The Legal Dimensions of Self Defence Under Islamic Jurisprudence

by

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ABSTRACT

Self-defence in Islam is always viewed as a violent phenomenon that is inevitably connected with the application of physical force. The use of force has been considered one of the salient features of self-defence that corresponds to the precepts of Islam. The Quran provides permission to apply force in self-defence. However, the general permission to use force in self-defence does not entail any confinements on how the force should be used or who is entitled to apply the force. Most theories of private defence under Islamic law are shaped by its purpose as a regulator of social and individual conduct. Under Islamic law, necessity may have different meanings. Necessity can be viewed as a separate criminal law defence that has nothing to do with other defences such as private defence. Alternatively, it may be regarded as a requirement of private defence. The principle of necessity is essential in terms of establishing the proof that the assailant acted in self-defence. The major influences of Muslim culture upon Islamic law, including the law regulating private defence, manifest themselves in the way that homicide is addressed, which is closer to concepts of popular justice than in other non-Muslim cultures. The cultural aspect of Islamic law provides political elites with an effective mechanism of control and repression. The study of differences and similarities provides an opportunity to illuminate our understanding of law and the process of its development. As both systems have their own methodology for tackling legal issues, their different approaches to similar problems will provide fresh insights leading to revitalised solutions. It will also be helpful to understand the methodology and the legal reasoning of both systems; this will lead to a better understanding of law in general while providing an efficient means for

improvement. Thus, the adoption of Islamic criminal legislation often serves as a prerequisite to the promotion of corporal punishment, particularly flogging, not only for *hadd* offences, but also for crimes that are not related to Islamic criminal law at all.

DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed.... .....

Date.....21st Oct 2018…….....

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LIST OF PUBLICATIONS

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  Khalid Owaydhah
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CHAPTER 1

PART 1 BACKGROUND OF THE RESEARCH

1. Introductory notes

The purpose of this research is to explore and explain the phenomenon of self-defence as it is regulated by Islamic law. This project uses both primary and secondary research materials and employs several methods. The researcher expects that the project at issue has provided valuable research findings, taking into account the fact that theoretical and empirical instruments and knowledge were juxtaposed. The present research was driven by the vigorous desire to cast light upon the theoretical understanding of self-defence from the perspective of Muslim jurists. The review of academic literature focused on understandings of self-defence. Primary research methods, such as the case studies and unstructured interviews, were used to scrutinize the legal reasoning of Islamic jurists and to develop an understanding of their approaches in relation to the underlying principles of self-defence outlined in the literature review.

Besides, the present research framework was conceived to compare and contrast the salient features of Islamic legal models of self-defence and the doctrine of self-defence under English law. The primary research methodology of case studies in conjunction with unstructured interviews fostered the dynamics of unravelling situations. In the first phase of the primary research, all data relevant to Muslim jurists and their understanding of self-defence through the prism of real-life practical situations was collected. The quality and pertinence of the data collection procedures were ensured by the efficacy of field notes. In the second phase of the primary research, it was possible for the researcher to narrow the

boundaries of the investigatory activities in order to establish and scrutinize the salient features of the cases in question, i.e. the principles of self-defence in the context of real-life situations. The third phase of the study was actualized as a draft report of what had been established and construed in the framework of primary research.

In summary, the current project was directed at answering a set of urgent questions for academic research such as:

a) Is it possible to justify self-defence resulting in murder through the Islamic juridical concepts of *qatl shibh al-amd* (unintentional murder) or *qatl al-khata* (murder by mistake)? How is this position considered by Islamic judges, lawyers, jurists and other participants in the legal process?

b) Is it possible to discern the doctrine of self-defence under Islamic jurisprudence?

c) What are the major discrepancies between the Islamic legal understanding of self-defence and the legal doctrine of self-defence under English law?

In order to facilitate the process of answering the above research questions, the research had the following objectives:

1) To gain insights into the understanding of self-defence and its principles under Islamic law.

2) To determine how the principles of self-defence are applied in practice by Islamic judges, jurists, lawyers, and other participants in criminal legal proceedings.

3) To carry out case studies in order to provide an empirical rather than theoretical investigation into the roles and functions of the principles of self-defence and their roles in shaping the legal reasoning of Muslim jurists, judges, lawyers, and other participants in criminal legal proceedings.

4) To compare and contrast the approaches taken towards a legal understanding of self-defence in different countries and in Islamic law countries in order to discern and construe the major arguments for and against the Islamic legal model of self-defence.

The present study's significance lies in the fact that the research findings it provides—especially by putting under scrutiny the opinions, legal reasons, and professional viewpoints of Islamic jurists, lawyers, judges, and other participants in criminal legal proceedings—are capable of extending the legal boundaries of the Islamic legal model of self-defence.

2. Hypotheses

The present research project was conceived to test the validity of a series of research hypotheses. Specifically, the following hypotheses were verified as a result of employing the primary research methodology:

a) The Islamic juridical concepts of *qatl shibh al-amd* (unintentional murder) and *qatl al-khata* (murder by mistake) (dependent variables) justify murder in self-defence (independent variable).

b) Self-defence under Islamic jurisprudence (dependent variable) has a doctrinal nature (independent variable).

3. Concept of self-defence in Islam

It is important to first ascertain the legal dimensions of self-defence in Islam. Islam establishes links between self-defence and the use of force.[1] Self-defence in Islam is always

[1] Routledge, C & J Arndt, 'Self- sacrifice as self- defence: Mortality salience increases efforts to affirm a symbolic immortal self at the expense of the physical self' (2008) 38(3) *European Journal of Social Psychology*, 531-541.

viewed as a violent phenomenon that is inevitably connected with the application of physical force. Thus, the use of force can be considered to be one of the salient features of self-defence according to the precepts of Islam.[2] Specifically speaking, Islam and Islamic law, as an authoritative constituent of Islam permit the use of force in self-defence and in defence of those who are assaulted and actually unable to defend themselves.[3] The use of force in self-defence is not offensive in nature and, thus, the offensive theory of jihad, as another constituent of Islam, is not applicable to the situations of self-defence.[4] The vast majority of Muslim jurists are prone to advocating the defensive theory of force (in the domestic context) and the defensive theory of jihad (in the international context). The specificity of self-defence in Islam stems from the fact that this category can be applied in different contexts.[5] On the one hand, self-defence may be manifested through private defence of an individual person, while on the other hand, self-defence may be regarded as the use of force by a nation or groups of people.[6] A more detailed analysis of the two legal and philosophical paradigms of self-defence in Islam is offered in chapter 2, section 2.2,

4. Private self-defence versus general self-defence

Although Islam does not specifically differentiate between the two contexts in which force may be applied, it is still essential to examine the disparity between self-defence as an individual right or obligation and self-defence as the *jus ad bellum* of Islamic law. Thus, both

[2] K Trapp, 'Back to basics: necessity, proportionality, and the right of self-defence against non-state terrorist actors' (2007) 56 (01) *International and Comparative Law Quarterly*, 141-156.
[3] NA Shah, 'The use of force under Islamic law' (2013) 24 (1) *The European Journal of International Law* 343.
[4] A Jalal, Self and sovereignty: Individual and community in South Asian Islam since 1850 (Routledge, 2002) 20.
[5] Shaheen Sardar Ali and Javaid Rehman, 'The concept of Jihad in Islamic international law' (2005) 10 (3) *Journal of Conflict and Security Law*, 321-343.
[6] H Von Stietencron, 'Religious configurations in pre-Muslim India and the modern concept of Hinduism' (2005) *Representing Hinduism: The construction of religious traditions and national identity*, 51-81.

paradigms of self-defence originate from a number of common Quranic verses and sources of Islam. More precisely, the *Quran* verse 22:39 provides permission to apply force in self-defence.[7] The permission to use of force in self-defence is not accompanied by any constraints on how that force should be used or who is entitled to apply the force.[8] However, this passage from the *Quran* specifies that the permission to apply force—in other words, to fight—is provided for those individuals who initiate the use of force against wrongdoers. In other words, the presumption of wrongdoing is the key requirement for the application of force in both private and general self-defence. This Quranic verse may be reinforced by another passage from the *Quran* verse 2:190, which highlights that the permission to use force is restricted to the methods permitted by Allah in order to prevent transgression in Islam.[9] This implies that Allah does not tolerate the transgressors. Despite the common-sense interpretation, the Quranic verse 2:190 can be interpreted differently for the purposes of private self-defence and general self-defence. The Islamic doctrine of general self-defence suggests that the right to apply force is ascribed to Muslims as a generic term and reflects the general permission provided in verse 22:39 to fight against aggressors, who, by definition, general self-defence means fighting combatants regardless were Muslims or non-Muslims in self-defence..[10] However, the Quranic verses 22:39 and 2:190 are applicable specifically to individual or private self-defence. The Quranic verse 4:75 also applies to cases of individual self-defence as it permits the use of force in the defence of those

[7] Surat al-Hajj V:39.
[8] T Ruys, & S Verhoeven, 'Attacks by private actors and the right of self-defence' (2005) 10 (3) *Journal of Conflict and Security Law*, 289-320.
[9] J N Maogoto, 'War on the enemy: self-defence and state-sponsored terrorism' (2003) 4 *Melb. J. Int'l L.* 406.
[10] A Phillips, 'When culture means gender: Issues of cultural defence in the English courts' (2003) 66 (4) *The Modern Law Review*, 510-531.

individuals who are incapable of defending themselves such as weak men, women, and children.[11]

In contrast to general self-defence as an Islamic right to fight non-Muslim aggressors to protect the Islam the private right of self-defence is the individual right to defend oppressed and weak Muslims and other people who are unable to defend themselves. Here, it is essential to grasp the major difference between general self-defence and private self-defence: the former is directed against aggressors in general and does not envision Muslims as aggressors, whereas the latter is directed against individual violators and can be applied against Muslims if they are found to be the assailants. Another significant difference between general self-defence and private self-defence originates from the fact that general self-defence is an attribute of the law of war,[12] whereas private self-defence is a justification in criminal law. The law of war has an international nature and significance, whereas criminal law has a more personal and domestic essence. In analysing the disparity between general self-defence and private self-defence, it is important to underscore that some scholars are inclined to associate general self-defence with public defence, whereas the concepts of individual self-defence and private defence are used interchangeably. In light of the categorisations of self-defence as public and private, it must be pointed out that the notion of public defence or general defence is closely linked to the necessity of guarding against aggression and general infringements on the public good.[13] However, the idea of private defence stems from Islamic principles that guarantee the rights of individuals to liberty, life,

[11] G O'Boyle, 'Theories of justification and political violence: examples from four groups' (2002) 14 (2) *Terrorism and Political Violence*, 23-46.
[12] W M Reisman, & A Armstrong, 'The past and future of the claim of preemptive self-defense' (2006) *American Journal of International Law*, 525-550.
[13] C Warbrick, & Z W Yihdego, 'Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications' (2007) *56*(03) *International and Comparative Law Quarterly*, 666-676.

health, and property. These principles of Shari'ah prescribe that no individual rights can be abridged without the due process of law. Thus, it is possible to deduce that any infringement on the right to life, health, chastity, and property is explicitly declared to be unlawful under Islamic law.[14] In this sense, private defence serves as an instrument of assurance that the right to life, health, chastity, and property are not infringed upon; if the aforementioned rights are breached, then the individual can protect his or her own interests without the fear of being prosecuted for the use of force in the process.

Under Islamic law, it is possible to discern between two major paradigms that enable the division of self-defence into private defence and public defence. The first paradigm is the specificity of interests called to be protected by two different types of self-defence. In the context of public defence, the interests of the moral, social, and legal values of a Muslim society as a whole are brought to light. Therefore, public or general self-defence seeks to protect the common values of Islamic society as the basis of every Muslim country. On the other hand, private defence is directed at the protection of a person's body, the chastity of a woman, property, or other lawful interests of an individual in personalised cases of aggression.[15] Muslim jurists are prone to covering the right of private defence with the term *Daf'u Al- Saa'il* which means the right or necessity of warding off the aggressor (assailant). Unlike general (public) defence, which is directed against a violation of social norms and tenets, private defence is instrumental in warding off the aggression caused by an individual against an innocent individual.

[14] A Khurshid, *Islam: its meaning and message* (Islamic Council of Europe, London, 1976), 106.
[15] S Zubaida, 'The politics of the Islamic investment companies in Egypt' (1990) 17 (2) *British Society for Middle Eastern Studies. Bulletin*, 152-161.

5. Analysis of the major theories

After the key discrepancies between general and private defence have been ascertained, it is essential to examine the influential legal theories that gave rise to the doctrine of private defence under Islamic law. The majority of the theories of private defence under Islamic law are shaped by the purposes of Islamic law as a regulator of social and individual conduct.[16] Thus, some Muslim jurists purport that defence, both private and general, should be viewed through the prism of the theory of *maqasid al-Shari'ah* (purposes of the Shari'ah).[17] In analysing the structure of this theory, it is necessary to have recourse to Al-Ghazali (1058–1111), a noteworthy Muslim jurist, who highlights two prominent purposes of Islamic law: the *dini* or the purpose of hereafter; and the *dunyawi* or the purposes relating to the present world.[18] Furthermore, Al-Ghazali subdivides Earthly purposes into four categories: (1) the preservation of life (*nafs*); (2) the preservation of progeny (*nasl*); (3) the preservation of intellect (*'aql*); and (4) the preservation of wealth (*mal*).[19] These items constitute the five fundamental purposes of law, which are also referred to as *Darura* (primary purposes).[20] The primary purposes are followed by the secondary purposes of Islamic law, which are dependent upon and inseparable from the primary purposes.[21] Also, it is possible to discern a third set of categories, which are referred to as *tawassu'* (ease) and *taysir* (facility) under Islamic law. The third set of purposes is also covered by the term *tahsinat*, meaning complementary values. The key objectives of *hajat*

[16] A J Bellamy, Just wars: from Cicero to Iraq (2006), 82.
[17] M Munir, 'The protection of women and children in Islamic international law: a critique of John Kelsay' (2002) 25 *Hamdard Islamicus* 69.
[18] D Kretzmer, 'The inherent right to self-defence and proportionality in jus ad bellum' (2013) 24 (1) *European Journal of International Law*, 235-282.
[19] S Al-Ghazali, *I-Mukhil wa Masalik al-Ta'lil* (Baghdad: Dar al-Kutub al-'Ilmiyyah, 971), 186-87.
[20] M Abo-Kazleh, 'Rethinking International Relations Theory in Islam: Toward a More Adequate Approach' (2006) 5 (4) *Alternatives: Turkish Journal of International Relations* 18.
[21] S Tadjbakhsh, 'International relations theory and the Islamic worldview' (2009) *Non-Western International Relations Theory: Perspectives on and beyond Asia* 174-96.

and *tahsinat* are to protect and defend *Darura*. When viewing self-defence through the prism of the various purposes of Islamic law, it must be pointed out that the proponents of this theory discern two critical facets of self-defence as a legal phenomenon. Thus, on the one hand, private self-defence has positive aspects as it helps to secure the interests of an individual. On the other hand, self-defence has negative facets as it preserves those interests.[22] More specifically, the positive facets of private self-defence may be deduced from the teachings of a prominent Muslim jurist, Abu Ishaq Ibrahim b. Musa al-Shatibi (1320-1388), who claims that a legal notion such as self-defence manifests itself through the affirmation of its components and the recognition of its foundations.[23] In contrast, the negative aspects of self-defence may be unravelled through the expulsion of the actual or expected disharmony.[24] This implies that positive manifestations of self-defence occur when the actual application of force in self-defence creates the conditions for the facilitation and promotion of other essential principles and doctrines in Islamic law, whereas negative manifestations of self-defence lie in protection and in guarding against aggression and assault.[25]

6. Theory of necessity when considering different sects

Apart from the theory of the purposes of Islamic law, the issue of private defence may also be analysed through the prism of the theory of necessity. Thus, under Islamic law, necessity may have different meanings. In one context, necessity can be viewed as a separate criminal law defence that has nothing to do with other defences such as private

[22] H A Sadri, 'An Islamic perspective on non-alignment: Iranian foreign policy in theory and practice', in *The Zen of International Relations* (pp. 157-174) (Palgrave Macmillan UK, 2011).
[23] G Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer' (2013) 24 (1) *European Journal of International Law* 283-290.
[24] E Gellner, *Muslim society* (No. 32) (Cambridge University Press, 1983).
[25] K Fattah, & KM Fierke, 'A clash of emotions: The politics of humiliation and political violence in the Middle East' (2009) 15 (1) *European journal of international relations* 67-93.

defence.[26] In another context, necessity may be regarded as a requirement of private defence. In analysing necessity as a requirement of private defence under Islamic law, it must be pointed out that the complete and successful actualisation of necessity in terms of private defence is likely to justify the act of the defender. To justify the act of defender under Islamic law, it is essential to fulfil the following two conditions: first, the conduct of the defender must be necessary to defend or facilitate the interest at issue; second, the conduct of the defender must inflict only proportional or reasonable damage in response to the threat.[27] Hence, it follows that the requirement of necessity is closely connected with the requirements of proportionality and reasonableness. If the inflicted harm is proportional to the threat from the assailant, the defender is considered to have acted through necessity. However, the requirement of necessity is fulfilled only if the defender uses force to protect the interest at issue rather than to retaliate or to infringe upon the assailant's interests.

In Islamic law, it seems that the fact of proportionality and reasonableness of force is easier to establish than the fact that the defender acted in the defence of an interest at stake. Under Islamic law, proportionate force is always reasonable force, whereas deadly force is an exceptional measure. The use of deadly force always casts doubt upon the reasonableness and proportionality of private defence. The principle of necessity is essential in terms of establishing the proof that the assailant acted in self-defence. However, different legal schools of Shari'ah adopt various interpretations of necessity as a requirement for private defence. Thus, Hanbalites (section 2.4.4) imposes more stringent constraints upon

[26] N J Coulson, 'The state and the individual in Islamic law' (1957) 6 (01) *International and Comparative Law Quarterly* 49-60.
[27] J Rehman, 'The sharia, Islamic family laws and international human rights law: Examining the theory and practice of polygamy and talaq (1986) 21 (1) *International Journal of Law, Policy and the Family* 108-127.

the problem of private defence by claiming that it is impossible to prove the necessity of private defence without making the defender provide evidence, regardless of whether the assailant was notorious for violent conduct.[28] If the evidence helps to establish that the assailant possessed a deadly weapon and attacked the defender, the application of the deadly force will be justified and, thus, deemed necessary. However, according to Hanbalites, the mere proof that the assailant entered the defender's dwelling does not automatically imply that the use of the deadly force against the assailant is justified.

However, representatives of the Malikite school (section 2.4.2) point out that the inability of the defender to justify the use of deadly force by evidence makes him or her liable to *Qisas*. In order for the defender to invoke his right to private defence, it will be necessary for him to prove that the death of the assailant was inflicted in the course of the lawful exercise of his right to private defence.[29] According to the Malikites, if the defender fails to prove that the application of deadly force was necessary, he will be convicted of murder. All things considered, the principle of necessity is an important element of private defence under Islamic law.[30] Although different schools of Islamic law focus on various dimensions of the principle of necessity, all concede that necessity is most significant in cases where the defender applies deadly force.

7. Gap between Islamic and English concepts of self-defence

One of the assumptions to be verified in the framework of this study is that there is a gap between Islamic and English concepts of self-defence. This gap may handicap the

[28] A A An-Na'im, Toward an Islamic reformation: Civil liberties, human rights, and international law (Syracuse University Press, 1996), 122-123,145,128.
[29] J W Messerschmidt, *Masculinities and crime: Critique and reconceptualization of theory* (Rowman & Littlefield Publishers, 1993), 191.
[30] W A Schabas, 'Islam and the death penalty' (2000) 9 *Wm. & Mary Bill Rts. J.* 223.

actual enhancement of self-defence as a doctrine of Islamic law.[31] When analysing this gap, it is necessary to note that although English law is abundant in provisions that regulate the problem of private defence, the legal situation in the country is not absolutely clear. After analysing various pieces of academic research, it would be possible to conclude that there is no consistency and no single approach to how the problem of private defence should be regulated under English law.[32] This is manifested particularly through a multiplicity of disputes regarding the existing law and the desirable law.[33] As far as the existing law is concerned, a salient feature of English law concerning private defence is that the law regulates private defence not merely as self-defence, but also as the criminal law defence of another person.[34] In other words, English law considers the purpose of the criminal law defence of the use of force to be crime prevention and to facilitate arrest.[35] This type of private defence has significant effects on the use of force in self-defence, with Article 3 of the Criminal Law Act 1967 stating that the use of force is permissible for crime prevention, as well as for the conduct of a lawful arrest.

