cit*, 21 [1].

is impossible for children to reach puberty before a particular age. This age is defined differently by various schools of Islamic jurisprudence.

Following the arguments of Peters, it is possible to generalise that the jurists from Hanafites are believe that puberty cannot be established before 12 (boys) and 9 (girls). In contrast, representatives of Malakites express confidence that both boys and girls cannot reach puberty before the age of 9. The same position is held by lawyers of the Shafi'ites school. In contrast, supporters of Hanbalites assert that puberty cannot be established in boys before the age of 10 and in girls before the age of 9.³⁴

In addition, Peters summarises different positions of the contesting schools of Islamic criminal law with regard to the age after which the absence of puberty cannot be established. In this regard, the three schools (Hanafites, Shafi'ites, and Hanbalites) provide that 15 is the common age for both boys and girls after which the absence of puberty cannot be established. In contrast, representatives of the school of Malikites contend that the absence of puberty cannot be established after the age of 18 in girls and boys.

To elaborate further, Peters maintains that between the two age group limits, puberty can be established only by proving that an individual possesses the physical evidence of sexual maturity. Thus, Peters arrives at the conclusion that the minority status prevents an individual from being recognised as guilty of a crime and makes his or her conviction impossible. This notwithstanding, the factor of minority does not debar the financial liability on the grounds that the responsibility stemming from torts only requires causation and does not require proof of fault.

Minority status as an excuse of criminal liability under the law of Shari'a is also discussed in the research by Au et al. The authors write that in Afghan law, the doctrine of criminal liability rests on the principle that the perpetrator is responsible for the harmful conduct only if he possesses enough knowledge about the disparity between right and wrong.³⁵ In this sense, the analysis of children's behaviour clearly shows that minors often lack the judgment, intelligence, moral capacity, and emotional maturity to properly decide on the issues of right and wrong.

This insight has led Afghan authorities to adopt the Juvenile Code. Article 10 of the Afghan Juvenile Code clearly articulates that persons who have not reached the age of 12 are precluded from criminal liability and conviction.³⁶ In addition, the Code states that juveniles above the age of 12 are liable for crimes, but their actions are qualified differently than those of adult perpetrators. Suffice it to say that juveniles over the age of 12 can afford more legal protection, and their confinement is deemed as the last resort for the purposes of reeducation and rehabilitation of children.

In the ultimate analysis, it should be considered that the category of age is an excuse rather than a justification of criminal liability as it helps to show justice for particular unlawful conduct. The matter of justice is associated with the mental and physical ability of an individual to fully realise the implications of his actions.

³⁴ Loc.cit

³⁵ Au et al, op.cit, 55 [1].

³⁶ "The Juvenile Code of Afghanistan" (2005), Article 10 (29 March 2013) <<http://www.rolafghanistan.esteri.it/NR/rdonlyres/565B6AC3-4472-4B4E-8315-9987F40E280D/0/23JuvenileLaw.pdf>>

The Concept of Duress under the Law of Shari'a

According to Islamic criminal law, the category of duress (Ikrah) means coercion under the influence of which a crime has been committed. Au et al believe that coercion is the simplest excuse of criminal liability.³⁷ Notably, the doctrine of duress originates from the Quran. In the Quran, it is stated that “Allah does not burden any human being with more than he is well able to bear”.³⁸ Hence, it follows that the main source of Islamic criminal law does not permit the punishment under Hudood³⁹ and Qisas⁴⁰ on perpetrators who inflicted harm under duress, to the same extent as they lacked realization of the criminal behaviour because of their young age or for any other excuse.