According to a recent study of interpreting the contours of self-defence within the boundaries of the rule of law, the common law and human rights, English law academics and scholars are still debating an extremely fundamental and principal question: are the traditional rules of English common law that regulate the problem of private defence—particularly those relating to the rules of proportionality, necessity, and the duty to retreat—

[31] F Pollock, & F W Maitland, *The history of English law before the time of Edward I* (Vol. 2) (University Press, 1899), 56.
[32] R M McPherson, Access *to justice: women who kill, self-defence and pre-trial decision making* (Glasgow Caledonian University, 2015), 24.
[33] P D Clarke, 'Legitimate self-defence in Medieval theory and practice: the European Ius Commune and English common law compared' (2015) *Rivista Internazionale di Diritto Commune*, *25*.
[34] A Ashworth, & J Horder, *Principles of criminal law* (Oxford University Press, 2013), 78.
[35] C Harlow, 'Self-defence: public right or private privilege' (1974*) Criminal Law Review* 528; See above n 34 39-140.

still applicable in present-day England, or does Article 3 of the Criminal Law Act 1967 replace all traditional common law rules that may be viewed as contradictory.[36] There is no definite answer to this question and English laws of private defence remain unsettled. Some scholars, such as Smith and Hogan, believe that Article 3 of the 1967 Act overrides the traditional rules of common law addressing the problem of private defence and directs the universal principle of reasonability. Conversely, Card, Cross and Jones advocate the standpoint that the traditional common law rules and the 1967 Act has simultaneous application.[37] In contrast, Ashworth maintains that the 1967 Act was not designed to supplant the common law rules on private defence, and the courts have continued to develop and perfect the rules.[38] A variety of different approaches can also be found in the publication *The Law Reform Commission of Canada and the Defence of Justification* by Garneau.[39] The existence of multiple approaches to the regulation of private defence by English common law and English statutory law widens the gap between English and Islamic concepts of self-defence. However, there is one principle that may be common for both jurisdictions—the principle of reasonableness.[40] Thus, irrespective of the meaning of private defence in English and Islamic law, the use of force must be reasonable to qualify as a criminal law defence. Under both English law and Islamic law, the principle of reasonableness is essential for the analysis of self-defence. According to English law, the reasonableness of self-defence may be dependent upon the requirement for retreat, although the requirement to retreat is not a decisive factor for the examination of reasonableness. Islamic law also

[36] C Elliott, 'Interpreting the contours of self-defence within the boundaries of the rule of law, the common law and human rights' (2015) 79 (5) *The Journal of Criminal Law*, 330-343.
[37] A Norrie, Crime, reason and history: A critical introduction to criminal law (Cambridge University Press, 2014), 288, 301-303.
[38] See above n 34.
[39] Grant Smyth Garneau, 'The Law Reform Commission of Canada and the defence of justification' (1983) 26 (1) *Criminal Law Quarterly*.
[40] J Holroyd, & F Picinali, 'Implicit Bias, Self-Defence, and the Reasonable Person' (2016) 109.

does not recognise the requirement to retreat as a decisive precondition for reasonableness. Under the *Quran* and other sources of Islamic law, self-defence is a duty rather than a right. Therefore, the simultaneous existence of the duty to defend and the duty to retreat might create more contradictions in the understanding of private defence under Islamic law.

In exploring English law further, it is possible to reveal many other uncertainties that hinder the progress of filling the gap between English and Islamic concepts of private defence. For example, English law regulates the defence of property in a manner that is fundamentally different from the way in which the defence of the body is regulated. Under English law, the defence of property qualifies as a valid criminal law defence if the defender actually believes that his act is reasonable; whereas, the defence of the body qualifies as a valid criminal law defence if the defence is objectively reasonable. Hence, it follows that English law restricts the defence of the body to objective reasonability, and is not dependent upon the subjective perceptions and intentions of the defender; whereas, the defence of property has a more subjective tonality and should be interpreted in conformity with the defender's vision, perception, and belief.[41] Although Islamic law imposes objective restrictions to the reasonableness of defence that are similar to those under English law, the law of Shari'ah does not articulate specific deference towards the subjective reasonableness of the defence of property. In other words, Islamic law recognises objective reasonableness in relation to all types of private defence.

The gaps between English and Islamic concepts of private defence can also be traced in other elements of private defence such as the severity of the danger, the necessity

[41] D Archibugi, M Croce, & A Salvatore, 'The debate about the prohibition of the use of force and collective security as a structural element of international relations discourse through the centuries' (2014) 89.

of the force, the immediacy of the response, and the proportionality of the force.

The requirement of necessity in Islamic law has already been discussed in the previous section of this chapter. The diversity of opinion in different Muslim juridical schools is not reflected in English law and academic literature. The latter does not show an appreciable dispute around the meaning and application of the necessity requirement.[42] Under English law, the requirement of necessity consists of a number of factors that need to be taken into consideration. First and foremost, there is a requirement that the defensive action against the assailant must be necessary both quantitatively and qualitatively. The term *qualitatively* implies that the defender must have taken into consideration other available alternatives, while the term *quantitatively* means that the defender must have taken into account the measure and degree of the force that was applied by him or her in self-defence. Here, it must be underscored that, in contrast to Islamic law, English common law very specifically differentiates between the qualitative and quantitative elements of the necessity requirement of self-defence.

Additionally, the gap between English and Islamic concepts of self-defence can also be ascertained by scrutinising how the immediacy requirement of private defence is addressed under the two systems of law. Under English law, the immediacy requirement is considered to be an additional or extra facet of the menace—the threat of assault needs to be directly and immediately placed upon a legitimate interest.[43] However, unlike Islamic law, where the requirements of necessity and immediacy are equally important and horizontally placed in the framework of private defence, English law articulates that the requirement of immediacy stems directly from the requirement of necessity. This means that, under English

[42] See Above n 37, 278-279.
[43] Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing Limited 2006) 150.

law, the requirement of immediacy is inseparable from and subordinate to the requirement of necessity. A wide spectrum of English jurists and academics show their acceptance of the immediacy requirement. However, some tend to express the opinion that the requirement of immediacy is the most fundamental and significant requirement and must, therefore, be separated and differentiated from the necessity requirement.[44] However, the key problem in understanding immediacy lies in the fact that there is no codified definition of this requirement under English law. According to English common law, the requirement of immediacy consists of two aspects. First, private defence must be justified and carried out at the earliest possible moment—as soon as the threat is posed or incipient and not a moment earlier; i.e. the threat or danger must be imminent. Second, the application of force must take place while the danger still exists and not a moment later; i.e. the danger or threat must be present at the time when the force is applied. Unlike English law, Islamic law does not differentiate between the presence and imminence of danger as two separate facets of the requirement of immediacy. However, this does not mean that Muslim jurists and judges neglect these facets when considering individual cases of private defence.

The requirement of proportionality is important in defining both English and Islamic concepts of private defence. Moreover, English scholars and lawyers are prone to believing that the requirement of proportionality is the single condition for the establishment of private defence that has precise significance and the content of which would at one and the same time be part of the convenient rationale for private defence under English law. In this sense, English jurists and legal theorists suggest that the key importance of the proportionality requirement, is that, notwithstanding the existence of necessity, the defender must refrain

[44] S H Kadish and S J Schulhofer, *Criminal law and its processes* (London, 1989), 869.

from applying force because the price of his defensive action may be too high. Hence, it follows that English law and theoretical paradigms focus upon the concept of price when they analyse the contents and context of the proportionality requirement. However, the concept of price is less discernible in the studies of Islamic jurists or in the opinions of Muslim judges. In analysing the notion of price, English experts maintain that the proportionality requirement is manifested through the order, given to the defender, not to apply force in self-defence at all under specific circumstances, and to give up his or her right to self-defence in favour of the assailant in order to make the "wrong" have prevalence over the "right".[45] The rationale underlying the requirement of proportionality under English law seems to be not easily comprehensible. However, this rational has two fundamental implications. First, the requirement of proportionality depends upon the requirement of necessity and, thus, is shaped by it. Second, the requirement of proportionality has a flexible rather than a rigid nature and, therefore, cannot be interpreted as an absolute prohibition to use force in self-defence. Under English law, the requirement of proportionality is justified in the light of the social-legal order. That is, redundant harm to the assailant does not only fulfil the purpose of protecting the social-legal order, but, on the contrary, it causes substantial damage to the social-legal order and actually negates the purpose of private defence.[46]

As far as the second implication of private defence for the proportionality requirement is concerned—the flexible nature of the requirement—it must be asserted that the justification of private defence does not originate strictly or entirely from the comparison between the physical damage anticipated from the aggressor and the person assaulted,

[45] LA Alexander, 'Justification and innocent aggressors' (1987) 33 *Wayne Law Review* 1180; PH Robinson, *Criminal law defenses* (2 vols, MN, 1984), 88; GP Fletcher, 'The right and the reasonable' (1985) 98 *Harvard Law Review* 386.
[46] See above n 43, 167.

and, therefore, no rigidity of proportionality is required. In other words, the interest that the defender protects should be more substantial than the interest that is harmed by the defender in order to justify the damage inflicted upon the assailant. This is the twofold rationale that underlies the proportionality requirement of private defence under English law. In contrast, Islamic law does not view the requirement of proportionality as the dominance of the interest to be saved by the defender over the interest to be harmed by the defender. Muslim jurists and judges juxtapose proportionality and equality. *Qisas* is a clear example of how the principle of proportionality is interpreted under Islamic law. *Qisas* means equality, and Muslim lawyers define this term as the infliction of similar damage upon the assailant as he or she inflicted upon the victim. In terms of private defence, the principle of equality (proportionality) means that the interest to be protected by the defender must be adequate or equal in significance to the interest to be harmed by means of private defence.

8. Culture and self-defence

Finally, it is essential to raise the issue of the relationship between culture and self-defence. Various cultural factors and determinants play substantial roles in shaping the legal regime of self-defence, especially when the culture of the Islamic world is taken into consideration.[47] Specifically speaking, there is a strong nexus between Islamic culture and the regulation of private defence under Islamic law. Thus, the development and foundation of Islamic countries may be viewed as a religious duty for all Muslims as well as an attempt to bring paradise within the boundaries of such states. However, the emergence and

[47] K Walseth, & A Strandbu, 'Young Norwegian-Pakistani women and sport How does culture and religiosity matter?' (2014) *European physical education review*, 361.

evolution of every state, including Islamic states, is inevitably connected with the emergence and development of law.[48]

The major influences of Muslim culture upon Islamic law, including the law regulating private defence, also manifest themselves in the way in which homicide is addressed and is closer to concepts of popular justice than in other non-Muslim cultures. Additionally, the cultural impacts of Islam upon criminal law can be analysed through the prism of the influences of popular ideas on political elites in the Muslim world.[49] The cultural aspect of Islamic law provides the political elites with an effective mechanism of control and repression. Thus, the adoption of Islamic criminal legislation often serves as a prerequisite to the promotion, in a large arena, of corporal punishment, particularly flogging, not only for *hadd* offences, but also for crimes that are not related to Islamic criminal law at all.

A further example of how Islamic culture affects Islamic criminal law is that the victim's heirs actually control the criminal process, as they are a party to the trial and the prosecution often depends on their desire and will. Also, the victim's heirs may consent to an extrajudicial settlement of the case.[50] These examples clearly demonstrate the difference between Islamic and Western systems of criminal law. In the latter, the victim's heirs are not allowed to be parties to the criminal trial and may only be granted the status of witnesses without a say in the proceedings, whereas the cultural tendencies of Islamic societies are influenced by the role that the victim's heirs play in the framework of Islamic criminal proceedings.

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[48] M Verkuyten, 'Justifying discrimination against Muslim immigrants: Out group ideology and the five step social identity model (2013) 52 (2) *British Journal of Social Psychology*, 345-360.
[49] N Omar, & M A C Noh, 'Islamic Education Teaching Practice Based on the Cultural Diversity of Students' (2015) 4 (1) *Academic Journal of Interdisciplinary Studies*, 135.
[50] M Daneshgar, F B A Shah, Z B M Yusoff, N Senin, S F Ramlan, & M R B M Nor, 'A Study on the Notions of'Ali ibn Abi Talib in Malay Popular Culture' (2013) 6 (4) *Journal of Shi'a Islamic Studies*, 465-479.

9. Summary

Self-defence in Islam is always viewed as a violent phenomenon that is inevitably connected with the application of physical force. To that end, the use of force should be considered one of the salient features of self-defence that corresponds to the precepts of Islam. The majority of theories of private defence under Islamic law are shaped by the purposes of Islamic law as a regulator of social and individual conduct. Under Islamic law, necessity may have different meanings. In one context, necessity can be viewed as a separate criminal law defence that has no relation to other defences such as private defence. In another context, necessity may be regarded as a requirement of private defence. The principle of necessity is essential in terms of establishing the proof that the assailant acted in self-defence. Finally, it is essential to raise the issue of the relationship between culture and self-defence.

PART 2

HISTORY OF ISLAMIC CRIMINAL LAW

1. Introduction

A study of criminal Islamic law without an appreciation of the history of Islam as a religion would be impossible. This is because the Islamic legal system is considered a divine law that accompanied the appearance of the Islam religion in the texts of both the *Quran* and the *Sunna*. The Islamic legal system constitutes one of the major legal systems in the modern world today. For example, Iran and Pakistan, which have predominantly Muslim populations, officially apply Islamic constitutions.[51] These constitutions contain provisions to the effect that Islam is the state religion and all laws should be in conformity with Islam.[52] This chapter will offer a brief view into Islamic law, particularly Islamic criminal law, in order to provide a full understanding of the nature of Islamic law and its jurisprudential and legal concepts. The chapter is divided into five main sections: the nature and sources of Shari'ah, the categories of offences in Islamic law, the role of schools in the development of criminal Islamic law, the concept of rights and duties, and law as a part of religious belief.

2. Nature and Sources of Islamic law

The source of Islamic law is divided into two types: primary and secondary sources. The secondary sources are inherited from the primary sources.

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[51] Dr Martin Lau and Dr Doreen Hinchcliffe, *Introduction to Islamic* law (University of London Press, 2010) 9[1].
[52] Ibid.

2.1 Primary Sources of Islamic law

Sources of Islamic law fall into two main categories—primary sources and secondary or dependent sources; some sources are designated as agreed upon and others are disputed. In the classical view of Islamic jurisprudence, the Holy *Qur'an*, *Sunna* and *ijma* together with *Qiyas* comprise the primary sources.[53]The following sections discuss each source in detail.

2.1.1 The Quran

The *Quran* is the holy book of Islam, which all Muslims believe was revealed sequentially to the Prophet Muhammad (pbuh) by the angel Gabriel, and which contains the divine commands and duties for every Muslim.[54] The *Quran* is the first source of Islamic legislation and the is most important source of Islamic law. It contains about 6,200 verses and it is divided into two categories: *Ibadat* (issues belonging to Allah such as praying, fasting, etc.) and *Muamalat* (issues belonging to people such as sales, purchasing, work, etc.). [55] Generally, these verses contain matters of belief and morality, the five pillars of faith, social justice, legal contents, and ideas related to economics and other themes.[56] In addition, the *Quran* also contains about 70 verses that deal with civil law, 30 verses that deal with criminal law, 13 verses that deal with procedure and jurisdiction issues, 10 verses that deal with constitutional law, 25 verses that deal with international law, 10 verses that deal with economic and financial matters, and 70 verses that deal with family law.[57]

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[53] Hassan, Ahmad, "The Sources of Islamic Law" (Islamic Studies, 7th ed,1968) 13

[54] Abdul Allah Ibin Mohammed Bin Qudamah Al Mqdsi, *Rodat al Nather and Junto al* Manather (University of Imam Muhammad bin Saud, ١٩٧٨) (Arabic) (Author's Translation) 33-34.

[55] M H Kamali, *Principles of Islamic Jurisprudence* (The Islamic Text Society, Publictions 3th ed, , 2003) 25-[2].

[56] Ibid 26-[1].

[57] Azhar Javed, Intoxication & Self-defence: A Comparative Study of Principles of English Law and Shari'ah (PhD University of Islamabad, 2004) 27, 28 [4-1].

Moreover, the *Quran* is also the root of all other sources of Islamic legislation such as the *Sunna, Ijma, Qiyas, Ijtihad, Fiqh, and Usul al-Fiqh*. It significant that the *Quran* is the fountainhead of Shari'ah as this means that no one can override or encroach upon its special authority. The provisions of the *Quran* are interpreted, but it can be improved by secondary sources, which will be discussed later in this chapter. Therefore, the provisions of Shari'ah are unlike all other laws, such as the man-made laws, which can be changed by changes in policy or by governments.

It may be questioned why Muslims sanctify the *Quran* and follow its commands. Although the *Quran* is from Allah, it is inimitability itself; there is much evidence to indicate this.[58] First, the *Quran* is described as inimitable in terms of linguistic excellence and precision.[59] Second, it is described as inimitable in terms of the events narrated in *Quran* that will take place in the future, after the advent of Islam, or that happened in the past before the advent of Islam. These are several examples of events predicted in the early times of Islam that later occurred such as the victory of the Muslims in the battle of *Badr*, the conquest of Mecca, and the collapse of the Persian and Roman Empires.[60] Moreover, in terms of the events narrated in the past, before Islam or before the birth the Prophet Mohammed (pbuh), which have been confirmed by historical evidence such as the days of the Prophets Jesus or Moses (pbuh).[61] Finally, the revelations of scientific knowledge, such as the creation of the earth, humans, and the planetary systems,[62] indicate the inimitability in the *Quran*. Thus, anyone wants to understand Islamic legislation and laws must first turn to the *Quran* before looking at any other source.

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[58] See above n 55, 51-52.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.

2.1.2 The Sunna

The *Sunna* is the second most important source of Islamic law because it consists of the Prophet Muhammad's words (pbuh) and deeds, which were later transferred and recorded by the Prophet's companions. Indeed, the *Sunna* explains and elaborates the Quran's verses, which simultaneously constitutes an independent source of Shari'ah.[63] Furthermore, the *Sunna* explains the precise rules of the *Quran*, qualifies its absolute injunctions, and specifies its general statements.[64]

The importance and validity of the *Sunna* is heightened by the Holy Prophet, who not only taught but also practiced His teachings and applied them to all the important affairs of life. The hadiths, being the embodiment of the *Sunna*, were authenticated and attested to on the basis of the quality of the Isnad. The transmitter should be '*Adil'* and must therefore be honest and truthful by reputation in all his dealings. Towards the middle of the century, the Hadith had been established in its authoritative form and had acquired most of its detailed content.

The two most prominent authors and evaluators of the hadiths were Imam Muhammad ibn Isma'il al-Bukhari (810-870), later heralded by Muslims as being next in authority only to the Qur'an, and the Sahih of Imam Muslim ibn al-Hajjaj (261-875) whose prominence is close to that of Imam al-Bukhari.

For instance, it has been written in the *Quran* that the penalty of theft is the amputation of a hand. The method and conditions for applying this penalty can be found in the *Sunna* because this crime occurred at the time of the Prophet Muhammad (pbuh) and the companions of the Prophet who brought us the *Sunna*, who saw its implementation.

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[63] See above n 57, 28 [3].
[64] Ibid.

Thus, with respect to Islamic criminal law, the Prophet Mohammed (pbuh) explains in the *Sunna*, in general terms, the judicial procedures practised in cases of self-defence, and methods for gathering evidence of crimes punishable by *Qisas*, *Hudud*, and *Ta'azir* (which must be given by witnesses).

2.1.3 Ijma

All four Sunni schools of thought are in agreement with the doctrine of *Ijma*, although the rules and regulatory conclusions formed on the basis of *Ijma* vary in degree of sanctity between the various schools. However, there is an unanimity of opinion that once *Ijma* has been established, it cannot be repealed or overruled. The Muslim jurists are unanimously in accordance with the principle that all that Muslims consider good is good in the eyes of Allah; hence, the doctrine of *Ijma* implies that the rules derived from and formed upon the doctrine of *Ijma* entail divine approbation. It is therefore binding on Muslims to act on a principle that has been established upon *Ijma* by qualified legal scholars of any generation.

Ijma or consensus of opinion, is considered to be the third source of Islamic law. It has been defined as an agreement among qualified Muslim jurists about a particular legal issue such as the right to private self-defence irrespective of the country or the school of thought. The legitimacy of the *Ijma* has been approved by the *Quran*, which an important factor in the formulation of a good Muslim community that unifies Muslims through agreement with regards to the regulation of law.[65]

Ijma does not require a specific number of Muslim scholars to be applied to a controversial matter, but some of the Muslim scholars should be enough in that period.[66] There are various views among Muslims jurists about *Ijma*. Al-Nadame (one of the Muslim

[65] See above n 57, 30 [3].
[66] See above n 54, 132 -[2].

jurists),[67] for example, rejected the *Ijma* as a source of Shari'ah, although most Muslim scholars agree that the *Ijma* is the third source of Islamic law and an important legislative source.[68]

Whenever a new issue arises in a Muslim community that needs agreement amongst Muslim jurists (*Mujtahidun*), *Ijtihad* must prove several of elements as following.[69] First, there must be a number of *Mujtahidun*.[70] Second, *Mutahidun* must reach a consensus on one opinion about the matter at the time.[71] Third, the agreement of the *Mujtahidun* must be proven. Finally, *Ijma* should consist of the majority of *Mujtahidun* opinions.[72]

Muslim jurists should express their points of view clearly and openly about a controversial matter. Furthermore, *Ijma* is not legally binding without a general consensus of ideas about the matter.[73] Once consensus is reached, *Ijma* becomes an indisputable authority that cannot be challenged and the reason *Ijma* becomes indisputable is to avoid further debate among Muslim jurists.

2.1.3 Qiyas

The fourth and final source of Islamic law is *Qiyas* (analogy). It is usually applied on a principle of equality to identical causes and identical occurrences that are equally judged. *Qiyas* have been defined as attempting "to deduce, from earlier decisions, a rule that could be applied to a case not directly covered by either the *Quran* or the *Sunna*".[74] *Qiyas* is often applied between two matters, which, although different, involve a similar

[67] Ibid 128 [2].
[68] Ibid 132,133.
[69] See above n 55, 233-234.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] See above n 51, 19 [6].

cause, in order to obtain a decision or a judgment.[75] For instance, Shari'ah prohibits all intoxicants such as drugs or wine because they share the same cause, i.e. intoxication or loss of mind. It can thus be deduced that *Qiyas* is applied through four elements: the origin (wine), the branch (intoxicants), the cause (intoxication), and the rule (prevent the drinking of alcohol).[76] The Caliph (Leader of Muslims) Omar Ibn al-Khattab (may Allah be pleased with him) wrote to Judge Abu Mussa Al-Ashʿary and advised him, "Use analogies, make use of precedents and similar cases, and seek judgements which you consider to be closest to the truth and the most likely to earn the good pleasure of Allah".[77]

The objectives of *Qiyas* are to extend and develop Islamic criminal law at any time, particularly with regard to new cases that have the same effective cause as an original case that exists in the *Quran* and the *Sunna*.[78] However, Muslim jurists have different opinions about accepting the *Qiyas* as a source. The Maliki and Shafiq School accept *Qiyas* as a valid source of Islamic law and the Hanafi School strongly support *Qiyas* as source of Islamic law.[79] In contrast, several Muslim jurists consider *Qiyas* as a weak source of Islamic law and several, such as Shiite jurists, do not accept it as source in Islamic law.[80] Consequently, *Qiyas* is often considered to be an important source in Shari'ah because it can develop the Islamic legal system and can create new laws regarding matters that do not already exist in Islamic law.

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[75] See above n 54, 272 [2].
[76] See above n 55, 267 [3].
[77] Mohammed Ibn Al-Qayyim Al-Jauzih, Ealam al-Muaqain An-Rabb Al-Alamin (Dar Bin Al-Jauzih Publication, 1th ed 2002) Chapter 1, 24-27.
[78] See above n 55, 264-265.
[79] See above n 54, 276 [1].
[80] Ibid.

2.2 Secondary Sources of Islamic Law

The secondary sources of Shari'ah usually require flexibility in order to absorb changes in the conditions of the Muslim community. The basic principles that guide this legislation are justice, doing of good, and wisdom. The study of Islamic legal system leads to the conclusion that there are several matters that have been specified by a definite way in the sources of Shari'ah. However, there are several that are left to the discretion of jurists or society, so as to determine appropriate rules for people, but under the core condition that they must not contradict the principles of the primary sources. The important secondary sources are *Urf* (custom), *Ijtiihad*, and *Istihsan*.

2.2.1 Urf (custom)

Urf has been defined as those things that are common among people and become familiar or customary, a "recurring practices which are acceptable to people of sound nature".[81] At the time of the advent of Islam, there were many customs and laws among Arabs, which Islamic religion agreed with some and rejected others. The *Quran* and *Sunna* are the basis for the guidance of *Urf*, which means that the *Urf* is considered as a law unless it conflicts with provisions in the *Quran* and the *Sunna*. The *Quran* mentions the *Urf* in many cases; for example, verse 2:232 Allah says "When you divorce women, and they have reached their term, do not prevent them from marrying their husbands, provided they agree on fair terms. Thereby is advised whoever among you believes in Allah and the Last Day. That is better and more decent for you. Allah knows, and you do not know".

[81] See above n 55, 369 [2].

This (instruction) is an admonition for him among you who believes in Allah and the Last Day. That is more virtuous and purer for you. Allah knows and you know not".[82] Therefore, the holy *Quran* itself has stated the validity of *Urf* in terms of determining the maintenance of a wife. Jurists also consider the *Urf* as a source of Shari'ah by using four elements:

1 The *Urf* must be a common thing and a recurrent phenomenon.

2 The *Urf* must be in existence at the time of usage.

3 The *Urf* must not be in conflict with the clear text of the *Quran* or the *Sunna* and the principles of Shari'ah.

4 The *Urf* must not violate the principles of the law for others, whether absolute or partial.[83]

In several cases, *Urf* may be incorporated and assimilated by exercising *Ijtihad*, which could be specified by preference, public interest, or even the consensus of Muslim jurists. The *Urf* has been divided into two types, namely verbal (*Qawli*) and actual (*fi'li*).

Qawli is a general agreement among people on the usage and meaning of several words, although it's spread in different purposes rather than their literal meaning.[84] Consequently, an agreement of the customary meaning becomes dominant and the original or literal meaning is reduced.[85] There are many examples in the *Quran* and *Sunna* about the use of *Qawli*. One example is Lahm, which means meat, although the *Quran* usually uses it to include fish. However, the customary usage is for meat rather than fish.[86]

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[82] Surat Al-Baqarah, V: 232.
[83] See above n 55, 373-374
[84] Wahba Al zohily, Al-Wajiz Fi Usul Al-Fiqh, (DAR Al-Fikr, First Published, 1999) (Arabic) (Author's Translation) 97.
[85] See above n 55, 253 [4].
[86] Ibid.

Also, there are many examples in the *Quran* and *Sunna* about the use of *fi'li*. An example *fi'li* is the use of the right to self-defence in two different Muslim societies. In the first scenario, in Western society, if a husband sees a strange man at his house accompanied with his wife, he will suppose that he is a friend or a new neighbour. Thus, if the husband attacks that person, the situation is considered to be a crime. The reason for this is that Western societies are mixed and permit both men and women meet in a private place together, which is thus an *Urf*. However, in Arab societies, such a situation may be completely different. The husband will immediately fight that person under the condition of private self-defence because in that society it is not permitted to mix between men and women in private place such as houses. Therefore, the *Urf* plays a strong role in the application of the law of self-defence. As a result, the Shari'ah has approved the *Urf* in several cases as a valid law in terms of halal and haram, but one, which differ from one community to another.

2.2.2 Ijtiihad

Many jurists considered *Ijtihad* to be one of the most important sources of Islamic law after to the *Quran* and the *Sunna*. *Ijtihad* has been defined as the possession of a good ability to derive legal rule, which requires learning, deep knowledge, and effort from a jurists (*Mujtahidun*).[87] The most important difference between the *Ijtihad* and the *Quran* or the *Sunna* is that the *Ijtihad* continues the process of development by *Mujtahid*, irrespective of time or place.[88] In other words, *Ijtihad* continues to be the main tool for interpreting the divine message and relating it to cases that might changing in Muslim society in order to attain its justice aspirations and implementation.[89] The main role of *Ijtihad* is to focus on dealing with

[87] See above n 55, 315.
[88] Ibid.
[89] Ibid.

questions under Shari'ah, with specific concern for the practical rules of Shari'ah that usually regulate conduct.[90]

The *Ijtihad* cannot be exercised for issues of belief such as the creation of the universe, the existence of Allah, or the sending of prophets because there is only one correct vision in this regard.[91] The *Ijtihad* is usually applied to issues that are not clear or not defined under any Islamic rules.[92] For instance, Prophet Muhammad (pbuh) asked Muadh Ibn Jabal (may Allah be pleased with him), when he sent him to Yemen as a judge, "How will you judge between people?". Muadh replied that he would do so by the *Quran* and the *Sunna*, to which the Prophet said, "if you could not find an answer in *Quran* and *Sunna*?". Muadh said "I will see in my opinion (*Ijtihad*)".[93] There are many examples, including several military affairs, of *Ijtihad* by Prophet Muhammad (pbuh) and his companions (may Allah be pleased with them).

There is disagreement between jurists about the practices of *Ijtihad*.[94] Some Muslim jurists say that practices are divinely inspired, whilst others say that all practices are under the rubric of *Ijtihad*.[95] There are several requirements that must be fulfilled by the *Mujtahid* in order to be able to judge and accept his independent judgment. These requirements are as follows: [96]

- The *Mujtahid* must have knowledge of Arabic that assists him in understanding the *Quran* and the *Sunna*.

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[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] See above n 54, 159 [1].
[94] See above n 55, 483-484.
[95] Ibid.
[96] Ibid 477- 479.

- The *Mujtahid* must have a great knowledge in the *Quran* and the *Sunna*, particularly the aspect that is related to the subject of *Ijtihad*.
- The *Mujtahid* should know about the consensus of the companions of the Prophet, particularly the successors and the leading Imams, and even the opinions of previous *Mujtahids*, in order to avoid conflict with a previous *Ijma*.
- The *Mujtahid* must have a great knowledge of the *Qiyas*.
- The *Mujtahid* must have knowledge about the objectives (*maqasid*) of the Shari'ah.
- The *Mujtahid* must be an upright (*`adil*) and trusted person who refrains from committing sins.

All Muslim jurists have agreed that the *Ijtihad* is the collective duty (*fard kafa'i*) of all qualified jurists, if there is a new matter that stands in the way of the Muslims; whereas, the *Ijtihad* is a personal obligation (*wajib* or *fard `ayn*) of the qualified *Mujtahid*, if the matter is urgent.

Thus, *Ijtihad* is a process of deriving rules from the divine sources through the knowledge and experience of Muslim jurists and is considered as a bridge between the immutable provisions of the divine sources and the contemporary needs of Muslims. Moreover, the *Ijtihad* creates rules with a rational character in order to avoid differences of opinion, to apply the doctrines of *Ijma*.

2.2.3 Istihsan

Istihsan is a word derived from Hassan (good or beautiful), which literally means approved or preferable.[97] In a juristic sense this means exercising personal opinion without rigidity or unfairness, which could result from the implementation of rules by *Mujtahidun*.[98]

[97] Ebin Mandor, Lsan Al-Arabs (DAR Al-Murf, First Publication) (Author's Translation) 877-879.
[98] See above n 54, 85.

Mujtahidun have described the *Istihsan* as a process of taking the best provision from several provisions of legitimacy in the light of strong evidence from the *Quran* and the *Sunna*.

There are three sources of *Istihsan* in the *Fiqh*: the provisions of legitimacy, the opinions of *Mujtahidun*,[99] and the proofs of the *Quran* or *Sunna*.[100] Indeed, *Istihsan* is considered as a supplementary source of *Qiyas* in certain cases in the *Fiqh*. Therefore, if the *Qiyas* opposes an *Ijma*, public interest or *Urf*, and the principle of eliminating harm, the *Mujtahidun* will tend to use the *Istihsan* to achieve facilitation for the people.[101] It is worth noting that *Mujtahidun* sees the *Istihsan* as an important branch of *Ijtihad* and *Fiqh*, which enhances the adaptation of Shari'ah to the changing needs of society at any time and encourages flexibility.[102]

In the Quran verse 2:185 Allah mentions the principle of facilitation for people in the Shari'ah, saying "Allah desires ease for you, and does not desire hardship for you".[103]

Companions of the Prophet have applied the *Istihsan* in certain cases. For example, the caliph, `Umar b. al-Khattab, (may Allah be pleased with him) did not apply the *Hudud* penalty of amputation of a hand for the crime of theft during the year of the famine in Medina.[104] In fact, the *Istihsan* has become the subject of much argument among schools, such as Hanafi, Maliki, and Hanbali jurists, who consider the *Istihsan* as a secondary source of Shari'ah. However, jurists of Zahiri and Shi'i reject this.[105] Thus, the *Istihsan* is a method

[99] By the way, this is choice of Abu Hanifa.
[100] See above n 54, 85-86.
[101] See above n 55, 334[1].
[102] Ibid 324 [3].
[103] See above n 54, 272 [2].
[104] See above n 55, 325.
[105] Ibid.

that can improve the existing Islamic law, stripping any unfair and undesirable elements from it, without change in the existing law.

2.3 Categories of Offences in Islamic Law

Offence in Islamic jurisprudence is defined as "committing of an act which is prohibited and which there is punishment for such commitment … or omitting an act which is required and which there is a punishment for such omission".[106] From the above definition, it can be deduced, that there no offence unless there is a penalty for it. In a broad sense, the Shari'ah has imposed appropriate penalties for each offense and different penalties for all criminal offences to be implemented by an Islamic ruler.[107]

In a narrow sense, Muslim scholars have divided offences in Islam into three major categories: *Hudud* (prescribed punishments) crimes; *Qisas* (law of equality) crimes (and both *Hudud* and *Qisas* for serious crimes); and *Ta'azir* (chastisement) crimes for the least serious crimes.[108]

2.3.1 Hudud

Hudud offences are considered as serious and harmful crimes, and each crime has a certain penalty that is precisely prescribed in the *Quran* and the *Sunna*. *Hudud* cannot be changed or reduced by a judge because *Hudud* offences are written with details of the application in the *Quran* and the *Sunna*.[109] Furthermore, if an offender is been found guilty by the court, the penalty is determined by Shari'ah and the offender has no right to add, alter, or reduce (appeal) the penalty after the judge's decided, as *Hudud* is considered to be

[106] Abdullah Saad Alarefi, Overview of Islamic Law (PhD Brunel University UK, 2009) 727 [2].
[107] Ibid.
[108] Ibid.
[109] Ibid.

a right of Allah.[110] Thus, in a case where the offender is found guilty, the court has no discretion when punishing *Hudud* crimes.

Six offences are defined in either the *Quran* or in the *Sunna* under the enactment as *Hudud* offences. These are *Zina* (adultery), *Qathaf* (false accusation of adultery), *Riddah* (apostasy or renouncing Islam), *Shurb Al Khamr* (drinking liquor or intoxicating drinks), *Sariqah* (theft), and *Ḥirābah* (highway robbery).[111] The penalties for *Hudud* offences are as follow: [112]

- The penalty of *Zina* is 100 lashes, or stoning if she/he is married.
- The penalty of *Qathaf* is 80 lashes.
- The penalty of *Riddah* is death.
- The penalty of *Shurb Al Khamr* is 80 lashes.
- The penalty of *Sariqah* is amputation of the right hand.
- The penalty of *Ḥirābah* is amputation of the right hand and left foot.

The judge may treat *Hudud* offences as lesser *Ta'azir* offences if there is doubt about the guilt of a *Hudud* crime, for example if there is no confession or too few witnesses to a crime.

2.3.2 Qisas

The second category of offence in criminal Islamic law is the *Qisas*. This means 'equality' in criminal Islamic law terminology. *Qisas* offences are of two types: the crimes of

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[110] Ibid.
[111] Abd Al-Rahman Al-Jaziri, *Kitab Al-Fiqh Ala Al-Madzahib Al-Arba'ah*.(DAR al-Kotob al-Ilmiyah, 2003) (Arabic) (Other Translation) 12 .
[112] Mohammed Ahmed Bin Rushid Al-Qurtubi and Dr Abd Allah Abadi (ed), Sharh Bdait Al-Mujtahid Nhait Al-Muqtasid (DAR Al-Salam, 1th , 1995) (Arabic) (Author Translation) 2235-2257-2251-2261-2271.

murder or of loss (loss of an eye, fingers, or hand). Such crimes are punishable in two ways: by the *Qisas* (equality) law of parity or equality or by *Diya* (compensation).[113]

For instance, if someone amputate another person's hand in a fight, the victim can ask for the amputation of a hand or for money as compensation. In the Shari'ah, if both parties agree, especially the party that is seeking retribution, with the approval of the court, *Qisas* can be replaced by *Diya*. This can benefit both parties. It does not aim to ease the punishment of *Qisas*, but it presents a choice for the victim, who may prefer money. As mentioned in the Quran verse 2:178 Allah says "O you who believe! *Al-Qisas* (the law of equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood-money, then adhering to it with fairness and payment of the blood-money to the heir should be made in fairness. This is alleviation and a mercy from your Lord. So, after this whoever transgresses the limits (i.e. kills the killer after taking the blood-money), he shall have a painful torment".[114]

The main objective of the *Qisas* in criminal Islamic law is the protection of the lives of human beings from any transgression.[115] *Qisas* offences have been divided in the *Quran* into five categories: murder, voluntary killing (similar to intentional killing or voluntary manslaughter), involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming.[116] *Hudud* and *Qisas* have almost the same meaning in that both are penalties prescribed by Allah and a right for the victim. Thus, *Qisas* offences are a right

[113] See above n 54, 217.
[114] See above n 54, Surat Al-Baqarah, V: 178.
[115] See above n 100, 729[2].
[116] See above n 114.

for the lives of human beings that are stated in the *Quran* and can be solved through several options that benefit both parties.

2.3.3 Ta'azir

The third category of offences is *Ta'azir*. In the broadest sense in criminal terminology this means chastisement, and it is different from *Qisas* and *Hudud* offences. However, it is considered as complementary to *Hudud* offences or less serious than *Hudud* offences if a judge has doubts about the defendant's guilt or there is not enough proof for *Hudud* offences.[117] *Ta'azir* offences provide the court authority with jurisdiction and freedom to inflict a more appropriate punishment on the offender, which depends on the circumstances of the crime.[118] In contrast to Western law, the court will acquit the accused because there is not enough evidence against the offender.[119]

There are three categories of *Ta'azir* penalties, which are as follow:

- Criminal acts that are related to *Hudud* offences such as simple robbery, robbery with absent or weak evidence, and attempted robbery.
- Criminal acts that are normally punished by *Hudud* but have been replaced by *Ta'azir* offences because there is not enough evidence.

Several crimes are mentioned in the *Quran* or in the *Sunna* without a specific penalty. For example, *Riba* (unlawful interest) and bribery;[120] as mentioned in Quran verse 3:130 Allah says "O you who believe! Do not feed on usury, compounded over and over, and fear Allah, so that you may prosper".[121]

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[117] See above n 57, 97 [2].
[118] Ibid 98 [2].
[119] Ibid.
[120] See above n 54,731.
[121] See above n 51, Surat Ali-Imran V: 130.

The basic objective of the penal systems in Shari'ah is to punish the offender whilst protecting society from the recurrence of the offence.[122] Thus, *Ta'azir* offences encompass all offences in Shari'ah that are not written as a penalty in the sources of Shari'ah and are delegated to the judge.

2.4 Role of the Schools of Jurisprudence in Developing Shari'ah

After the Prophet Muhammad (pbuh), Islam continued to expand, particularly in the days of Umar; the distances between the different areas under Islamic rule also increased.[123] As a result, many centres of Islamic learning or schools of jurisprudence (doctrines) appeared that were interested in the study of Sunni jurisprudence.[124] Examples of Islamic schools are the Hanafi School, the Maliki School, the Shafi School, and the Hanbali School.

2.4.1 Hanafi School

The Hanafi School was founded by Imam Abu Hanifa, Al Nuaman Bin Thabit who was born in Kufa, Iraq (699–767). Famous students of Imam Abu Hanifa are Abu Yousaf, Muhammad al-Shaybani, and Zufar.[125] Imam Abu Hanifa was born in Kufa in (699AD) to a Persian family. His father was a merchant, and he is considered a *Tabi* because he remained in close contact with the teachings of the Prophet and his decisions was mainly inspired by his precedent.[126] The doctrines of Hanafi were spread in Iraq at the beginning of the eighth century. They then spread to Syria, Afghanistan, Turkish central Asia, and South Asia.[127] The school was

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[122] See above n 54, 731.
[123] Wael B. Hallaq, *The origins and evolution of Islamic law* (Cambridge University Press 2005).
[124] Mohammed Umar Al-Ashkar, *History of Islamic Jurisprudence (*DAR Al-nafus. 1991) (Arabic) (Other Translation).
From a legal point of view, in France, doctrine means: the writings of legal scholars, but it is also used to describe these scholars as a group. The term is used with the Islamic schools as a group of people (a school of thought within fiqh (Islamic jurisprudence))
[125] Al-Hafiz Emad Al-Din Esmaeil Bin Katheer, *Al-Bdayah and Al-Nhih* (DAR Al-Hijrah, 1998) chapter 13, 414-420 Arabic) (Author Translation).
[126] See above n 55, 315.
[127] See above n 54, 718 [2].

named after its founder, Abu Hanifa, by his students and is considered as the greatest and the most famous school of jurisprudence in the history of Muslim law because it has an immense power of law reasoning.[128]

The Hanafi School was far superior to its contemporaries technically and in terms of its high development, circumspection, and refinement.[129] This was because the Hanafi School did not confine itself only to real problems, but also considered hypothetical problems that could arise in the future, proposing solutions by the interpretation of laws. This is considered to be a feature of the Hanafi School.[130] For instance, Imam Abo Hanifa was the first of the Muslim jurists to think about the translation of the meanings of the *Quran* into non-Arabic languages. He also invented a council of jurisprudence for Muslim jurists to discuss new matters in *Fiqh*, which consists of forty Muslim jurists. The school method in the field of jurisprudence is moderate, judicious, and more sensible. Therefore, the majority of the Sunni Muslims around the world follow this school.[131] The major base of this school, which builds laws on *Qiyas*, was adopted as the official law in the Ottoman Empire in Turkey and by the Mughals in India.[132]

Imam Abo Hanifa learned religious sciences such as jurisprudence and Hadith from the Prophet's companions.[133] Imam Abo Hanifa wrote many books on Hadith and *Fiqh* such as Al-Musnad, Al-Fiqh Al-Akbar, and Al-Mkhkrej.[134] Many books have also been written on

[128] See above n 55, 315.
[129] Ibid.
[130] Ibid.
[131] See above n 54, 719 [1].
[132] Ibid.
[133] Ibid.
[134] Al-Khatib al-Baghdadi, History of Baghdad (DAR Al-Garb Al-Islami, 2001) (Arabic) (Author Translation).

the views of Imam Abo Hanifa, which collect his *Fatwas;* however, the most important book is Al-Mabsoot.[135]

2.4.2 Maliki School

The second Islamic school in terms of chronology is the Maliki School, which was founded by Imam Malik bin Anas, who was born in (710–795AD) in Medina. He is also called Imam Dar Al-Hijrah.[136] Imam Malik was one of the greatest scholars of Hadith at that time, and his famous book is Al-Muwatta which is about the *Fiqh*.[137] The Al-Muwatta is considered as a collections of traditions and *Fiqh* and consists of the general practice of the Muslims of Medina, which is a base for the legal propositions in the school.[138] This is because, in his view, the practices of the Muslims who live in Medina were more reliable than verbal traditions.[139] Al-Muwatta covered various areas of *Fiqh* such as prayer, fasting, and the correct conduct of business relations. It also contains about 2,000 Hadiths attributed to the Prophet (pbuh), and thus it is considered the greatest contribution of Imam Malik.[140]

The Maliki School uses the *Quran* and the *Sunna* as primary sources, followed by *Ijma* and *Qiyas*, as with other Schools. Moreover, it uses the practices of the people of Medina as a secondary source.[141] It is worth noting that Imam Malik often used free opinion, particularly in cases where the practice of the Muslims of *Madina* did not exist.[142] The teachings of Imam Malik spread from *Madina*, over North African (Algeria, Tunisia, and

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[135] Ibid.
[136] See above n 55, 719 [3].
[137] Ibid.
[138] See above n 57, 43 [1-2].
[139] Ibid.
[140] See above n 54.
[141] Ibid.
[142] See above n 57, 43 [3].