According to Abiad et al, the nature of duress as an excuse of criminal liability originates from the fact that free consent to commit a crime is one of the three basic elements of criminal liability. In the case of duress (coercion), the element of free consent is removed. This means that the criminal accountability and responsibility of a person will be incomplete if the individual is coerced into committing a crime. Nevertheless, the implications of duress may be verified in different legal systems. For instance, according to Article 211 of the Islamic Penal Code of Iran, duress, or the coercion to kill, is not considered to be a justification for murder. In this sense, if an individual is ordered or forced to kill another individual, then the murderer must be sentenced to Qisas, while the person who initiated the murder must be convicted to life imprisonment.⁴¹

In contrast to the Iranian Penal Code, the Penal Code of Afghanistan articulates that an individual who commits an offence under the impact of a material or moral force, of which aversion is impossible, must not be deemed liable.⁴² The main discrepancy between the two legal regulations of duress is the fact that the Iranian Penal Code interprets duress in relation to murder, whereas the Afghan Penal Code regulates duress in the context of any crime. Interestingly, in the framework of the Afghan Penal Code, duress is considered to be an excuse of criminal liability, whereas in the framework of the Iranian Penal Code, duress is postulated as a mitigating circumstance only.

Thus, from the perspective of the Afghan Penal Code, duress takes place when a criminal associate effectively forces another person to act against his will in order to commit a crime that was conceived by the former. Au et al contend that duress may be a very substantial defence in the court of justice if the defendant can prove the components identical to those of necessity.

In other words, Au et al deem it wise to juxtapose duress and necessity as two equivalent types of excuse of criminal liability under Islamic criminal law.⁴³ Despite this approach, the concept of coercion is not totally identical to necessity. In order to better understand the nature of coercion as an excuse of criminal liability, it is essential to compare and contrast the

³⁷ Au et al, *op. cit.*, 60 [1].

³⁸ Nisrine Abiad et al, “Criminal law and the rights of the child in Muslim states: a comparative and analytical perspective” (BIICL, 2010) 56 [2].

³⁹ A Hudud may be defined as fixed punishment to be implemented as the right of God.

⁴⁰ Shari 'a 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.

⁴¹ Nisrine, *op.cit.*, 160 [4].

⁴² The Penal Code of Afghanistan, *op.cit.*, Article 94.

⁴³ Au et al, *op.cit.*, 60 [2].

two types of excuses. Au et al writes that there are two main distinguishing features of duress and necessity. First, necessity is conducted without a threat of serious physical harm or death. That is, under the conditions of necessity, the defendant must prove that he has inflicted less damage than he has actually averted. Second, Islamic criminal law does not confine the excuse of necessity exclusively to the harm inflicted and harm averted with regard to a person's life. This means that, in the context of necessity, harm may be inflicted because the perpetrator is threatened by the real possibility of a bigger harm. The excuse of necessity may be utilised as a defence even if a stranger was threatened by the possibility of the bigger losses or hazards.

In contrast, the excuse of duress is limited to cases only where the perpetrator is personally threatened. Undoubtedly, the excuse of duress in Islamic criminal law was influenced by the provisions of Western common law. In terms of Western common law, threats to unknown people, or even to children or a spouse, as the means to force an individual to commit a crime, are deemed insufficient.⁴⁴

In addition, the common law states that the claim for duress is restricted to the requirement that the defendant must not have been responsible for the threat. In other words, if the defendant is a gang member who is threatened to commit a crime by another gang member, he will not be allowed to rely on the excuse of duress.⁴⁵

In terms of the Kingdom of Saudi Arabia, Islamic criminal law stipulates that the fact of duress may justify an individual's harmful behaviour only if there is no causal nexus between previous criminal behaviours of the individual and the harmful act which has been conducted under the influence of coercion.

The Specificities of the Right to Self-defence under the Law of Shari'a and under the Criminal Law of South Australia: Comparative Analysis

After the main excuses of criminal liability under Islamic criminal law have been discussed, it is the right time to expatiate on the issues of self-defence and its regulation by the law of Shari'a. First and foremost, it should be stated that self-defence is a justification from criminal liability, rather than an excuse. This inference was made after findings of Au et al had been analysed. Thus, according to Au et al, a justification under the Islamic law implies vindication or demonstration of justice in the particular act in order to prove that the act is not criminal, whereas a valid excuse is the defence of an individual by appealing to some legal circumstance that precludes criminal liability of the individual for his unlawful conduct.⁴⁶ In other words, a justification precludes criminal liability due to the lawful nature of the conduct in question, whereas an excuse precludes criminal liability for the unlawful conduct due to the existence of some legal circumstance.