Libya), and to central and western Africa and the eastern Arabian coasts in the Arabian Peninsula.[143]

2.4.3 Shafi School

The third school of Islamic jurisprudence is the Shafi School, which emerged in Medina through Imam Muhammad Bin Edris Al-Shafi. He was born in Gaza, Palestine, in (767–820AD) and also belonged to the tribe of *Quraish*.[144] Imam Shafi saw and learned from several companions of the Prophet Mohammed (pbuh)—Ata Bin Abi Rabah, Abd Allah Bin Abas, and Abd Allah Bin Al-Zubair, for example.[145] He was described as having the best knowledge of the meanings of the *Quran* and *Sunna* and an expert on the Hanafi and Maliki schools.[146] Imam Shafi was a student of Imam Malik Bin Anas, which influenced his thoughts (in relation to strong logic and reason, for example).[147]

The Shafi School is like the other schools that use the primary principles of the School the *Quran*, *Sunna*, *Ijma*, and *Qiyas*.[148] Imam Shafi is considered as the first jurist to write about Islamic jurisprudence and the methodology of law, which is a significant feature of Shafi's jurisprudence.[149] These methodologies have been freely borrowed from various sources such as the Malik School and the Abu Hanafi School; the Shafi School is thus a compromise place between the two schools.[150] The Shafi School or Shafi doctrine can be found in Eastern Africa, South Arabia, and several parts of Eastern India and South East Asia such as Indonesia and Malaysia.[151]

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[143] See above n 55, 334[1].
[144] See above n 54, 720 [2].
[145] Ibid.
[146] Ibid.
[147] See above n 57, 720 [2].
[148] Ibid.
[149] See above n 57, 44 [2].
[150] Ibid.
[151] Abdullah Saad Alarefi, Overview of Islamic Law (PhD Brunel University UK, 2009) 727 [2].

2.4.4 Hanbali School

The last School is the Hanbali School, which was founded by Imam Ahmad Bin Hanbal in Baghdad (780-855), who was one of Imam Shafi's student.[152] Imam Ahmed often travelled between Islamic countries such as Iraq, Syria, and the Hijaz in order to seek knowledge and collect Hadiths.[153] In addition, he directed his efforts to the study of the and collecting Hadiths has already been mentioned, which assist him when deriving many rules of law.[154] The greatest work of Imam Ahmad is Al-Musnad, which contains more than 30,000 Hadiths. For this reason, several scholars consider him as a narrator of Hadith more than a jurist.[155] Thus, the Hanbali School is described as having judicial subtlety without parallel.[156]

Imam Ahmed was described as pious, unassuming, and tolerant, and also having the strength to say the right word. Imam Ahmad suffered from a great sedition that was the creation of the *Quran* in the days of Caliph Al-Mamoun and Al-Mutasim. Imam Ahmad has been coerced into saying to the people of Baghdad that *Quran* is words of prophet Mohamed by Caliph Al-Mamoun and Al-Mutasim. The Caliph and all the people of Baghdad were confused about this sedition, which came by Al-Mutazilah. Thus, the Caliph wanted to find the truth by asking the best jurist at that time, who was the Imam Ahmed.[157] The Caliph threatened Imam Ahmed with death or imprisonment to force him to state that the *Quran* did not come from Allah and was instead man-made. However, he refused because he believed that this was an apostasy and atheism.[158] Furthermore, Imam Ahmed did not demand that

[152] See above n 54, 720-721.
[153] Ibid.
[154] See above n 57, 45 [1].
[155] See above n 54, 132 -[2].
[156] Ibid.
[157] See above n 126, Chapter 10 from date of year 218 AH.
[158] Ibid.

his followers fight or overthrow the Caliph; he was very patient with regard to the word of truth and said that the *Quran* was revealed to the Prophet Muhammad from Allah by Gabriel.[159] The Caliph then released him from prison, when Caliph makes sure that *Quran* has been revealed to the Prophet Muhammad from Allah by Gabriel.[160]

The Hanbali School used the *Quran* and the *Sunna* as basic resources. Imam Ahmed always tried to draw law from the *Quran* and the *Sunna*.[161] The majority of Muslim scholars consider that the Hanbali School is stricter than other Muslim schools because Imam Ahmed rejects any proposition not based on the *Quran* or the *Sunna* and extensively used *Istishab*.[162] The Hanbali School was strong in Iraq and Syria until the Ottoman conquest, reviving in the 18th century in the Kingdom of Saudi Arabia, Qatar, Syria, and Palestine.

As a result, no Muslim schools or jurists have the authority to create new laws (such as common law) on the basis of their views; their function is to discover and expound the principles of Islamic jurisprudence[163] in order to find answers to new questions or matters, that been recently updated by *Ijtihad* and *Qiyas*.[164] Jurisprudence and Islamic laws have been developed through the diligence of Muslim scholars, independent of government and its legislative organs.[165]

3. Concept of Rights and Duties in Shari'ah

All modern laws emphasise human rights but show much less concern towards obligations. These modern laws govern the relationships between individuals. However, in Shari'ah there are obligations towards God, other humans, and even towards oneself, which

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[159] Ibid.
[160] Ibid.
[161] See above n 54, 132 -[2].
[162] See above n 57, 45 [2].
[163] Ibid 45-46.
[164] Ibid.
[165] Ibid.

must be fulfilled.[166] With regard to the obligations towards Allah, the Quran states, "I did not create the jinn and the humans except to worship Me".[167]

Shari'ah has emphasized the obligations between people, even non-Muslims, in terms of injustice, oppression, and harm. Prophet Mohamed said on the 10th of Dhu'l−Hijja (On 6th of March, 632AD) in the Mosque of Arafa in Makkah: "your blood, your property and your honour are sacred to you like the sacredness of this day of yours, in this city of yours, and in this month of yours. You will soon meet your Lord and He will ask you about your deeds. So, do not turn after me unbelievers (or misguided), some of you striking the necks of the others".[168]

Each person has an obligation toward him or herself in term of harm; the prohibition of suicide in Islam, for example. The issue of suicide in Western countries is considered to be a large problem and a threat to society. This is because people consider it as a right or a personal decision. Allah said "O you who believe! Do not consume each other's wealth illicitly, but trade by mutual consent. And do not kill yourselves, for Allah is Merciful towards you".[169]

Shari'ah is considered as a doctrine of duties and a code of obligations and individual of rights. The concepts of relationships are defined between the individual and the society in terms of duties not in terms of rights in Shari'ah.[170] All people are under the obligation to respect the right of life of others. Therefore, if someone violates this, he or she should be liable to the penalty of *Qisas*.[171] For example, suicide is considered as an offence because

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[166] Mohammed Bin Ahmed Al-Sarakhsi, *Usul Al-Sarakhsi* (DAR al-Kotob al-Ilmiyah, first published, 1993) (Arabic) (Author's Translation) 289-300.
[167] Surat Adh-Dhariyat, V: 56.
[168] Abu Al-Hussein Muslim Bin Hajaj Alnisaburi, HADITH Sahih Muslim [Source of Sunna] (Author's Translation) 1043- [Hadith n 4160].
[169] Surat An-Nisa, V: 29.
[170] See above n 57, 294 [2].
[171] See above n 55, 25-[2].

it is transgression of the right of Allah— because Allah owns people's lives. People are equally bound to fulfil their obligations, and there is no authority that can exempt one from these obligations. Those people who do not fulfil their obligations do not have any legitimate rights.[172]

If everyone performs his/her duty well toward the rights of others, the rights of others will be safeguarded and people will enjoy their freedom and live in peace and security.[173] Indeed, the emphasis on obligations leads to harmony between people in an Islamic community and infringements of rights will naturally vanish. [174] Conversely, an emphasis on rights lead to difficulties because everyone has concerns about his or her rights and it is difficult to simultaneously consider obligations towards other people.[175]

4. Law is a Part of Religious Belief

It is worth noting that Islamic law is a part of religious belief for Muslims because Muslims believe that the application of Shari'ah's provisions and rulers are a religious duty.[176] The *Quran verse 5:43* mentions this duty; Allah said, "Those who do not rule according to what Allah revealed are the unbelievers".[177]

In terms of faith and provision, the principles of Shari'ah are highly respect within the hearts of Muslims because they believe they came from Allah and are therefore sacred. This belief encourages Muslims to follow these principles sincerely and to consider it as the basis for true belief.[178]

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[172] See above n 57, 55 [4].
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Muhammad Ali, Maulana, The religion of Islam : a comprehensive discussion of the sources, principles and practices of Islam (The Ahmadiyyah Anjuman Ishaat Islam sixth published Lahore, 1990) 358-365.
[177] Surat al-Ma'idah, V: 43.
[178] See above n 57, 53 [5].

As a result, a person might confess himself or herself guilty in front of the judiciary before the police find him or before the court knows anything about his or her crime. This is known as the Islam *Tawbah* (repentance) and hence is a feature of Shari'ah.[179] The *Quran verse 2:160* has indicated the *Tawbah*; Allah said, "Except those who repent, and reform, and proclaim. Those—I will accept their repentance. I am the Acceptor of Repentance, the Merciful".[180]

According to the previous Ayah[181], Allah gave a promise of forgiveness during life and after death for loyal Muslims who do *Tawbah*, which is the main motivate for doing *Tawbah*. Not all Muslims are honest and loyal to the *Tawbah*, but many do it because the *Tawbah* is one of the principles of Shari'ah. There are many examples of cases of *Tawbah* in Islamic history. For instance, there is a famous story of *Tawbah*, which happened in the time of the Prophet Mohammed. This is the story of Mauz Ibn Malik and Al-Gameih, who confessed to adultery to Prophet Mohammed (pbuh).[182]

Consequently, a majority of Muslims respect all the legislation of Shari'ah and they look at it as sacred; hence, no one can be opposed to it whether they be rulers or judges.

5. Summary

The preceding chapter highlighted the sources of Islamic criminal law and the methodology of Islamic punishments. This was followed by the relationships between the Islamic legal system and the religion. In addition, it attempts to clarify the concept of the rights and the duties in Shari'ah. Shari'ah is unlike other laws and is the product of time, built

[179] Ahmed Abd al halim Ibn Taymiyah, *Tawbah* and Astagfar (DAR Al-Arabi first Published 1994) (Arabic) (Author Translation).
[180] Surat Al-Baqarah, V: 160.
[181] By the way, a Ayah means literally in Shari'ah a sentence or phrase in the holy Quran.
[182] Abu Abd Allah Mohammad Ismail Al-Bkahry, Al-Jama Al-Sahheh, (Salfy Library first published, 1979) Chapter n 4 page 253 [Hadith n 6815, 6816].

on the interests of rich people only sometimes and the conflicts for power between politicians.

The Shari'ah has been described as a divine source. It does not accept change because the *Quran* is the first source of legislation. The meaning of its words is unambiguous, but multiple interpretations are possible. In addition, the *Sunna* is one of the sources for Islamic legislation but is secondary to the *Quran* in terms of its explanations and descriptions of how to apply penalties. The secondary sources of Shari'ah are complementary to the primary sources, which give legal answers for certain cases that arise in the community.

Categories of offences in Islamic law, such as *Hudud*, *Qisas*, and *Ta'azir*, have been discussed in detail. Each offence has a special condition and methodology, which have come from the *Quran* and the *Sunna*. Moreover, the role of the Islamic schools of jurisprudence in the development of Shari'ah have been demonstrated. The basis of each school and its objectives has been discussed.

Finally, the concepts of rights and Muslim duties in Shari'ah has been explained. It is important to be aware that Islamic law is unlike man-made law. Islamic law concerns the relationships between individuals, Allah, and oneself. Thus, Islam looks at each case precisely and assigns a suitable law to it.

CHAPTER 2

PART 1 CONCEPTUAL FRAMEWORK OF SELF-DEFENCE

1. Introduction

The conceptual framework's aim is to provide insights into the Islamic legal understanding of self-defence and its principles, as well as to highlight the principles of English law with regard to self-defence. There may be certain circumstances that excuse a defendant from liability or render his conduct justified. Criminal liability requires the consideration of all circumstances leading to the commission of a potentially criminal act; it is not based solely on the nature of such an act.[183] A defendant may claim a justification or excuse for the *mens rea* on the grounds of necessity, provocation, self-defence or being under duress (i.e., avoiding a threat of harm). This chapter has been devoted to demonstrating the resources in Shari'ah and English law and to dealing with the defences in both laws that may be invoked by a defendant. The study will analyse whether Shari'ah recognizes the principles of defences in criminal liability and whether these principles are compatible with the principles of English law. Thus, the main research questions of this thesis are formulated as follows: *Is it possible to justify self-defence resulting in murder through the Islamic juridical concepts of 'qatl shibh al- 'amd' (unintentional murder) or 'qatl al-khata (murder by mistake)?*

[183] Robinson, Paul H., "Criminal Law Defences: A systematic Analysis" 82 (1982) Columbia Law Review, 199 at 250.

2. Self-defence in Shari'ah Sources

2.1 Self-defence in the *Quran*

The key and most universal source of Islamic law is the *Quran*. This means that the search for answers to legal questions must begin from the analysis of Quranic verses. As far as the issue of self-defence is concerned, the *Quran* is not explicit about whether a man is entitled to self-defence. Nevertheless, some verses of the *Quran* contain implicit wording justifying self-defence. The fact is that Islamic lawyers infer the right to self-defence from *Quran* 2:195.

According to *Quran* verse 2:195, it is incumbent on Muslims to prevent their own deaths, because a Muslim's reluctance to avert the cause of his or her own death is prohibited under the *Quran*.[184] In this light, Yunus writes that under Quranic verses, the defence of one's life is a valid defence against allegations of criminal liability if an individual kills another person in order to prevent the threat of being killed by the assailant.[185]

To continue, the Quranic verses not only prescribe the right of an individual to self-defence, albeit implicitly, but also provide legal grounds for the juxtaposition of other forms of defence. Thus, Peters acknowledges that the *Quran* recognises defence of an individual's life also when a man is on the verge of starvation and, under such circumstances, kills the owner of (e.g. the food) products in order to save his life. However, in such a situation, self-defence would be deemed a legitimate justification only if it is proved that the owner of the food refused to give food to the defendant.[186]

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[184] Surat Al-Baqarah, V: 195.
[185] Mohamad Ismail Bin Mohamad Yunus, 'The Right of Self Defence of A Person: A Comparative Legal Alignment' (2015) 11 *Journal of Islamic Law Review*,118-119.
[186] R Peters, Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century (Cambridge University Press, 2006), 25.

In accordance with the *Quran*, a salient feature of killing the owner of the food in self-defence lies in the necessity of substantiating that the owner of the food acted unlawfully against the killer by refusing to provide the killer with food. Also, in such a case, it is vital to prove that the killer was truly deprived of food and on the verge of starvation.

Referring to the Quranic verses, it is possible to deduce that any harm inflicted as a result of self-defence, such as wounding or even death, is recognised as lawful and leads to no financial or criminal liability of the defender because it is considered a form of lawful retaliation for the assailant's aggression.

To continue, the *Quran* –also supplies females with the right to self-defence.[187] Thus, from the Quranic verses, it is possible to infer that Muslim women are entitled to self-defence under special circumstances, including killing an abusive husband. In such situations, it is essential to prove that the husband was genuinely abusive. Otherwise, if the husband was not at fault, a wife who considers her marriage unbearable could dissolve it via *Khula*[188] without killing her husband.

The right of a woman to kill her abusive husband can be deduced not only from those Quranic verses that address the formal legal aspects of an individual's obligation to prevent harm to his or her life, but also from those Quranic verses that regulate the social aspects of a woman's life. The fact is that the *Quran* guarantees protection of the ties of the woman/wife with her original family, especially if taking into consideration that the parents of the wife are usually responsible for the arrangement of the marriage.[189]

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[187] W B Hallaq, *An introduction to Islamic law* (Cambridge University Press, 2009), 67.
[188] Khula means the separation of the wife in return for a payment; the husband takes the payment and lets his wife go, whether this payment is the mahr which he gave to her, or more or less than that.
[189] See above n 189, 68.

To this end, if the parents are usually involved in the arrangement of the marriage, they will usually be responsible for the well-being of their daughter. Hence, it follows that the failure of the marriage always leads to inconveniences, with economic and other consequences. In accordance with the *Quran*, close ties between a wife and her parents are often regarded as some sort of countermeasure against possible abuse from the husband.[190]

Nevertheless, the *Quran* states that the preservation of ties between the wife and her family do not prevent abuse in all cases, albeit they may reduce such abuse. To this end, it is possible to infer that killing an abusive husband is justifiable under conditions when the ties between the wife and her parents appear to be irrelevant for the prevention of the abuse.

Not opposed to Hallaq, Peters also acknowledges a woman's right to self-defence. In conformity with Peters' research, the *Quran* guarantees a woman's right to self-defence in the form of defence of a woman's honour.[191] That is, defence may be carried out not only to protect one's life, but also to protect one's honour, particularly when a female is sexually assaulted by a man and fights back.

Moreover, similar to a man's case, self-defence by a Muslim woman is more of an obligation than a right under the *Quran*. In other words, it is incumbent on a woman to defend herself if she is capable of it in order to satisfy the requirements of Quran 2:195. It is interesting to note that the Quranic verses contain no restrictions on the methods used by women for the purposes of self-defence. This implies that Muslim women are entitled to defend themselves by all available means in order to ward off the assault, including killing the attacker under the circumstances when this is the only possible means of defence.[192]

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[190] See above n 189, 68.
[191] See above n 188, 25.
[192] Ibid.

The lack of a precise definition of self-defence in the Quran, as well as the absence of an explicit right to self-defence, gives rise to multiple interpretations and considerations. According to Wasti, although the *Quran* leaves the field of self-defence wide open, there are general Quranic principles that make it possible to infer the existence of the right to self-defence in numerous occasions, and not only for the protection of one's life against an assailant or killing an abusive husband.[193]

Thus, Wasti examines a very important principle of Quranic law – the principle of equalisation.[194] Following this principle, it is possible to deduce that the right to self-defence is an entitlement to equalisation.[195] Following the Quranic precept of equalisation, it should be inferred that a man or woman acting in self-defence seeks to equalise the status quo that is disturbed by the individual who inflicts harm either via active behaviour (an assailant) or through passive conduct (an owner of food).

The principle of equalisation is well-elaborated in *Quran* verse 99:7-8. According to these Quranic verses, an individual who is responsible for even a negligible amount of good deeds will encounter good, whereas an individual who is responsible for even a negligible amount of evil deeds will encounter evil.[196] The aforementioned Quranic verse underlies not only the principle of equalisation, but also the principle of justice in Islamic law.

The fact is that the two principles – justice and equalisation – intertwine in the law of Shari'ah. Equalisation is often posed and understood as the means toward the restoration of justice, whereas on the other hand, justice is regarded and comprehended as the ultimate goal of life of a Muslim. As far as the concept of self-defence under the *Quran* is concerned,

[193] T Wasti, The application of Islamic criminal law in Pakistan: Sharia in practice (BRILL, 2009), 80.
[194] Ibid.
[195] Surat al-Baqarah, 2:178.
[196] Surat az-Zalzalah, V:7-8.

Hallaq argues that the *Quran* permits not only killing a Muslim assailant, but also killing a non-believers who is engaged in war against Muslims.[197] This means that the killing of a non-believers is implicitly recognised by the *Quran* as a form of self-defence, taking into account that a non-believers who is engaged in war against a Muslim automatically becomes an impediment to the Quranic precept to refrain from allowing harm against oneself.

From the Quranic perspective, the killing of a non-believers who is engaged in war against Muslims manifests itself as some sort of retaliation, equalisation and restoration of justice because war against Muslims is a priori a violation of the status quo in Muslim society as well as an encroachment on justice.[198] However, it needs to be stressed that not the status of a non-believers, but his engagement in war against Muslims, makes the killing justified.

The principle of justifiability is another important precept of Quranic law that needs to be taken into consideration when analysing the right of a Muslim to self-defence. The essentiality of providing justification for killing or inflicting any harm constitutes the spirit of Islamic law.[199] In this connection, the *Quran* prohibits homicide or any unjustified infliction of harm. Therefore, in Muslim countries, homicide in the form of killing without legal justification is prohibited and punishable.

Given the Quranic verses on justification as a legal principle, it is possible to deduce that self-defence and its consequences are not prohibited or punishable by law because they correspond with the fundamental principle of justification. In other words, killing in self-defence is a justified killing; thus, it is not a crime in the traditional meaning.

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[197] See above n 124, 143.
[198] See above n 189.
[199] B G Weiss, *The spirit of Islamic law* (University of Georgia Press, 2006), 78.

Following the arguments presented in Weiss' publication, it is possible to infer that the Quranic principle of justification is also reflected in the right of a Muslim woman to self-defence. Thus, Weiss makes it apparent that the overall purpose of the *Quran* is, among other things, to preserve the patrilineal family unit.[200]

This implies that Quranic law prohibits certain kinds of sexual activity, such as fornication, because it is extramarital. Given this, it is possible to deduce from the Quranic verses that a woman may kill a man who tries to rape in self-defence if she finds him guilty of a forbidden sexual activity.

In like manner, the principle of justification may be evaluated in the light of the Quran's intent to preserve property from infringements and abuses. It is possible to discern at least two occasions of how the *Quran* protects property. The first case is the prohibition of particular types of transactions, such as gambling, due to the fact that it is unlawful on the ground of indefiniteness of the consideration received for money paid.[201]

The second case of how the *Quran* protects property may be associated with defence of an individual's property. Under the Quranic verses, it is possible to justify killing or wounding in defence of one's property. The practice of applying Quranic verses shows that a high level of violence is permitted if the lawful owners of stolen property show they were resisted when taking back their property.[202]

When summarising evidence from various studies regarding the concept of self-defence in the Quran, it needs to be reiterated that the Quranic verses provide an implicit recognition of self-defence. The fact is that there is no definition of self-defence in the Quran, nor does the *Quran* prescribe requirements of self-defence. Nevertheless, the right to self-

[200] Ibid.
[201] Ibid.
[202] See above n 188, 27.

defence may be deduced and interpreted from some specific verses of the *Quran* that address related issues, such as justice, retaliation, justification, obligation to prevent loss of one's life, etc.

2.2 Self-defence in *Sunna*

Sunna is the way of life prescribed as normative for Muslims on the grounds of the practices and teachings of the Islamic prophet Muhammad and the interpretations of the Quran.[203]

Therefore, *Sunna* is an important part of Islamic law that is closely connected with the Quran but extends the latter's understanding. Moreover, *Sunna* delineates the practices and contemplations Muhammad narrated and practically implemented as both a teacher of the Shari'ah and its best exemplar.[204]

As far as self-defence is concerned, *Sunna* provides different interpretations of killing under specific conditions, such as self-defence. First and foremost, *Sunna* prohibits killing non-believers.[205] This means that if an individual is a non-believer, it does not mean that a Muslim has the right to kill him. As the foregoing discussion must suggest, the *Quran* permits killing of non-believers only if they are in a state of war against Muslims. In other circumstances, both the *Quran* and *Sunna* prohibit killing a non-believer because such killing is unjustified.

Similar to the Quran, *Sunna* addresses the precepts of jihad. In conformity with *Sunna*, jihad substantially promotes the right of self-defence, but never encourages war.[206] Similar to Malekian, Afsaruddin and Munir maintain that the Quran, as well as its precedents,

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[203] B G Weiss, *Studies in Islamic legal theory* (BRILL, 2002), 51.
[204] A A Islahi, 'Difference between Hadith and Sunna: fundamentals of Hadith interpretation' (2009).
[205] W B Hallaq, A history of Islamic legal theories: an introduction to Sunni Usil Al-fiqh (Cambridge University Press, 1999), 56.
[206] F Malekian, Principles of Islamic international criminal law: a comparative search (BRILL, 2011), 187.

such as *Sunna*, do not encourage violence against non-believers, but ensure the protection of faith and individual honour.

Thus, Muslim scholars differentiate between two types of justified killing as self-defence: 1) killing combatants and non-combatants in terms of a state of war and 2) killing civilians outside the context of war.

As far as killing combatants and non-combatants in terms of a state of war is concerned, *Sunna* only permits killing those in militaristic societies.[207] Under the prescriptions of *Sunna*, jihad is associated with self-defence. The fact is that jihad is not an aggressive phenomenon, but rather a means of defence or protection.

Although *Sunna* and the *Quran* encourage jihad for the purposes of self-defence, these sources of Islamic law do not intend to promote war. One verse of the *Quran* is interpreted in the framework of *Sunna* as pertinent to the right to self-defence. Thus, from the perspective of *Sunna*, the *Quran* juxtaposes self-defence with the defeat of aggressors: 'Fight in the way of God against those who fight against you but begin no hostilities; surely God does not love the aggressors.[208]

Sunna interprets that the aforementioned Quranic verse is clear and unambiguous when analysed through the lens of history.[209] From the historical perspective, the right to self-defence implies fighting in the way of God. This means that an individual is entitled to struggle for the encouragement of human rights and human dignity as well as respect and freedom of religion. Therefore, self-defence is a justifiable means of fighting if it is carried out in the way of God.

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[207] M Munir, 'Suicide attacks: martyrdom operations or acts or perfidy?' (2008) 90 *International Review of the Red Cross*.
[208] Surat al-Baqarah V :193.
[209] See above n 208.

Sunna provides that the second phrase of Quran incites fighting only against those who fight against you. Therefore, both the *Quran* and *Sunna* justify only that method of struggle that does not entail hostilities. In other words, Malekian explains that a fight can only be conducted in self-defence.[210] According to the scholar, both the *Quran* and *Sunna* prescribe the right to have recourse to self-defence only if the defender feels no hostilities with regard to the assailant.

Moreover, similar to the Quran, *Sunna* provides that the right to self-defence must be actualised in accordance with the principle of proportionality. The principle of proportionality implies that no harm must be inflicted on those who are not aggressors. Under the provisions of *Sunna*, God has no love toward aggressors, and aggressors are condemned under divine law.

The concept of self-defence under *Sunna* is also based on the interpretation of other verses of the Quran. Thus, the next Quranic verse is interpreted through the lens of *Sunna* as follows: any individual has the right to slay an aggressor wherever he finds him; further, tumult and persecution are worse than killing: 'but fight them not at the Inviolable Place of Worship unless they first attack you in it, but if they do fight you, then slay them, such is the reward of the infidels (who oppress the innocent)'.[211]

From the perspective of *Sunna*, the aforementioned verse establishes a number of acts during the actual fighting between Muslims and infidels. Also, the following interpretations of the Quranic right to self-defence ensue from *Sunna*. First, if an individual is being assaulted, another individual is allowed by Islamic law to attack the aggressor in

[210] Ibid.
[211] Surat al-Baqarah V :191.

order to defend himself. Second, self-defence must always be based on the principle of proportionality at all times. Third, 'persecution is worse than slaughter'.

First, this phrase from the *Quran* indicates the significance of an individual's freedom and accuses of those who persecute others, particularly for religious reasons. Once again, it needs to be noted that this Quranic verse has a strong historical context because it brings into light the case of Muslims who may have suffered from persecution by non-believers in the early period of their history, when Prophet Mohamed moved to Madinah.

Second, in this light, it is possible to infer that Islamic law prohibits persecution or any other form of interference in the matter of religion either on Muslim or non-believers' territory.

Third, if the *Quran* in *Sunna*'s interpretation recognises persecution as worse than slaughter, then killing in self-defence is considered a justifiable means of resistance against persecution.

Fourth, according to *Sunna*, fighting cannot be carried out everywhere, but may take place only in a specific recognised territory or place. Therefore, it is prohibited to fight and kill the aggressor in the Inviolable Place of Worship. This means that a Muslim is prohibited from beginning a fight in a temple. However, Malekian is disposed to think that this principle does not preclude the right to self-defence in the case where a Muslim is being attacked. Malekian argues that a broader and more contemporary interpretation of the above-mentioned principle is that a Muslim is obliged to avoid attacking civilian installations, churches, mosques, temples, hospitals or other conventionally recognised civilian facilities because they are not facilities of war.[212] It is possible to agree with Malekian that respecting civilian needs is one of the most important principles of Islamic law, which affects the

[212] See above n 208,189.

practical implementation of the right to self-defence. In the context of jihad, the aforesaid principle corresponds with the 1949 Geneva Convention and the 1977 Geneva Protocol regulating the protection of civilians and civilian installations.

Fifth, as a matter of fact, every Muslim is entitled to have recourse to self-defence if he is attacked in a civil installation. However, *Sunna* makes it clear that the right to self-defence is restricted by the principle of proportionality.

Sixth, the principle of proportionality in terms of self-defence is construed by the *Sunna* as the necessity to bring the attack to an end as soon as the enemy desists from such an assault. According to Hamidullah, the principle of proportionality is not only intrinsic to Islamic law, but also significant in the framework of Islamic international criminal law and humanitarian law.[213]

Seventh, another important principle of self-defence that is enrooted in the *Quran* and construed in *Sunna* is that a Muslim who has been assaulted should give amnesty to that individual who has discontinued the attack. In a nutshell, the aforementioned seven principles constitute the basis of the Islamic concept of jihad and shed light on the peculiarities of self-defence as a legal manifestation of self-defence.

However, killing the aggressor, albeit violating the Quranic principle of the protection and preservation of human life, is recognised in the framework of *Sunna* as an absolutely necessary principle for the protection of life – 'one life is taken to protect another (by logic of deterrence)'.[214] This principle is also applicable to the killing of the aggressor in self-defence.

When interpreting the right to self-defence, it is essential to study *Sunna* in conjunction with the *Quran* because the two parts of the Shari'ah are mutually reciprocal

[213] Hamidullah, *The battlefields of the Prophet Muhammad* (Kitab Bhavan, 1992), 35.
[214] See above n 207.

and indivisible.[215] According to the Quranic verses 3:164, *Sunna* is a practice of fulfilling the divine injunctions, moulding life in accordance with the will of God and carrying out religious rites, Allah says "Allah has blessed the believers, as He raised up among them a messenger from among themselves, who recites to them His revelations, and purifies them, and teaches them the Scripture and wisdom; although be-fore that they were in evident error" .[216]

Nevertheless, there is one important differentiating point between the *Quran* and *Sunna* in the regulation of self-defence: the *Quran* contains universal rules regarding self-defence; these rules are implicit, abstract and equally applicable in every Muslim country. By contrast, *Sunna* as a part of Islamic law contains more explicit and detailed rules on the right to self-defence that may rest on specific interpretations of the Quran, which are variable in different Muslim countries.

For example, in Afghanistan, Sunni – those who develop *Sunna* – interpret the right to self-defence in the same manner they interpret the defence of honour. Following their interpretation, it is possible to infer that, under specific circumstances, Muslims are entitled to take the law into their own hands in order to defend their honour, particularly by punishing adulterers to death.[217]

2.3 Self-defence in *Ijma*

Ijma, also known as a consensus of opinion, is the third pillar of Shari'ah. The concept of *Ijma* has several meanings and interpretations because it may denote a consensus of opinion either of the whole community, the jurists as a class of people or just of a specific

[215] M H Kamali, Law in Afghanistan: a study of the Constitutions, matrimonial law and the judiciary (BRILL, 1985), 25.
[216] Surat Ali 'Imran, V:164.
[217] See above n 217, 210.

locality.[218] In its most conventional meaning, *Ijma* denotes the consensus or agreement of the most qualified Muslim jurists.[219]

Despite its secondary nature, *Ijma* is closely connected with the other two sources of Islamic law – the *Quran* and *Sunna*. This is particularly because the successors of the Holy Prophet made efforts to retain both secular and spiritual power over the Muslim community. Therefore, a Muslim lawyer who was entrusted to decide any case had to interpret pertinent provisions of the *Quran* and *Sunna* in order to base his reasoning on a divine ruling concerning a specific issue.

However, if a decision-maker experienced serious trouble or failure in arriving at the correct conclusion, he had to seek a piece of advice of the noteworthy pious and well-educated members of the Muslim community in order to implement their unanimous opinion on the issue in question. Hence, it follows that recourse to *Ijma* was some sort of last resort permitted in situations where the question of law was not answered by means of the first two sources – the *Quran* and *Sunna*.[220]

Hence, it follows that *Ijma* is a very authoritative source of Islamic law that is designed to unite the diverse Muslim community under a common body of doctrine of law.[221] However, the doctrine of law that originates from *Ijma* is not an independent source of law because *Ijma* derives its authority from the *Quran* and *Sunna*. The derivative authority of *Ijma* may be understood after analysing Quranic verse 4:115.

In *Sunna*, it is explained that whatever is consented to by Muslims achieves the status of a binding rule. However, in contrast to the *Quran* and *Sunna*, *Ijma* does not have divine nature, and thus, must not be considered a divine source. The significance of *Ijma* as a source of Islamic law lies in the fact that it is a universal and absolute consensus that is difficult to achieve, but that must be taken into consideration in the most difficult cases.[222]

After the general understanding of *Ijma* has been achieved, it is essential to examine how the concept of self-defence is interpreted in the framework of Ijma. Thus, analysing the

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[218] D Waines, *An introduction to Islam* (Cambridge University Press, 1995), 82.
[219] N J Coulson, *History of Islamic Law* (University Press, Edinburgh, 1971), 77.
[220] M Walliullah, Muslim jurisprudence and the quranic law of crimes (I.B.S. Lahore, 1982), 32.
[221] See above n 220.
[222] M H Kamali, *Principles of Islamic Jurisprudence* (I.T.S., Cambridge, 1991), 168.

works of Muslim scholars, it is possible to conclude that self-defence is one of several important issues that constitute a theme of scholarly consensus. To be more precise, Shaykh Nub b. Sulayman al-Qudat articulates that the right to self-defence is recognised by prominent Muslim jurists as a value.

Originally, money and blood are protected. So, it is prohibited to attack them, unless there is a legal cause justifying it. One such legal cause that can cancel the protection is a legislated defence. The attacked has the right to defend himself, even though such defence may lead to the attacker's murder or injury because the attack removes the protection of the attacker, while at the same time gives the attacked the full right to self-defence.[223] However, such cancellation is limited and temporary.

The cancellation is initially limited by only the necessary amount for self-defence via the appropriate method. The attacked should not defend himself using deadly force, nor use methods in excess of what is necessary to defend himself.[224] Alternatively, he should defend himself using the easiest method and later increase this method gradually and with additional methods.[225]

According to the time of the attack that the right of self-defence starts from the time of the attack's beginning, in reality or based on the attacked person's judgement, and ends at the attack's expiry.[226]

If the attacked defends himself after the attack's expiry, or even defends himself using a stronger method than is necessary, considering that the easiest method is available, he

[223] Dr Abd Allah Almatrodi, 'Controls private self-defence and its implications in Islamic Jurisprudence' (2006) 37 *Umm al-Qura University* 42-43 (Arabic) (Author's translator).
[224] Ibid.
[225] Ibid.
[226] Ibid.

will be considered as having exceeded his legislated defence.[227] Hence, he will be an attacker, and his act will be considered a crime.[228] In such a case, he will be under penalty of *Ta'azir*, according to the Muslim jurists.[229] The attacked is allowed to defend himself, but whatever he does that exceeds this will be considered an aggression.[230] The implementation of *Ta'azir*'s penalty will be depended on offence and victim kind.[231] For example, if the victim is a human beings, the penalty will be either *Ta'azir* or *Qisas*. According to the availability of the *Qisas*'s conditions, whether the crime is against the body or part of body.[232] However, if the victim is an animal, the penalty will be a financial compensation paid to the owner of the animal.[233]

According to Al Zeil'y, if a person raises his weapon against another, shoots him and leaves, and then later the victim raises his weapon against the former and murders him,[234] he has *Qisas*. The reason is that the former, after leaving, is considered to be protected (as in the previous case) because he focused on raising his weapon and attacking the other person.[235] If he left without intending to repeat raising the weapon again, his evil is gone.[236] Therefore, there is no need to kill him since his evil is gone and his protection has returned. If the victim later kills the aforementioned, he is considered to have committed the unjust act of killing a protected person.[237]

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[227] Ibid.
[228] Ibid.
[229] Abd Allah Ibn Qudaamah Al-Maqdisi, *Al-Moqni* (Dar Alim Al-kutb 1997, Riyad) Principles of Fiqh in Hanbli School 12/532 (Arabic) (Author's Translation).
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid
[234] Uthman Ibn Ali Al Zeil'y, *Tabyyn Al-Haqaq* (Prince Publcation Press1th Cairo 1898) 6/110-111 (Arabic) (Author's Translation).
[235] Ibid.
[236] Ibid.
[237] Ibid.

The prominent Muslim jurists put the right to self-defence on par with such values as truthfulness; fidelity; honouring one's oaths; kindness; courtesy to all people; a husband's obligation to take care of his wife; a father's commitment to provide sustenance for his family; the inviolability of another individual's personality, honour, property, etc.[238]

To this end, it needs to be explained that the prominent scholars in the domain of Islamic law agree upon the fact that the right to self-defence is a fundamental value of the Muslim community, and not merely a legal entitlement. In accordance with the scholarly consensus, the right to self-defence is as important a concept of Islamic law as human dignity, honour, faithfulness and the inviolability of property.

Also, Goldziher writes that *Ijma* interprets the right to self-defence as a divine entitlement.[239] According to the scholar, *Ijma* is a very influential source of both Islamic law and theology. Therefore, scholarly commentators, the creators of *Ijma*, often regard the concept of self-defence through the lens of theology.

That is, *Ijma* may be reduced to a mere formality as a means of settling complex religious questions. Different scholars envision *Ijma* as a means of giving sanction to injustice and violence.[240] Taking into consideration that *Ijma* is capable of sanctioning violence, it is possible to infer that *Ijma* is also capable of sanctioning self-defence as a form of violence.

In his publication, Goldziher explains that Sunni Islam is based on *Ijma* (consensus), whereas Shia Islam is based on the authoritarian principle. Therefore, as the basis for Sunni

[238] A bin Hamid Ali, 'Scholarly consensus: Ijma' (n.d.) http://www.lamppostproductions.com/files/articles/Scholarly%20Consensus.pdf.
[239] I Goldziher, *Introduction to Islamic theology and law* (Princeton University Press, 1981).
[240] Ibid 191.

Islam, *Ijma* regulates that an Imam cannot be authoritative; therefore, the teachings and interpretations of Islamic law must rest on the agreement of the Imams.

Certainly, it is not always easy to reach an agreement of Imams with regard to the concept of self-defence. The fact is that the will of the infallible Imam, under Shia Islam may be regarded as a more effective way of deciding questions that have not already been settled for all of time by the received law.

Similar to the *Quran* and *Sunna*, *Ijma* interprets the concept of self-defence as something permissible under divine law. Moreover, *Ijma* associates self-defence with the concept of jihad. In this context, self-defence is posed as a response to the violation of an individual's rights and freedoms as well as a guarantee that the duty of every Muslim to abide by promises and moral obligations is exercised.[241]

Also, it needs to be noted that *Ijma* has close ties with *Qiyas*, especially with regard to the regulation of self-defence. Some scholars are disposed to think that *Ijma* coupled with *Qiyas* constitutes one of three primary sources of Islamic law.[242]

Both *Ijma* and *Qiyas* are considered by Muslim lawyers as the instruments for legislation on new problems that cannot be settled via direct guidance from the *Quran* or *Sunna*. In light of the fact that the *Quran* does not provide explicit interpretations of the concept of self-defence, *Ijma* and *Qiyas* play an important role in the definition and regulation of self-defence under Islamic law.

In addition to this, the superiority of *Ijma* in regulating self-defence as compared to other sources of Islamic law lies in the fact that the doctrine of self-defence under *Ijma* is agreed upon by all four Sunni schools of thought.

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[241] S Shahabuddin, 'Muslim world and the contemporary Ijma' on rules of governance' (2000) *The Milli Gazette*.
[242] see above n 53.

That is, all four schools of Islamic legal thought concur that the right to self-defence is permissible under Islamic law because this right entails good for Muslims. On the other hand, if something is good for Muslims, it is good in the eyes of Allah.[243] Hence, it follows that the doctrine of self-defence under *Ijma* sets forth rules of divine approval.

As far as *Qiyas* is concerned, it needs to be suggested that the interpretation of self-defence under *Ijma* will be inconsistent if the analogical reasoning of *Qiyas* does not reinforce it.

2.4 Self-defence in *Qiyas*

Qiyas is a way of evaluating the weight, length or quality of a case or its comparison and contrasting this with a similar case.[244]

In a nutshell, *Qiyas* is a form of analogical reasoning that helps to assess the equality or close similarity between two cases whereby one is viewed as a criterion to evaluate the other. For instance, the practical implementation of *Qiyas* may help to compare a case of self-defence with other similar cases, such as the defence of an individual's honour or killing under provocation.

Qiyas as an analogical reasoning tool is frequently utilised by Muslim jurists who seek agreement on complicated issues. As a result of *Qiyas*, Muslim jurists deduce the concept of self-defence from the general notion of self-defence established in the Quranic verses to the particular idea of self-defence in every single case. In other words, *Qiyas* makes it possible for Muslim lawyers to interpret the right to self-defence of a single individual in a single case that is based on the *Quran* and *Sunna*, and thus, is fully legitimate.[245]

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[243] AHM bin H Al-Ghazali, *Al-Mustasfa min Ullom ud Din* (Al-Moassat al-Rissala 1997) 411.
[244] B M Kerr, Applying the canon in Islam: the authorization and maintenance of interpretive reasoning in Hanafi scholarship (SUNY Press, 1996).
[245] MH Kerr, Islamic reform: the political and legal theories of Muhammad Abduh and Rashid Rida (University of California Press, 1966).

According to Muslim scholars, a key precondition to the proper application of *Qiyas* lies in the requirement that the original ruling rests on either of the two material sources of Shari'ah and that the settlement of the existing case cannot be reached by having recourse to the material sources or Ijma.[246] Similar to the *Quran* and *Sunna*, *Ijma* and *Qiyas* regard the concept of self-defence as something derived from divine law and justice.