The category of self-defence is recognised as a justification, rather than an excuse. Self-defence is an act that resembles a criminal act, but does not contain all necessary elements to be qualified as such.⁴⁷ It is possible to agree with Peters that self-defence is a circumstance that makes an unlawful act loses its unlawful character (*actus reus*). The fact is that self-defence should not be qualified separately from the act which, otherwise, would have been

⁴⁴ Richard G. Singer, and John Q. La Fond, *Criminal law* (Aspen Publishers Online, 2010) 451 [2].

⁴⁵ *Ibid* 451 [3].

⁴⁶ Au et al, *op.cit*, 42 [4].

⁴⁷ Peters, *op.cit*, 20 [2].

recognised as unlawful. The presence of self-defence in the framework of a particular act means that the act is automatically mitigated.

As far as the Islamic criminal law is concerned, Wasti claims that the category of self-defence is not explicitly regulated in terms of the primal source of law. Those verses of the Quran that discuss different types of punishment do not take into consideration the conditions under which any injury or harm is inflicted, such as sudden and grave provocation, or self-defence and its changing degrees.⁴⁸ This means that the explicit definition of self-defence should be sought in other sources of Islamic criminal law.

Before providing insight into the nature of self-defence under the law of Shari'a, it is important to verify whether the term 'self-defence' is the most appropriate denomination of the justification in question. Thus, some scholars believe that it is imprudent to call the analysed justification as self-defence, because the right to such defence is not confined to the protection of an individual's own body.⁴⁹ In its broad sense, the right to so-called 'self-defence' encircles such actions as prevention of a criminal offence, facilitation or assistance of a lawful arrest, aversion or suspension of a breach of peace, protection of material objects from illicit damage, destruction, or appropriation.⁵⁰ Such legal understanding of self-defence is reflected in the criminal law of South Australia. English and Australian juridical sources acknowledge the urgency of renaming the justification of self-defence into private defence.⁵¹

Regarding Islamic criminal law, Javed expresses confidence that Shari'a is stricter than secular jurisprudences in protecting interests of individuals and stipulates that a person can defend interests of another person only under exclusive circumstances.⁵² In the author's opinion, the Islamic criminal law entails duties of an individual, rather than rights. Moreover, the researcher explains that the right to private defence is not clearly expressed in the Quran, because Allah does not love aggressors and hostilities.⁵³

Nevertheless, the idea of private defence can still be deduced from the Quran and other sources of Shari'a. The right to private defence may be interpreted as an entitlement, or even a duty, of every Muslim to avoid aggression and defend his rights against any sort of unlawful aggression. In this regard, Ahmad Khurshid writes that Shari'a gives preference to the doctrine of private self-defence, which is restricted by the feeling of compassion.⁵⁴

To continue, the law of Shari'a differentiates between public and private defence. The category of public defence was conceived to ensure the protection of the social, moral, and legal values of an Islamic state by encouraging people to increase good deeds and refrain from committing evil acts. This type of defence can also be found in English law. In the context of the criminal law of South Australia, the concept of public defence may be reduced to the prevention of crime and promotion of order.

Regarding the notion of private defence, the Islamic criminal law interprets this concept as the right of an individual to defend his own property, body, chastity of a woman, or similar

⁴⁸ Wasti, *op. cit.*, 80 [2].

⁴⁹ L Warmington, *Stephen's commentaries on the law of England* (21st ed., Butterworth, London, 1950) 38 [2].

⁵⁰ The Law Commission, *A criminal code for England and Wales* (Law Com. No. 177, 1989) Clause 44 (1).