As a matter of fact, justice plays a very important role in the evaluation of self-defence as the right to justice. In the framework of *Ijma* and *Qiyas*, self-defence is viewed as a restoration of justice. In *Ijma*, the noteworthy jurists agree that justice has a divine background, and thus, self-defence has a divine background as well. In contrast to *Ijma*, *Qiyas* analyses the concept of self-defence through the efforts of Muslim judges to elaborate an essential common reason between similar cases of self-defence in order to apply the same rule of the earlier case to the latter ones.[247]

Qiyas supplements the knowledge about self-defence that is attainable in the framework of the *Quran*, *Sunna* and *Ijma*. In the framework of *Qiyas*, the right to self-defence is established separately in every single case through the doctrinal study of the *Quran* and *Sunna* by the judges.[248]

As a matter of fact, *Qiyas* involves the examination of the motive of an individual actor in the situation of self-defence as well as the investigation of the motive of law, or, in other words, ration legis, and the application of the judicial reasoning in one case concerning self-defence to other cases on the basis of analogy.

However, neither *Ijma* nor *Qiyas* is capable of analysing self-defence outside the scope of the Quranic verses and *Sunna*. This means that both *Ijma* and *Qiyas* are secondary

[246] See above n 224, 198.
[247] Ibid 89.
[248] GE Von Grunebaum, Medieval Islam (University of Chicago Press, 1953), 148.

(supplementary) sources of law that facilitate the understanding of self-defence without creating a totally new or discrepant meaning of self-defence (as compared to *Ijma* and *Qiyas*).

The most substantial benefit from *Ijma* and *Qiyas* regarding the regulation of self-defence lies in the applied character of these two secondary sources of Islamic law. As a practical source of law, *Ijma* establishes the conditions under which an individual act may be qualified as an act of self-defence. The first and foremost condition is the existence of unlawful assault.[249]

The prominent legal scholars of the Islamic world agree that the right to self-defence arises only in response to an unlawful assault. That is, the practical actualisation of the right to defend oneself and one's property ensues from an attack by another individual who acts contrary to the established norms and principles of law.

The second condition of self-defence established in the framework of *Ijma* is the imminence of an attack. In other words, it is agreed upon by the famous jurists that only imminent danger of assault must be considered a sufficient precondition to the realisation of the right to self-defence.[250] It is established in the framework of *Ijma* that, if an assailant does not have the possibility of immediately executing his threat, there is no legal entitlement to respond to the threat.

The third condition of self-defence is the inevitability of defence. In other words, the scholars of *Ijma* point out that an individual is entitled to self-defence only if there is no other option and other reasonable methods for defence are not available.

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[249] MA Khadeer, *Ijma and legislation in Islam* (Khadeer, 1974).
[250] Ibid.

Thus, the majority opinion among scholars is that a Muslim must retreat, resort to the assistance of public authorities or find protection somewhere if it is possible to save his life in such a manner and without inflicting harm on the attacker. In other words, the Muslim is not entitled to use force in self-defence if there is a possibility of milder means for the purpose of saving his own life, someone else's life or his property.[251]

The fourth condition of self-defence under *Ijma* is the reasonableness of the self-defence. This condition implies that the force applied as a result of self-defence must be reasonable and proportional to the criminal force of the assailant. The provisions of *Ijma* preclude the legitimacy of applying excessive force.[252]

Also, *Ijma* regulates that the defender must avoid causing the assailant's death. Therefore, the general principle of *Ijma* is the prohibition of killing as a result of self-defence. Nevertheless, the principle of reasonable defence entails that, under unavoidable circumstances, killing the attacker may be justifiable and necessary.

3. Defences in Shari'ah

3.1 Necessity

The concept of necessity in Shari'ah is called *Darura*. *Darura* in Arabic relates to the fear of death, bloody injury on human life or loss of money and property.[253] The concept of Darura is defined by Muslim jurists in conjunction with the notions of insanity, minority, intoxication (involuntary), duress and emergency situations. Au et al. state that the concept of *Darura* is an excuse rather than a justification for criminal liability.[254] To that end, the law indicates that the doctrine of *Darura* is created by Chief Justice Mumammed Munir in

[251] Ibid.
[252] Ibid.
[253] Wahba Al zohily, 'A comparative study in theory of Darura in Islamic criminal law (Al resalh, 4th 1985) 66-[1] (Arabic) (Author's Translation).
[254] U. Au et al, 'An introduction to the criminal law of Afghanistan' (2011),27.

'Reference by H. E. the Governor General'. In accordance with Munir's arguments, deducing that the doctrine of *Darura* rests on the requirements of absoluteness, extremeness and imminence is possible; under these requirements, any harmful act, which will otherwise be considered unlawful, becomes lawful if it is committed in good faith because of the pressure of *Darura*.[255] The concept of *Darura* under Islamic law coincides with the concept of the intention of the perpetrator to safeguard the existent society, constitution or the state against deterioration and dissolution.[256] Scholarly commentaries indicate that inferring the origin of the doctrine of *Darura* in Islamic law from English law is possible. For instance, Panhwar has grounds to believe that the doctrine of *Darura* is a purely English law doctrine which was designed under English law and incorporated into the system of Islamic law.[257] Furthermore, the doctrine of *Darura* is developed in the framework not only of common law but also of continental law. The continental doctrine of *Darura* rests on the Roman law maxim that the well-being of the people is the supreme law.[258] Nevertheless, Islamic law already has a wide spectrum of case laws conceived to restrict the exclusiveness of English common law in regulating the doctrine of *Darura*. In this regard, the case of Begum Nusrat Bhutto should be deemed a totally new Islamic source of constitutional law, which provides viable interpretations of the doctrine of *Darura*.[259] In such a case, Zulfikar Ali Bhutto and 10 other leaders of the Pakistan People's Party were arrested and detained in prisons under 1977 Martial Law Order No. 12. In response, Begum Nusrat

[255] M. Lau, The role of Islam in the legal system of Pakistan (BRILL, 2006) 26 [3].
[256] Ibid 26 [3].
[257] 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%20chellanging%20martial%20law.pdf>.
[258] WW Buckland, AD McNair, Roman law and common law: a comparison in outline (CUP Archive, 1952).
[259] See above n 259.

Bhutto, the wife of Zulfikar Ali Bhutto, challenged their detention in the Supreme Court of Pakistan by filing a constitutional petition under Article 184 (3).

The justification of *Darura* in Shari'ah was developed through many texts. The *Quran* has mentioned an example on the justification of *Darura* in the case of eating dead animal meat, which is prohibited in Shari'ah because it leads to health problems, Allah says "And why should you not eat of that over which the Name of Allah is pronounced, when He has detailed for you what is prohibited for you, unless you are compelled by necessity? Many leads astray with their opinions, through lack of knowledge. Your Lord knows best the transgressors".[260] This case highlights an exception from punishment under *Darura* because of the need to preserve human life. For instance, the justification of *Darura* in *Sunna* and the history of Islamic criminal law state that the acquittal of Abad Bin Sharhabeel during the year of drought in *Madina*, when he stole dates from a farm to save himself from starvation, was justified under *Darura*.[261] To prevent death, a person can consume essential produce which belongs to another person. Indeed, the majority of scholars from the Maliki School agree that as long as a person does not cause harm to the owner of the food, he or she can freely eat or drink in an attempt to prevent starvation.[262] Comparatively, jurisprudence scholars have divided this matter into two instances: when a person is travelling between countries or when a person is a resident in a country.[263] However, the majority of Shafi jurists have agreed with Maliki's view, unless a person is a resident in a country.[264] Moreover, in case of

[260] Surat al-An'am, V:119.
[261] Abu Abd Allah Mohammed Ibn Yazid Al-Qzweni and Mohammed Naser Al-Din Al-Albani (ed), Sahih Sunan Ibn Majah, (DAR Al-Marif first published, 1997) 246 Hudeth 1875.
[262] Ahmed Fathi Bahnassi, *Criminal liability in Fiqh* (DAR Al-Shroq fourth published, 1998) (Arabic) (Author Translation) 63.
[263] Ibid 264.
[264] Ibid.

the threat of starvation while travelling, jurisprudence scholars allow a person to carry a sufficient amount of food or drink for long-distance travel to avoid death.[265]

3.2 Duress

The notion of duress is defined by Islamic criminal law as an exception to criminal liability. Briefly, the concept of duress (*ikrah*) implies coercion, under the impact of which a criminal offence has been committed.[266] No unanimous position on the categorisation of duress exists, although Au et al. are inclined to believe that duress as coercion is the simplest excuse for criminal liability. The fact is that the doctrine of duress is embedded in the *Quran*, which states that 'Allah does not burden any human being with more than he is well able to bear'.[267] In reference to this Quranic verse, arriving at the conclusion that Islamic criminal law does not justify punishment under *Qisas* and *Hudud*[268] if the perpetrators have inflicted harm under duress is possible; the perpetuators are believed to have lacked realisation of the criminal behaviour, such as those who are of a young age.

As an excuse for criminal liability, duress is justifiable because the doctrine of crime rests on the free consent to commit crime as one of the three fundamental elements of criminal liability. The presence of duress (coercion) removes the element of free consent and renders the criminal liability of a person incomplete.

The majority of *Fiqh* scholars agree that the criminal responsibility of a person who has been forced to commit a crime, even the greatest sin of leaving Islam, is invalid.[269]

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[265] Ibid.
[266] See above n 256, 42 [3] (29 March 2014) <http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-CRIMINAL-1ST-EDITION.pdf>
[267] Nisrine Abiad et al, Criminal law and the rights of the child in Muslim states: a comparative and analytical perspective (BIICL, 2010) 56 [2].
[268] Hudud may be defined as "Fixed punishment to be implemented as the right of God.
[269] Surat an-Nahl V:106.

Indeed, the jurists of *Usul al- Fiqh* have categorised duress situations into two main categories: complete and incomplete.[270] The first situation is extremely strong, and the person has no choice to do anything; in other words, the person will lose his or her life or a part of his or her body if he or she refuses to be coerced.[271] The second situation of duress, which is less forceful than the first in terms of the threat involved, includes threats of imprisonment and beatings; the success of the coercion depends on the steadfastness of the person.[272]

Fiqh scholars have also applied duress as a justification to reduce criminal responsibility with three conditions: 1) a person refuses to commit the crime,[273] 2) an immediate and serious threat exists,[274] and 3) a threat of death or loss of body parts is involved.[275]

3.3 Self-defence

Under Islamic law, the concept of self-defence is defined as a justification rather than an excuse for criminal liability.[276]

Peters expresses that the Islamic concept of self-defence is often posed as a circumstance under which criminal behaviour loses its unlawful character (*actus reus*). In addition, Islamic jurisprudence defines self-defence as an active behaviour and not a circumstance which comprises all characteristics of a crime and thus can be imputed to the

[270] See Above n 3.
[271] Ibid.
[272] Ibid.
[273] See above n 264, 37.
[274] Ibid.
[275] Ibid.
[276] See above n 188, 20 [2].

actor. However, it may be considered lawful sometimes because of a justifying circumstance involved.[277]

Differentiating between the concepts of justification and excuse is important. The proper distinction of these two concepts may help shed light on the specificities of self-defence under both Islamic and English laws. Black's Law Dictionary defines the term 'justification' as 'a lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful'.[278]

By contrast, the term 'excuse' is defined in Black's Law Dictionary as 'a reason that justifies an act or omission or that relieves a person of a duty'.[279] In juxtaposing the two legal concepts, justification can be inferred to imply that a particular act is lawful under certain conditions, whereas under usual conditions, it is unlawful. By contrast, the concept of excuse means that a particular act is unlawful, but under certain conditions, the actor is relieved of criminal liability for such an act.

In reference to the doctrinal distinction between the concepts of justification and excuse, the phenomenon of self-defence can be deduced as a justification and not an excuse, particularly because it makes a specific act lawful and not merely relieves an actor of criminal liability for an unlawful act.

In other words, the notion of self-defence in Islamic law should be understood either as a circumstance which justifies an unlawful conduct by making it lawful or as an act which contains all the elements of an offence but is regarded as lawful because of a justifying circumstance.[280] In Shari'ah law, the motive behind any crime can assist in determining the

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[277] Ibid.
[278] BA Garner, *Black's Law Dictionary* (WEST, 2009), 944.
[279] Ibid 649.
[280] See above n 3.

type of penalty, such as *Ta'azir* [281] for manslaughter and *Qisas*[282] for intentional murder.[283] For instance, a controversial school of thought on the penalties for murder according to *Khid'a* [284] exists. In approaching this issue, Imam Malik mentions that no forgiveness for killers or a negotiation of *Diya*[285] can be extended in *Khid'a* murder and that the punishment will be *Hudud*.[286] For the purpose of this study, the concept of Shari'ah will denote only contemporary Islamic law, which is active in the territory of present Muslim states.

Furthermore, the majority of legal systems consider this view a preferable penalty for the act of *Khid'a* . For instance, the penalties set by the legal system in the Kingdom of Saudi Arabia adopt the view of Imam Malik's decision of the High Court No. 38 in 1975.[287] However, Ibn Hazm (994-1064) and the majority of *Usul al-Fiqh* jurists have argued that the penalty for *Khid'a* should be *Qisas*, which is supported by the Prophet's deed.[288]

Ibn Taymiyya (1263-1328), has urged that the punishment for *Khid'a* should be undertaken by the Caliph (governor of Muslims) because it is considered a serious crime.[289]

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[281] *Ta'azir* offences are less serious than the *Hudud* and *Qisas;* they include any conduct that violates Islamic norms like obscenity, usury, breach of trust, false testimony and contempt of court.
[282] 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.
[283] Zaky Mohamed Abu Ammer, Penal legal system, (Dar Al Mutboat, Kiro, 1989) 237 (Arabic) (Author's Translation).
[284] *Khid'a* means unlawful killings by trick or betrayal in order to steal, amongst other things, money.
[285] Diyya is a compensation of money, usually paid by an aggressor to the victim's family. It is an amount of money in the case of commission crimes by mistake to avoid retaliation. For example, 100 camels for the life of a Muslim.
[286] See Mohammed Arafa Al-Doski and Ahmed Al-Darder Al-Adawe (ed), *Hshiat Al-Doski on Al-Sharh Al-Kabir* (DAR Al-Fqer) (Arabic) (Author Translation).
[287] Soror Bin Mohammed, Criminal Intent and its impact on Ta'azir penalties in Shari'ah (Master Thesis Prince Nayef Security College, 2004) (Arabic) (Author's Translation) 214.
[288] Ibid.
[289] Ahmed Ibn Abd Al Halim Ibn Taymiyya, Majoa Fataw Ibn Taymiyya, (Press the King Fahd Quran ,2004) 100/28 (Arabic) (Author Translation).

For instance, the *Sunna* states that people's deeds belong to their intentions, whether these are benevolent or malicious.[290]

Extending the legal definition of self-defence under Islamic jurisprudence, Peters asserts that self-defence may also be considered a plea to halt an offence in progress. Therefore, from the classical doctrine of Islamic criminal law, murdering or harming an attacker in an attempt to defend one's life, honour or property is lawful 'if the act of self-defence is proportional to the acts of the acts of the attacker, i.e. if such an act does not exceed the level of violence necessary to ward off the aggressor'.[291] It thus follows that the principle of proportionality is fundamental to the doctrine of self-defence under Islamic jurisprudence. Peters states that the attempt to halt a crime in progress may be made by a person who uses proportional violence against another individual to prevent the aggressor from continuing to commit the crime. Given this, the principle of proportionality means that the harm inflicted as a result of self-defence must be proportional to the intended harm which such self-defence prevents. Evaluation of the harm to be prevented and control of a defensive action constitute the mechanism of self-defence. According to Oudah, the principle of proportionality means that a directly proportional relationship exists between unlawful attack and the right to self-defence,[292] so the inception of the attack gives birth to the right to self-defend. In other words, the right to self-defend does not arise before the perception of a risk, and it does not continue to exist after the cessation of the risk.

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[290] See above n 184, Hadith n 1, page n 13.
[291] See above n 188, 25 [2].
[292] A.Q. Oudah, *Al-Tashrih al-Jinai al-Islami* (Al-Risalah Publishing, 1997) 478 [2].

3.3.1 Self-defence and Defence of Another

For every intent and purpose, Peters argues that the legal basis for self-defence under Islamic jurisprudence can be derived from the *Quran*,[293] which mentions the important priority in Shari'ah about the protection of a person's life against any harms, Allah says "And spend in the cause of Allah, and do not throw yourselves with your own hands into ruin and be charitable. Allah loves the charitable".[294] The aforesaid Quranic verse is considered by all schools of Islamic law, with the exception of the Hanbalites, as the legal basis for self-defence.[295] Moreover, Islamic jurists believe that the *Quran* dictates that every Muslim *must defend* his or her life against infringements, even if the act of self-defence is at the expense of the life of the attacker.[296] In agreement with Peters, Sachedina also believes that the legal basis of self-defence under Islamic jurisprudence is the *Quran*; he writes that Islam establishes a very complex system of principles underlying private acts of self-defence and making them in line with the principles of public legal systems.[297] Sachedina states that both the *Quran* and Shari'ah allow self-defence by referring to the natural instinct of self-preservation, which spurs an individual to save his or her life without intending to deliberately harm or kill the attacker. In other words, Sachedina reduces the Quranic permission to self-defend to the empowerment of acting according to the dictates of the instinct of self-preservation.[298]

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[293] L. Abu-Odeh,'Crimes of honor and the construction of gender in Arab societies' (2011) 2 *Comparative Law Review*, [3].
[294] Surat al-Baqarah, V:195.
[295] See above n 188, [3].
[296] Ibid.
[297] A. Sachedina, 'Justification for violence in Islam: Part VI, pacifist activism in Islamic legal system' Journal of Lutheran Ethics (February 2003), 43, (15 May 2014) <http://www.elca.org/What-We-Believe/Social-Issues/Journal-of-Lutheran-Ethics/Issues/February-2003/Justification-for-Violence-in-Islam-Part-VI-Pacifist-Activism-in-Islamic-Legal-System.aspx>.
[298] Ibid 43.

In Saudi Arabia, public defence is directed against violations of socially connected rights (the rights of Allah), whereas private defence aims at restoring private parties' (individuals') rights which are either threatened or already violated.[299] Islamic law recognises the defence of another as a form of self-defence, and Islamic criminal law interprets this concept as the right of an individual to defend his or her chastity, or the similar interests of any other individual against any illicit assault through the use of reasonable force.[300]

3.3.2 Protection of property

Peter states that murdering an attacker in defence of life, property or honour is lawful if the act of self-defence is proportional to the acts of the assaulter, which means that the self-defence act should not exceed the level of violence sufficient to prevent the aggression.[301] Islamic criminal law interprets this concept as the right of an individual to defend his or her own property, or the similar interests of any other individual against any illicit assault through the use of reasonable force.[302] For example, in *Sunna*, Said Bin Zaid (Allah be pleased with them) reported that the Prophet Mohammed (peace be upon him) said, 'The person who killed while defending himself or his property or his honor is a martyr in Allah's way'.[303] It therefore follows that the defence of property is a form of self-defence similar to personal defence or defence of another.

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[299] Ibid.
[300] See above n 294, 473 [2].
[301] 25 [1].
[302] See above n 294, 473 [2].
[303] Abi Daoud Suleiman Bin Al-Ashath Al- Sijistani , Shoaib Arna'oot and Mohammed Kamel (eds) *Sunan Abi Dawood* (DAR Al-Resalh first published, 2009) (Arabic) (Author's Translation) ch 7- 150, Hadith 4772.

3.3.3 Provocation

Murder committed under provocation is differently regulated under various Islamic jurisdictions.[304] For instance, the Egyptian Penal Code does not contain a provision on provocation, and, thus, the Egyptian legislature does not perceive provocation as a general excuse for criminal liability.[305] However, in Egypt, provocation is still considered a specific excuse for criminal liability, which is pertinent to specific cases. For instance, compared with the Jordanian Penal Code, under which provocation is applied to ascendants, descendants or unlawful, Article 237 of the Egyptian Penal Code emphasises that provocation has limited application to the case of wives.[306] In addition, Islamic law differentiates between two forms of provocation: grave and sudden provocation.[307] Nyazee states that the underlying basis for the rules of grave provocation lies in the proposition that the law embodies compassion to human infirmity. The legal injunctions of Islam are considered sufficient proof of this concern. Sudden provocation implies that a harmful act is caused by the victim who has suddenly and unintentionally provoked the offender. The law of Pakistan prescribes that both grave and sudden provocation may be viewed as excuses for killing or inflicting harm on any individual if such provocation was not voluntarily incited by the offender and was developed as a matter of mistake, accident or other human infirmity.[308]

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[304] B. Baron, 'Women, honour, and the state: evidence from Egypt' (2006) 42 (1) *Middle Eastern Studies*.
[305] See above n 295, 23.
[306] Ibid.
[307] I.A.K. Nyazee, 'Grave and sudden provocation in Islamic law'http://www.nyazee.org/islaw/exercises/ex3.pdf.
[308] Ibid.

4. Self-defence in English Sources

4.1 Self-defence in legislation

Although this section covers UK law, there are separate laws for Northern Ireland and Scotland. For clarification, in this thesis any reference to UK laws means the law only in England and Wales. In the UK, the concept of self-defence is regulated in both statutory and common laws. As far as UK statutory law is concerned, Section 3 of Criminal Law Act 1967 contains the underlying statutory provisions which regulate self-defence under UK legislation. Some scholars are disposed to think that the regulation of self-defence in UK legislation is controversial compared with that under common law.[309]

Some experts opine that UK legislation on self-defence is conceived to supersede the existent common law in this field to eliminate the right to prevent the commission of indecent exposure. Other researchers are inclined to think that the provisions of Section 3 of Criminal Law Act 1967 do not prescribe a universal regulation of self-defence and that they concern only the issues of arrest and prevention of crime.[310]

However, the majority of scholars concede that Section 3 of Criminal Law Act 1967 is not the only available piece of UK legislation on self-defence. The fact is that defence of property is derived from Criminal Damage Act 1971, whereas a large number of other issues on self-defence are addressed in the framework of case law.[311]

In analysing the provisions of Section 3 of Criminal Law Act 1967, the use of force in self-defence, which is reasonable under the conditions of crime prevention or arrest of offenders, needs to be highlighted. Notably, Section 3(2) of Criminal Law Act 1967

[309] See above n 35.
[310] JC Kopel, *Smith & Hogan Criminal Law* (Butterworths, 1996), 259.
[311] See above n 43.

acknowledges the fact that this Act supersedes the rules of common law on the issue of application of force for the purpose of crime prevention or arrest of offenders.

As the case stands, Section 3 of Criminal Law Act 1967 not only abolishes common law rules on self-defence but also unifies the legal position with regard to the principles of self-defence. This legislation prescribes that a defender is entitled to apply reasonable force for the purpose of crime prevention or commitment of arrest under the following conditions. First, the right to self-defence facilitates the defender's defence of himself or herself from any type of assault as long as the assault is unlawful or criminal.[312] Second, the right to self-defence makes the aversion of the assault on another person possible if the defender believes that this is the only available way to defend the other person. Third, the right to self-defence implies that an individual is entitled to defend his or her property against unlawful assault or any other danger.

Despite the fact that Section 3 of Criminal Law Act 1967 does not refer to the right of self-defence under common law, it implies that the right to self-defence is existent under common law insofar as it is different in effect from this Section.[313]

If the force is applied not for the purpose of crime prevention or arrest of the attacker, Section 3 of Criminal Law Act 1967 does not prescribe a complete overlap between the principles of common law and the statutory provisions on self-defence.[314]

Besides, the legal provisions of Section 3 of Criminal Law Act 1967 are restricted by the provisions of Human Rights Act 1998, which incorporates Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms into English statutory law.

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[312] DB Kopel, *Return fire: the morals of self-defence* (Thomas Nelson Incorporated, 2004).
[313] F Leverick, *Killing in self-defence* (Oxford University Press, 2006).
[314] M Jefferson, *Criminal law* (Pitman Publishing, 1997), 278.

Article 2 of this Convention prescribes protection for the right to life and establishes exceptions under which depriving an individual of his or her life is lawful. Article 2 (1) of the Convention prescribes that every individual's right to life must be protected by law; 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.[315]

In analysing the above-mentioned provisions of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the prohibition of killing as a means of depriving an individual of his or her life in English statutory law (the Human Rights Act 1998) needs to be highlighted. Also, the same Article stresses on the exclusive role of a court of justice, which may impose on an individual a penalty leading to the deprivation of life.

In accordance with Article 2 (2) of the Convention, the deprivation of life may be actualised only if it is absolutely necessary. The following exclusive conditions make the deprivation of life absolutely necessary: first, if it is carried out in defence of any individual from unlawful violence; second, if the deprivation of life is made to affect a lawful arrest or to avert the escape of an individual lawfully detained; and third, if the deprivation of life is actualised as a measure lawfully taken to quell an insurrection or riot.

From the above-mentioned provisions on self-defence, inferring that English law allows killing in self-defence is possible. As far as the issue of property is concerned, Criminal Damage Act 1971 and other pieces of English legislation are designed to protect not only ownership but also possession of property. Under English statutory law, defence of property takes place when an individual applies force to prevent another person from

[315] Human Rights Act 1998, Article 2.

dispossessing him or her of his or her property or to regain possession immediately after dispossession.[316]

UK statutory law grants the right to use force against a would-be dispossessor of property if the lawful possessor or property owner reasonably believes that such a force is necessary to avert unlawful and imminent dispossession.[317] Also, UK statutory law imposes a set of limitations on the right to defend property. The first and foremost limitation is that the defender must be a lawful possessor of the property. The second condition lies on the fact that the attacker must not be legally entitled to the property in question.[318]

The defence of property should not be reduced to cases of dispossession only. As a matter of fact, the defence of property also extends to cases in which the perpetrator threatens, trespasses, inflicts physical harm or commits a crime concerning premises, burglary, tortuous interference or any other type of unjustified encroachment on the defender's property.[319]

In properly determining whether an individual is entitled to defend property under UK legislation, ascertaining what is covered by the term 'property' is essential. Under UK statutory law, the concept of property includes all types of moveable, immovable, personal and real things.[320] Also, the defence of property under UK law implies not only protection from immediate physical harms but also the social interest in the preservation of the right to keep personal property.[321]

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[316] J Dressler, *Understanding criminal law* (Mathew Bender, 1995), 235.
[317] Ibid 236.
[318] Ibid.
[319] PH Robinson, *Criminal law defences* (West Publishing, 1984), Vol II, 107.
[320] Ibid.
[321] Ibid 84.

The UK statutory law on the defence of property is reflected in other jurisdictions of the Commonwealth. For example, protection of property is a significant issue of self-defence under South Australian law. Therefore, Criminal Law Consolidation Act 1935 provides provisions concerning defence of property separately from those provisions regulating self-defence. According to 15A of the Act, an individual is entitled to necessary and reasonable defence of property only under the three following circumstances: a) when safeguarding property from unlawful destruction, appropriation, damage or interference; b) when averting criminal trespass to premises or land or to remove from the premises or land an individual who is committing a criminal trespass; or 3) to assist in the lawful arrest of an alleged offender.[322]

5. Defence in English Law

5.1 Necessity

The concept of necessity is defined in English law as a justification for criminal liability of a person who conducts an act in an emergency situation which the actor did not create and who inflicts harm which is less severe 'than the harm that would have occurred but for the person's actions'.[323] As a justification for criminal liability, the concept of necessity has several salient features. The first and foremost salient feature of necessity is that it is justified only in an emergency situation. The second feature lies in the fact that justification is possible only if the defendant did not create the emergency situation in question. The third feature originates from the fact that the defendant inflicts harm as a result of his or her act. The fourth feature is that the harm inflicted as a result of necessity is less severe compared with the harm prevented.

[322] Criminal Law Consolidation Act 1935, s 15A.
[323] See above n 280,1130.

In view of the above, Heuston argues that 'in some cases even damage intentionally done may not involve the defendant in liability when he is acting under necessity to prevent a greater'.[324] However, neither the common law nor the statutory law of the UK establishes the accurate confinements of the defence, particularly because necessity has similarities with other excuses and justifications, such as duress, act of God, inevitable accident or self-help.[325]

In most recent studies, scholars recognise that necessity as a justification for criminal liability is capable of encircling two disparate and distinct concepts: 1) justification of non-compliance with the law in an emergency situation and 2) infliction of justified harm for the purpose of some greater good.[326]

5.2 Duress

In English law, the concept of duress is recognised as a criminal defence. Scheb and Scheb state that common law considers duress as a defence to criminal charges in cases in which coercion with the use of threats of harm that are imminent, present or pending is involved.[327]

Also, differentiating between duress and necessity is essential. On one hand, necessity is a justification for criminal liability, whereas on the other hand, duress is an excuse to criminal liability.[328] In English law, the act committed under duress has no legal effect which it would otherwise have.

[324] RFV Heuston, *Salmond on the Law of Torts* (1977) 17th ed.
[325] Ibid.
[326] M Dubber, and T Hornle, *Criminal law: a comparative approach* (Oxford University Press, 2014), 424.
[327] J Scheb, *Criminal law* (Cengage Learning, 2008), 365.
[328] T Morawetz, 'Necessity', in S H Kadish, *Encyclopedia of crime and justice* (1983).

5.3 Self-defence

The concept of self-defence is an element of the private defence doctrine under English law, as well as a justification for criminal liability. Black's Law Dictionary states that the notion of self-defence must be understood as 'the use of force to protect oneself, one's family, or one's property from a real or threatened attack'.[329] This definition implies that self-defence is always an active behaviour which is directed at the protection of life or property from either an actual menace or a threatened attack.

In English law, the concept of self-defence rests on the principle of proportionality. Ashworth writes that the law of self-defence, 'as it is applied by the courts, turns on two requirements: the force must have been necessary, and it must have been necessary, and must have been reasonable'.[330] This principle means that proportionality, in conjunction with necessity, constitutes one of the key requirements of self-defence under English law.

Similar to the laws in other jurisdictions of the Commonwealth, the concept of self-defence in English law is posed as a justification, rather than an excuse, for criminal liability. The concepts of justification and excuse are often regarded as exceptions.[331] Exceptions must be understood as circumstance elements in an offence provision which are expressed in a negative form.[332] Justification and excuse are antagonistic to and different from the salient features of a crime, which are designed to establish the responsibility and criminality of the perpetrator.

Besides, exceptions, both excuse and justification, focus on the definition of innocence.[333] To that end, Gans points out several forms of exceptions, such as self-

[329] See above n 280,1481.
[330] A Ashworth, *Principles of criminal law* (1991), 114.
[331] J Gans, *Modern criminal law of Australia* (Cambridge University Press, 2011) 280.
[332] Ibid.
[333] Ibid.

defence, duress, necessity and insanity. Gans also argues that the meaning of each exception can be retrieved through statutory interpretation.

Both justification and excuse can be utilised as defences to criminal liability. Black's Law Dictionary defines 'justification' as a lawful or sufficient reason for an individual act or omission 'that prevents an act from being wrongful', whereas the 'absence of the reason, would constitute the offense with which the defendant is charged.'[334] By contrast, the term 'excuse' means 'a reason that justifies an act or omission or that relieves a person of a duty.'[335] The main difference between the concepts of justification and excuse, therefore, is that the former 'prevents an act from being wrongful', whereas the latter does not prevent an act from being wrongful but relieves an individual of a criminal liability.

Black's Law Dictionary specifies the following traditional forms of excuse: duress, entrapment, insanity, infancy and involuntary intoxication. The concept of self-defence should be treated as justification. In simple terms, self-defence is associated with acts which would otherwise be offences against an individual, such as murder or assault.[336]

5.3.1 Self-defence and defence of another

According to Hungerford Welch Staff, in the framework of common law, the scope of self-defence is extensive because it rationalises the use of force in several circumstances, such as in personal defence (self-defence), defence of another person and defence of property.[337]

As far as defence of another person is concerned, this form of private defence is addressed in both statutory law and common law of the US. Section 3 of Criminal Law Act

[334] See above n 280,944.
[335] Ibid 649.
[336] D Lanham, D Wood, B Bartal, and R Evans, *Criminal laws in Australia* (Federation Press, 2006) 66.
[337] Hungerford Welch Staff, *Sourcebook criminal law* (Cavendish Publishing 2001), 575.

1967 therefore regulates that an individual is entitled to apply reasonable force under specific circumstances to prevent any crime or arrest a perpetrator.[338] A detailed regulation of defence of another is provided in common law. In R v Rose, the court therefore held that reasonable force may be employed for the purpose of prevention of an assault on another individual.[339]

5.3.2 Protection of property

Defence of property is recognised in the framework of English law to the same extent as self-defence. The protection of property is justified with the fact that an assault on property is a criminal offence. If an attack on property is a criminal offence, then an application of reasonable force is justified if it is directed at the prevention of crime or the suspension of the offender. Common law illustrates that defence of property is frequently asserted in combination with self-defence, particularly in cases of burglary.[340] In addition to this, common law justifies killing an intruder or a trespasser even for the purpose of arresting him or her.[341]

Also, in DPP v Bayer, the court deduces that it is a principle of the common law that a person may use a proportionate degree of force to defend himself, or others, from attack or the threat of imminent attack, or to defend his property or the property of others in the same circumstances'.[342] Given this, Leverick clarifies that an English court is tasked to

[338] Criminal Law Act 1967.
[339] *R v Rose* (1884) 15 Cox 540.
[340] AG's Reference (No 2 of 1983) (1984) 1 AER 988.
[341] *R v Scully* (1824) 171 ER 1213.
[342] *DPP v Bayer* [2003] EWHC Admin 2567, 21.

evaluate all facts believed by the defendants and then to weigh all the circumstances of reasonableness and proportionality of the use of force in the defence of property.[343]

5.3.3 Provocation

In English law, the concept of provocation is closely connected with the concept of self-defence. Some scholars question whether provocation is a justification or excuse in cases of self-defence.[344] Some scholars are still prone to believe that the legal plea of provocation is an excuse and not a justification.[345] The author explains that provocation has different manifestations, so it may be conveyed through an individual's hostile words or actual deeds.

Determining by means of legal norms whether provocation is a justification or excuse for killing in self-defence, according to Uniacke, is also essential because justified conduct and excusable conduct have different moral evaluations. Note that English law differentiates between the concepts of self-defence and provocation. In reference to the Report of the Law Commission on *Partial Defences to Murder*, the same set of facts may thus be construed as either provocation or self-defence.[346]

Therefore, the Law Commission is predisposed to think that the rationale underlying the defence of provocation is rather elusive; no statutory or common law provisions which may help establish the requirements of provocation as an actual loss of self-control can be referred to.

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[343] See above n 315, 133.
[344] J L Austin, 'A plea for excuses', in A White, *Philosophy in action* (Oxford University Press, 1968), 20.
[345] S Uniacke, Permissible killing: the self-defence justification of homicide (Cambridge University Press, 1996).
[346] Law Commission, 'Report on Partial Defences to Murder' (2004) http://lawcommission.justice.gov.uk/docs/lc290_Partial_Defences_to_Murder.pdf.

6. Justification for the proposed framework

Cargan state that one of the main objectives of the conceptual framework is to justify a research project through the prism of its research objectives. Also, the conceptual framework should be emphasised as being constituted of theories, the derived hypotheses of research and relevant, operationally defined concepts and variables.[347]

In developing the conceptual framework, relying on literature review and other sources of theoretical research is essential.[348] In the framework of this study, the review of the literature is expected to facilitate the conceptualisation of investigations through a realisation that previous studies contain important findings necessary to elaborate the concepts and variables in the framework of the present study.

However, a reduced focus of the literature review may impose some limitations on the present study. Cargan states that the first limitations lie in the risk that the study can be a merely descriptive report of theories which have already been analysed by previous authors. The second restriction ensues from the risk that the present study may embrace a very broad field of knowledge in lieu of being constricted to theories which are pertinent to the research questions, whereas other theories are to be disregarded as irrelevant conceptual sources.

In view of these restrictions, actualising a twofold conceptual framework has been decided. This framework combines the elements of two research formats, namely, a doctrinal format of research and a format of theoretical foundations. Theoretical foundations predominantly originate from the literature review.

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[347] Cargan, L, Doing social research (Rowman and Littlefield, 2007) 29.
[348] Ibid.

Cargan indicates that theoretical foundations may facilitate the conduct of the current project by shedding light on subtle and previously unnoticed characteristics of self-defence under Islamic and English laws. Furthermore, complementing theoretical foundations with doctrinal research was selected to compensate for the tendency of literature review to overgeneralise and reiterate previous knowledge.

The doctrinal part of the conceptual framework is expected to enhance the process of theorising by verifying the concepts and hypotheses with the help of primary sources, such as legal statutes and case law. The two constituents of conceptual framework are justified in the following:

6.1 Theoretical foundations derived from the literature review

The theoretical foundations of this study are formed by means of literature review. The method of literature review is purposed to facilitate familiarisation with the existing academic literature on the notion of self-defence under both Islamic and English laws. Briefly, theoretical foundations stem only from academic literature which directly addresses the research problems and research questions.

The formation of the theoretical foundations of this study was made possible through access to various electronic databases and online libraries.[349] The method of literature review as a secondary data collection method facilitated not only the collection of necessary information but also the familiarisation of the researcher with contemporary academic approaches to the issue of self-defence. In addition, theoretical foundations established as

[349] GR Marczyk, D DeMatteo, & D Fetinger, *Essentials of Research Design and Methodology* (John Wiley and Sons, 2010).

a result of literature review helped represent the study as ‘an extension of what has previously been learned about a particular topic’.[350]

Clarifying that the theoretical foundations of the present conceptual framework were formed through a critical review of previous literature is also essential. This emphasis means that not all arguments of the authors were considered relevant or well-substantiated. The critique method helped filter the data and disregard irrelevant or unsubstantiated information.

The critique method facilitated a systematic and progressive exploration of the original constituents of the phenomenon explored, such as self-defence and defence of property.[351] The method of critique was primarily directed at the strengths and weaknesses of the secondary sources. In accordance with Gasche’s interpretation of the method, a critique of sources was also conducted as both a systematic and a progressive method.

In the framework of this conceptual framework, the critique method was purposed to reinforce the theoretical foundations by exploring the concept of self-defence with all of its constituents and relations. As a progressive method, critique facilitated the interpretation of the temporal and geographical dimensions of self-defence by illuminating the differences in the legal regulation of self-defence in various countries. All things considered, the method of critical literature review is considered justifiable because it entails an in-depth examination of the research problems.

[350] MG Maxfield, & ER Babbie, Basics of research methods for criminal justice and criminology (Cengage Learnin, 2011), 17.
[351] R Gasche, *The honor of thinking: critique, theory, philosophy* (Stanford University Press, 2007), 401.

6.2 Primary evidence and pure concepts of law derived from doctrinal study

A doctrinal format of research is the second part of this conceptual framework. The doctrinal format of research was achieved through the use of doctrinal study. The doctrinal format of research means that scientific procedures are directed at the questions of law on particular issues. In the framework of this research, the method of doctrinal study was directed at the following specific issues in question: a) the regulation of self-defence in *Quran*, b) the regulation of self-defence in *Sunna*, c) the position of legal theorists (commentators of law) and creators of the legal doctrines on self-defence in the framework of Ijma) the regulation of self-defence in UK and Australian legislation and e) the regulation of self-defence in common law.

To this end, doctrinal study was used as a purely legal research which emphasises specific statements of law and complex analyses of legal reasoning. The method of doctrinal study was employed through a set of sequential steps, such as 1) search and retrieval of legal instruments (international treaties, conventions and case law) which were pertinent to the questions and objectives of the research; 2) critical analysis and explanation of the relevant provisions and prescriptions of the legal instruments; 3) inferences from the legal analysis of the legal instruments.

7. Summary

The main objective of a conceptual framework is to provide insights into the Islamic legal understanding of self-defence and its principles, as well as to highlight the principles of the English law position with respect to self-defence. The framework indicates that the concepts and principles enunciated by Shari’ah centuries ago are compatible with the corresponding concepts and principles of any civilised legal system of the present world.

With all issues duly considered, generalising that both similarities and discrepancies exist in the regulation of defences under English and Islamic criminal law is possible. The key similarity lies in the fact that both English and Islamic criminal laws recognise necessity, duress, self-defence and provocation as a mitigatory defence in the criminal process. The major discrepancy between the Islamic legal understanding of self-defence and the legal doctrine of self-defence under English law in the regulation of provocation originates from the fact that English criminal law associate's provocation with loss of control, whereas Islamic criminal law addresses provocation as a mistake or accident and not as loss of control. English criminal law does not explicitly recognise excessive self-defence as an excuse to criminal liability or as a mitigatory defence, whereas Islamic criminal law recognises excessive self-defence as such. Self-defence resulting in murder may possibly be justified through the Islamic juridical concepts of 'qatl shibh al- 'amd' (unintentional murder) or 'qatl al-khata' (murder by mistake). Therefore, creating a legal system which can benefit from the experience of others is also possible. In this regard, the English legal system can be suggested to adopt the justification of Shari'ah in dealing with the problem of self-defence resulting in murder.

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1. Abstract

The purpose of this paper to delineate and explore the concept of self-defence in Islamic jurisprudence from various perspectives. That is, self-defence is to be scrutinised as both a general concept of Islamic jurisprudence and a specific idea of various schools of Islamic law, such as Sunni schools of Sahfii, Hanbali, Maliki, and Hanafi. Given this, the current study is purposed to provide comprehensive answers to a series of research questions. Thus, the primary question of research should be formulated as follows: What is the legal basis for self-defence under Islamic jurisprudence? To continue, the secondary question of research should be articulated as follows: What are the principles of self-defence under Islamic jurisprudence? The last but not least, the tertiary question of research should be stated as follows: What are the specificities of the practical application of the principles of self-defence by Islamic jurists, judges, lawyers and other participants of the legal process?