⁵¹ Alan Reed, & Peter Seago, *Criminal Law* (Sweet & Maxwell London, 1999) 206 [2]; A J Ashworth, 'Self-defence and the right to life' (1975) *CLJ* 282, 288 [2].

⁵² Javed, *op.cit.*, 288 [1].

⁵³ Quran 2:190. See also, King Fahd Complex for the Printing of the Holy Quran' (13 March 2013) <<http://www.qurancomplex.org/Quran/Targama/Targama.asp?L=eng&Page=29>>

⁵⁴ A Khurshid, *Islam: its meaning and message* (Islamic Council of Europe, London, 1976) 106 [1].

interests of any other individual against any illicit assault through the use of reasonable force.⁵⁵ In other words, the law of Shari'a discerns the right to private self-defence on the grounds that this right is performed in order to prevent an illicit assault against the property, body, or chastity. In contrast to the right of private defence, Islamic criminal law associates the right of public defence with the entitlement to settle the contraventions of the general (public, moral) prohibitions and commandments.

In Saudi Arabia, public defence is directed against the violations of socially-connected rights (the rights of Allah), whereas the private defence aims at restoring the rights of private parties (individuals) that are either threatened or already violated.

After the salient features of self-defence under the law of Shari'a have been discussed, it is the right time to provide insight into the regulation of self-defence under the law of South Australia. South Australia is a state of Australia, and therefore the state jurisprudence on the right of self-defence embodies the principles of English law.

Thus, unlike Islamic criminal law, the right to self-defence under English law concerns only offences against property and person. Thus, the English doctrine of private defence does not differentiate between various interests that the person is entitled to protect. Moreover, the English concept of private defence rests on the principle that the use of violence against the assailant is justified, whereas the Islamic concept of private defence is based on the principle that each person is entitled to stop aggression through the defence that is tempered by compassion.

To elaborate further, in contrast to Islamic law, the common English law did not initially recognise the right of private defence.⁵⁶ The preceding analysis found that despite the Quran not explicitly discerning the right to self-defence, interpretation of the Quran and other sources of Shari'a clearly find that Allah condemns aggression and stipulates that it is incumbent on every individual to defend physical, economic, or familial interests against criminal threats. In contrast, the distinction of private defence as a justification in the framework of English common law took place only in the modern times.⁵⁷

Nowadays, English common law as well as the jurisprudence of South Australia recognises the concept of self-defence (private defence) as a justifiable reaction of an innocent individual to a culpable aggression.⁵⁸ In that vein, the person who has conducted private self-defence under English common law is not to be prosecuted for the inflicted injury or harm.⁵⁹ To be more specific, Section 15 (1) of the Criminal Law Consolidation Act 1935 provides that self-defence is a justifiable act only if it encompasses the following characteristics: (1) the defender's belief that his or her conduct is reasonable and necessary for the purpose of defence, and (2) the defender's belief that his or her conduct is reasonably proportionate to the threat which is believed by the defender to have existed.⁶⁰

The same legal interpretation of private self-defence may be found in instances of Islamic criminal law. Thus, Articles 57-64 of the Afghan Penal Code offer a circumstantial discussion

⁵⁵ A Q Oudah, *Al-Tashrih al-Jinai al-Islami* (Al-Risalah Publishing, Beirut, 1997), Vol. I, 473 [2].

⁵⁶ Per Lord Griffith, *Beckford v R* [1988] AC. 130, 144.

⁵⁷ Javed, *op.cit.*, 255 [3].

⁵⁸ M D Bayles, *Principles of law: a normative analysis* (D. Reidel Publishing, 1987) 334 [3].

⁵⁹ J Dressler, *Understanding criminal law* (Matthew Bender, 1995) 208 [1].

⁶⁰ Criminal Consolidation Act 1935 (South Australia) s 15 (1) (29 March 2013) <<http://www.legislation.sa.gov.au/lz/c/a/criminal%20law%20consolidation%20act%201935/current/1935.2252.un.pdf>>

of self-defence. For instance, Article 57 of the Code articulates that the conduct of a criminal act for the purpose of performing the legitimate right of defence must not be deemed a crime.⁶¹ Similar to the Australian legal definition of self-defence, the Afghan Penal Code prescribes that self-defence is a justification from criminal liability only if the defender is totally assured through logical reasons and rational instruments that a hazard of transgression is directed against life, good, or honour of the defender or someone else.⁶²

Methodology

This study was conducted by means of several research methods, such as doctrinal approach, the method of review and socio-legal research. The doctrinal format of research was used in order to treat the questions of law on particular issues as the main objects of research. In the context of the present research, the particular issues of doctrinal study were the justifications and excuses of criminal liability under the law of Shari'a. The doctrinal format means that the explorations were made largely as the legalistic research, coupled with the examination of specific statements of law and a complex analysis of legal reasoning.

Also, the present research made use of the method of review. Review should be considered an overhaul and critical evaluation of the knowledge from previous studies. The method of review provided theoretical and methodological contributions to the researched topic. These contributions were dependent on the nature of review as a secondary data collection method. This means that review did not report about original or new empirical findings. It manifested itself as a reconsideration and evaluation of the already known findings concerning the justifications and excuses of criminal liability under the law of Shari'a. In the context of the present study, the method of review helped to cast light on the gaps and drawbacks in existent publications on the justifications and excuses of criminal liability under the law of Shari'a.

As far as the last method is concerned, socio-legal approach should be recognized as an inter-disciplinary approach to scrutinizing law, legal phenomena, and correlations between them and social institutions. To put it briefly, socio-legal approach combined peculiarities of sociological and legal studies. The legal nature of the aforesaid studies manifested itself through the employment of a variety of methods towards the investigation of law and legal phenomena, whereas the sociological constituent of the studies requires the legal phenomena of justifications and excuses of criminal liability to be explored from the perspective of society and its social institutions, such as religion of Islam.

Discussion

The main objective of the section of Discussion is to offer the evaluation and interpretation of the research findings in relation with the research questions. In the framework of this article, it needs to be stated that the research questions were answered completely. It should be reiterated that the main research question was to explore the unique features of justifications and excuses from criminal liability under the law of Shari'a. The comprehensive answer to the aforesaid research question was found, because the conducted research not only clarified the

⁶¹ The Penal Code of Afghanistan, above n 26, Article 57.

⁶² Ibid Article 59.

legal dimensions of justifications and excuses from criminal liability under the law of Shari'a, but also provided a viable differentiation between the concepts of justification and excuse. That is, self-defence was found to be a justification, whereas age, necessity, duress, and intoxication were disclosed as the excuses from criminal liability.

The second research question was conceived to explore the major similarities and discrepancies of the right to self-defence under the Shari'a law and the law of the Australian state of South Australia. As a result of exploration, it was found that the two systems of law had both similar and different traits. Among other things, the two systems of law were found to be similar in the recognition of self-defence as a justification, rather than an excuse, from criminal liability. Regardless, the biggest difference between the two systems of law was found to lie in the fact that the law of South Australia considered self-defence as a right, whereas Quran prescribed that self-defence was an obligation. Additionally, the law of South Australia was found to allow self-defence as the protection of a person and property, whereas the law of Shari'a was found to permit self-defence as the protection of individual reputation and dignity.

Conclusions

Considering the findings discussed above, it is possible to generalise that Islamic criminal law offers a very specific interpretation of justifications and excuses of criminal liability. The conducted study managed to provide comprehensive answers to the two questions of research. The research objectives were also accomplished, including:

1. Insight into the concept of criminal liability and its justifications under the Islamic criminal law.
2. Identification of various justification and excuses from criminal liability under the Shari'a, such as the criminal intent, necessity, age, duress, age, and the right to self-defence.
3. A comparison of the specificities of self-defence under the Shari'a law and the criminal law of South Australia.

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