2. The Legal Basis for Self-defence under Islamic Jurisprudence

After the purpose and research questions of this study have been delineated, it is mandatory to commence search for comprehensive answers to the questions of research.[352] The first research question pertains to the legal basis for self-defence under Islamic jurisprudence. To start with, it needs to be clarified that the term ‘legal basis’ denotes legal

[352] AA Al-Alfi, Punishment in Islamic criminal law (1982) *Bassiouni MC The Islamic criminal justice system*, 17.

reasons for something.[353] Therefore, the phrase legal basis for self-defence under Islamic jurisprudence means legal reasons underlying the concept of self-defence as specified by Islamic jurisprudence. [354] On the other hand, the notion of jurisprudence encircles both practice and theory of law. In that vein, Islamic jurisprudence is viewed through the prism of an instrument which determines theoretical and practical dimensions of the concept of self-defence. [355]

To be more precise, Wasti writes that legal basis in terms of Islamic law consists of theoretical and legal foundations.[356] That is, theory and legal practice play equal roles in shaping the legal basis of every concept under Islamic law, including the notion of self-defence.[357] Besides, Wasti provides that every source of Islamic law can make a different impact on the administration of criminal justice, especially in terms of different concepts of criminal law, such as the concept of self-defence.[358] Following Wasti's arguments and observations, it is possible to arrive at the conclusion that the legal basis of self-defence as a concept of Islamic law may involve diverse and even conflicting issues, taking into consideration that Islamic law, or, it is much better to say Islamic jurisprudence, is a very 'parti-coloured' and complex system which lacks uniformity and chronological immutability.[359]

As a matter of fact, Wasti's research unveils a very important particularity of Islamic jurisprudence as a source of the legal basis of self-defence – its variability and evolutionary

[353] Cambridge Dictionaries Online, 'Basis', http://dictionary.cambridge.org/dictionary/learner-english/basis.
[354] See above n 354.
[355] Ibid.
[356] See above n 195, 57.
[357] T Mahmood, Criminal law in Islam and the Muslim world: a comparative perspective (Vol. 2) (Institute of Objective Studies, 1996), 47.
[358] See above n 195, 239.
[359] See above n 359.

nature.[360] Thus, Wasti makes it clear that Islamic jurisprudence tend to evolve and metamorphose in different Islamic countries and under different historical circumstances. [361] Therefore, the legal basis of self-defence under Islamic jurisprudence is also subject to evolution and alteration.[362] In this connection, it is affordable to presuppose that the key driver of such evolution and transformation lies in the fusion or disintegration of the traditional law of Shari'ah and non-Islamic legal tenets.[363]

For instance, Wasti writes that the legal basis of the new Pakistani law of murder and culpable homicide, presumably based on the principles of the law of Shari'ah, such as *Diya* and *Qisas*, did not underlie the Legislative Assembly of Pakistan.[364] Instead, the aforesaid law was carefully considered, thought over, debated, discussed, weighed, dissented and finally accepted by judges of the Shari'ah courts, 'on whose insistence it was ordained by the State in 1990.'[365] The aforementioned fact clearly exemplifies how complex and variable Islamic jurisprudence is.[366] Also, it is doable to infer from Wasti's arguments that the legal basis of self-defence under Islamic jurisprudence must not be viewed merely through the prism of Islamic legal theory, taking into account that the Shari'ah courts may carve the legal basis of self-defence in conformity with practical challenges and expectations. [367]

Debating on the legal basis of self-defence under Islamic jurisprudence, it is suggested to consider Kamali's arguments, who stresses on the critical role of principles of

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[360] R D White, *No space of their own* (Cambridge University Press, 1991), 11-78.
[361] Ibid.
[362] R Cryer, H Friman, D Robinson, & E Wilmshurst, *An introduction to international criminal law and procedure* (Cambridge University Press, 2014), 86.
[363] M Lippman, Islamic criminal law and procedure: religious fundamentalism v. modern law (1989) BC Int'l & Comp. L. Rev., 12, 29.
[364] See above n 195,57.
[365] Ibid.
[366] GJ Weimann, Judicial Practice in Islamic Criminal Law in Nigeria—A tentative overview (2007) Islamic Law and Society, 14(2), 240-286.
[367] Ibid.

Islamic jurisprudence in defining and regulating various concepts of Islamic law.[368] Undoubtedly, it is imprudent to ignore the role of legal principles in shaping the legal basis of self-defence under Islamic jurisprudence.[369] Although the discussion of major principles of self-defence under Islamic jurisprudence is to be made in the next section of this study, it is deemed wise to pay heed to the relationship between the principles and legal basis of self-defence. In this light, Kamali writes that the principles of Islamic jurisprudence, also known as *Usul al-Fiqh*, constitute the roots of Islamic law.[370]

In view of the above, it needs to be emphasised that the legal basis of self-defence under Islamic jurisprudence embraces fundamental reasons underlying self-defence as a legal concept.[371] Therefore, the principles of Islamic jurisprudence, as the roots of Islamic law, can be considered the first and foremost sources of Islamic jurisprudence which define the legal basis of self-defence.[372] To put it in other words, the principles of Islamic jurisprudence not only provide the most fundamental insights into the nature of self-defence as a concept of Islamic law, but also prescribe the methodology of law that help to deduce new reasons as the legal basis of self-defence.[373] Thus, according to Kamali, the methods of deduction and interpretation should be considered the primary methods of *Usul al-Fiqh* which are not exclusively devoted to methodology. To put it in other words, Kamali defines *Usul al-Fiqh* as 'the science of sources and methodology of the law' as well as 'the subject matter to which the methodology of *Usul al-Fiqh* is applied.'[374]

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[368] See above n 224, 3.
[369] See above n 368.
[370] See above n 224, 12.
[371] R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.
[372] Ibid.
[373] R Peters, Islamic and secular criminal law in nineteenth century Egypt: The role and function of the Qadi, (1997) *Islamic Law and Society*, *4*(1), 70-90.
[374] See above n 224, 12.

In other words, the methodology of *Usul al-Fiqh* refers to various methods of reasoning, including juristic preference (*Istihsan*), analogy (*Qiyas*), presumption of continuity (*Istishab*) and the rules of interpretation and deduction.[375] Following Kamali's arguments, it is possible to make inference that the legal basis of self-defence originates not only from well-known sources of Islamic jurisprudence, such as the *Quran* or *Sunna*, but also from the methodology of *Usul al-Fiqh*, which helps to extend the legal dimensions of the concept of self-defence by viewing the concept from the prism of continuity, analogy, juristic preference, deduction, and interpretation.[376]

In his other publication, Kamali points out that the legal basis of substantial legal concepts under Islamic jurisprudence is determined by salient features of Shari'ah.[377] To be more precise, Kamali writes that the law of Shari'ah can easily be described as a 'diversity within unity, diversity in detail and unity over essentials.'[378] To that end, the concept of self-defence can be analysed as diverse in legal details but united in terms of its essential elements.

As a matter of fact, the finality of the divine revelation of the *Quran* and its timeless validity is deemed by Kamali instrumental in making a unifying effect which guarantees that there is continuity in the comprehension of legal fundamentals. [379] That is, the legal basis of self-defence rests on the universal legal fundamentals of the *Quran* as the key source of law that makes a unifying influence on the understanding and application of the concept of self-defence in practice. [380] Following the reasoning of Kamali and other researchers, it is

[375] M C Bassiouni, Sources of Islamic Law, and the protection of human rights in the Islamic criminal justice system (1982) *The Islamic Criminal Justice System*, *3*, 23.
[376] Ibid.
[377] M H Kamali, *Shari'ah law: an introduction* (Oneworld Publications, 2008), Chapter 3.
[378] Ibid.
[379] See above n 373.
[380] Ibid.

attainable to deduce that the *Quran* is the core of the legal basis of self-defence.

Thus, Akhtar reveals that the *Quran* produces 'an enthusiastic embrace of the divine will.'[381] The idea of enthusiasm is often correlating with the notion of zeal. According to the Quranic verses, enthusiasm is imposed on all Muslims with the exception of the infirm and disabled.[382]

As far as the concept of self-defence is concerned, Akhtar unfolds that the early Muslims tended to refrain from fighting even in self-defence, whereas the *Quran* erodes their reluctance and inertia by stipulating them that it is incumbent on God to judge of what is bad or good for the Muslims.[383] As the core of the legal basis for self-defence, the *Quran* provides that violent fight against militant infidel opposition is divinely sanctioned. Furthermore, all violent struggles are sanctioned by the *Quran* if they are carried out in self-defence. To that end, it is achievable to discern spiritual nature of a violent struggle, especially in terms of self-defence.

To elaborate further on the fundamental essence of the *Quran* as the core of the legal basis of self-defence, it needs to be pointed out that the ninth Quranic chapter, being one of the two al-jihad an surahs, presents a unifying theme that any violent struggle against armed infidel adversity is sanctioned by God. [384] Therefore, self-defence as violence against an armed pagan hostile is clearly permitted under the Quranic law. The fact is that the *Quran* prescribes no geographical or political motives of self-defence. As the case stands, Quranic verses focus merely on the religious/spiritual facets of violence that is committed in self-defence.[385]

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[381] S Akhtar, The Quran and the secular mind: A philosophy of Islam (Routledge, 2007), 9.
[382] Surat at-*Tawbah* V :90-1 and Surat al-Fath V :17.
[383] Surat al-Baqarah V :216 and Surat an-Nisa V:77.
[384] See above n 373.
[385] Surat at-*Tawbah* V :38-99.

Analysing the Quranic core of the legal basis of self-defence, it is deemed wise to take into consideration the fact that the *Quran* promotes enthusiasm for the faithful cause.[386] That is, self-defence is justifiable under Islamic jurisprudence as long as it is committed for the faithful cause. [387] From the contrasting point of view, if violence is driven by temptation, rather than by enthusiasm and faithful cause, the act of such violence cannot be considered self-defence from the perspective of the *Quran*. [388]

To continue the discussion of the legal basis of self-defence under Islamic jurisprudence, it is vital to reiterate that the *Quran* ensures the unity of the legal basis of self-defence, whereas the legal practice brings into light existent discrepancies in this field. Thus, for instance, Lippman, McConville, and Yerushalmi write that there are regional disparities in the local characteristics of the law of Shari'ah, while the law of Shari'ah denotes a progressive and straightforward step in the development of Islamic legal practice as it metamorphoses the Islamic customs of blood revenge and retaliation.[389] It is doable to infer from the aforementioned argument that there is no unified or codified legal basis of self-defence, because the *Quran* itself does not preclude a possibility of disparate interpretation of the concept of self-defence in Islamic legal practice. [390]

Besides, Weimann argues that divine law of the *Quran* may conflict with local customs in different Islamic cultures.[391] In other words, the fact that a violent act is considered self-defence under the Quranic precepts does not automatically entail the recognition of the

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[386] Surat at-*Tawbah* V:38-41
[387] See above n 373.
[388] Ibid.
[389] M R Lippman, S McConville, and M Yerushalmi, *Islamic criminal law and procedure: An introduction* (New York: Praeger, 1988).
[390] See above n 373.
[391] G J Weimann, Islamic criminal law in northern Nigeria: politics, religion, judicial practice (Amsterdam University Press, 2010), 55.

violent act as self-defence under customary law. [392] The problem is that every Islamic country makes personal decisions on how and to what extent Islamic law should be applied in the territory of the country. Hence, it follows that the concept of self-defence may be unequally understood, interpreted and applied in different Islamic states. Therefore, the legal basis of self-defence under Islamic jurisprudence is shaped not only by various sources of Islamic law and legal practice, but also by the will of Islamic statesmen who are entrusted to decide on the implementation of the law of Shari'ah in practice. [393]

In addition to this, it needs to be pointed out that the process of reislamification of certain territories, such as the northern states of Nigeria, affects the formation and practical utilisation of the legal basis of self-defence.[394] The fact is that the process of reislamification may change the state of affairs in the affected states by way of developing new interpretations of self-defence based on classical Islamic texts.

Returning back to the issue of diverse sources of Islamic law and practice, it needs to be claimed that all these sources can be categorised into two major groups, taking into account their regulative effects on the concept of self-defence.[395] The first group can be described as Islamic positive law. The second group can be regarded as Islamic customary law. As far as the first group of sources is concerned, Islamic jurisprudence considers self-defence as a legitimate right of individuals, Islamic states, and nations to have recourse to violence under the conditions of absolute necessity. [396]

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[392] See above n 392.
[393] Ibid.
[394] R Peters, and M Barends, 'Islamic criminal law in Nigeria' (2003), 46.
[395] See above n 208,39.
[396] M Yunus, The Exercise of Self Defence to Cause Death; A Legal Analysis under the Malaysian Penal Code, (Thomson Reuters Malaysia Sdn Bhd, 2016) 59.

In this connection, it needs to be recapitulated that specific Quranic verses prescribe the concept of self-defence as a significant element of Islamic positive law. [397] Thus, the *Quran* addresses self-defence as the right of oppressed individuals and peoples who are authorised to fight against unjustified acts of aggression or violation, because of their oppressive nature.[398] Alternatively, the category of aggression implies any act of violence which is contrary to the principles of equality. In other words, Islamic positive law pertains to the concept of self-defence as a necessary remedy to aggression which is given birth whenever specific basic rights and entitlements are breached or specific conditions are not respected. [399]

Likewise, the concept of self-defence is addressed in the framework of Islamic customary law. The key role of customary role is to fill the gaps in the legal regulation of self-defence under Islamic positive law. To that end, Islamic customary law focuses on the principles of self-defence that can be deduced and extended from the *Quran* and other sources of Islamic positive law. [400] The fact is that Islamic customary law stresses on the significance of self-defence as an instrument for justice and not for violence.

3. Critical Analysis of the Principles of Self-defence under Islamic Jurisprudence

After the key facts and arguments concerning the legal basis of self- defence have been provided, it is essential to get back to the issue of the principles of self-defence under Islamic jurisprudence. [401] As the foregoing discussion must suggest, the principles of self-defence are fundamental roots of Islamic law upon which all legal concepts, theories, and

[397] See above n 392.
[398] J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.
[399] See above n 392.
[400] See above n 373.
[401] See above n 400.

practices are based.[402] Therefore, the principles of self-defence define the basic nature of self-defence as an Islamic legal concept. In this connection, it is prudent to start with the principle of a twofold interpretation of self-defence.[403] This principle can be inferred from the *Quran*.[404]

The Quranic verses convey rulings and precepts which may be either clear and unequivocal, or open to different interpretations due to the unclear language of the Quranic texts. Thus, it is undisputed that self-defence is permitted by the *Quran* under the circumstances of violent aggression of unbelievers.[405] However, additional interpretations are needed with regard to the particularities of self-defence under other threats and circumstances.[406] The problem is that the *Quran* contains passages which are in the nature of probability (*zahir*) and ambiguity (*mujmal*).

With regard to self-defence, the *Quran* clearly prescribes that every individual is entitled to the natural right to life: "if one slayeth another, unless it be a person guilty of manslaughter, or of spreading disorder in the land, shall be as though he had slain all mankind, but that he who saveth a life shall be as though he had saved all man-kind."[407] The aforesaid passage conveys both unequivocal and unclear characteristics of self-defence under Islamic jurisprudence.[408] To be more precise, the verse in question permits self-defence as an act of saving an individual's life, and, on the other hand, prohibits any form of killing. Therefore, additional interpretations are required in order to ascertain whether killing

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[402] See above n 373.
[403] See above n 224, 45.
[404] See above n 400.
[405] See above n 373.
[406] See above n 373.
[407] RD Yadav, *Law of crime and self-defence* (Mittal Publications, 1993), 93.
[408] See above n 373.

in self-defence is allowed under Islamic jurisprudence in terms of saving another individual's life. [409]

To elaborate further, the next passage also exemplifies how the twofold principle of self-defence is expressed in the Quranic verses: "do not kill any one whom Allah has forbidden, except for a just cause."[410] Viewing the aforesaid passage through the prism of the twofold principle of self-defence, it is doable to deduce that, on the one hand, the *Quran* is silent with regard to the question of whether it is permissible to kill in self-defence, whereas, on the other hand, it clearly stipulates that the act of murder is prohibited unless it is carried out for a just cause.[411] Hence, it follows that killing in self-defence is allowed only if the act of self-defence is considered a just cause.

Elaborating on the discussion of other principles of self-defence, it is found necessary to highlight that the Islamic law often articulates the concept of self-defence in conjunction with the idea of proportionality.[412] Thus, it is affordable to consider proportionality a principle of self-defence, because self-defence is introduced in Islamic jurisprudence as a right (entitlement) and, therefore, it is not devoid of certain limitations or boundaries. The principle of proportionality is called to guarantee that the right to self-defence is not abused or misapplied under various conditions. [413]

As far as the principle of proportionality is concerned, it is possible to agree with Malekian that the key role of the aforesaid principle lies in the prevention of oppression and aggression in the case of self-defence. [414] To put it in other words, the principle of

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[409] Ibid.
[410] See above n 409.
[411] RD Yadav, 'Right of self-defence in Islamic jurisprudence', *Aspects of Islam and Muslim Societies* (2006), 315.
[412] See above n 208,38.
[413] See above n 373.
[414] See above n 400.

proportionality should be interpreted in conjunction with the principle of self-defence. If Islamic jurisprudence does not provide a clear meaning of a certain characteristic of self-defence, then it will be impossible to utilise the principle of proportionality in relation to such characteristic. [415] The mutual reciprocity between the concept of self-defence and principle of proportionality originates from the fact that the concept of self-defence brings about an active behaviour towards the infliction of violence, whereas the principle of proportionality actualises mechanisms of restrictive behaviour which is directed at the prevention of redundant violence as a result of self-defence. [416]

To every intent and purpose, it is achievable to agree with Malekian that the principle of proportionality does not empower the act of self-defence as a permission to have recourse to violence and aggression. [417] Contrariwise, the principle of proportionality is conceived to function against any unsubstantiated and unrestricted act of violence for the benefit of its prevention. [418] It is extremely interesting to note that Malekian sets forth for consideration a set of supplementary principles which have been viewed by Islamic jurists as a precondition to the application of the principle of proportionality.

These supplementary principles should be summarised as follows. First, the principle of proportionality cannot be actualised in practice unless there is a definite indication of act which clearly unequivocally constitutes a substantial wrongful conduct against an individual's life, health, or property. [419] Second, the principle of proportionality is not tolerated under circumstances when there are non-violent alternatives which can be exhausted in

[415] See above n 373.
[416] See above n 400.
[417] See above n 373.
[418] See above n 373.
[419] See above n 398, 60.

practice.[420] Third, the principle of proportionality loses its power unless it is fully respected. The full respect of the principle of proportionality stems from the fact that this principle constitutes a fundamental element in Islamic jurisprudence of self-defence and, thus, carries out a significant function for the qualification of an act constituting an act of self-defence. [421] Fourth, a violent act which is conducted for the purpose of self-defence needs to be ceased at the moment when a wrongful conduct is corrected or prevented. [422] Fifth, a retaliatory act cannot be recognised as an integral element of the right of self-defence, due to the fact that the right of self-defence is automatically enforced against a crucial act of attack which is imminent of obvious. [423]

After supplementary principles of proportionality in terms of self-defence have been reviewed, it is important to emphasise that self-defence under Islamic jurisprudence has quite different meaning as compared to the concept of self-defence under international law or other legal systems.[424] The fact is that Islamic jurisprudence restricts the scope of the application of proportionality in self-defence to divine methods, whereas, in other legal systems the legal dimensions and scope of the principle of proportionality are determined by the political authorities of the pertinent state. [425] In other words, only under Islamic jurisprudence the concept of self-defence in conjunction with the principle of proportionality is given the divine meaning: “Fight those in the way of God who fight you, but do not be aggressive.”[426]

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[420] R Peters, The reintroduction of Islamic criminal law in Northern Nigeria: A study conducted on behalf of the European Commission (2001).
[421] Ibid.
[422] See above n 373.
[423] See above n 421.
[424] DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.
[425] See above n 373.
[426] See above n 208,39.

The aforementioned Quranic verse makes it clear that self-defence is a very important concept of Islamic law which is based on a variety of immutable principles. Apart from the principle of proportionality, the *Quran* underlines the principle of criminality of aggression. [427] In other words, self-defence can be considered as such under Islamic jurisprudence as long as it is not aggression, because aggression is crime. Besides, the *Quran* and other sources of Islamic jurisprudence make it absolutely clear that it is morally correct and legally permissible to fight against those who wage war or other forms of aggression. This doctrinal position implies that self-defence is not only a legal right, but also a moral obligation. [428]

Also, it is deemed wise to acknowledge that self-defence cannot be motivated by violence. The *Quran* and other sources of Islamic jurisprudence prohibit violence as a purpose or motive of Muslims' actions. [429] Therefore, self-defence is based on the principle of justice, because it is driven by the desire and necessity of bringing justice. The principle of justice has universal significance under Islamic jurisprudence. [430] This implies that the aggressor must be stopped, prosecuted and punished through self-defence and other subsequent means in order to secure justice 'without due regard to geographical position.'[431] In this context, Malekian is prone to recognise another fundamental principle of self-defence under Islamic jurisprudence – the principle of judicial responsibility for 'the implementation of justice and the founding of the truth.'[432]

[427] See above n 373.
[428] See above n 426.
[429] Ibid.
[430] See above n 373.
[431] See above n 208,36.
[432] See above n 208,36.

It is prudent to agree with Malekian that the principle of judicial responsibility plays crucial role in the recognition, implementation, and qualification of self-defence as a fundamental concept of Islamic criminal law. [433] As a matter of fact, the recognition of self-defence cannot be carried out automatically unless the court at issue decides that all requirements of self-defence have been properly fulfilled in the case at issue. [434] In like manner, it is often impossible to actualise an individual's right to self-defence without risk of becoming a participant of subsequent criminal process. [435]

To continue analysis of the principles of self-defence under Islamic jurisprudence, it is extremely interesting to note that Islamic jurisprudence sets forth a series of principle under which killing a person in self-defence is not punishable.[436] Prior to examining these principles, it needs to be stated that the basic rule of Islamic law lies in the prohibition of ending an individual's life unless it is decided so by the judiciary.[437] That is, self-defence must not result in killing of the attacker. [438] The general rule is that nobody is permitted to kill another individual or bring end to another individual's life by claiming that the individual deserves death, judging by his or her own opinion and criteria. [439]

Islamic jurisprudence makes it very clear and unequivocal that, if a Muslim or any other individual kills another individual, the killer is recognised as a murderer and deserves the criminal punishment for the murder. [440] However, Islamic law prescribes specific obligatory situations, in which it is lawful to resist aggression because of obligation and, thus,

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[433] See above n 426.
[434] See above n 373.
[435] See above n 426.
[436] A Zeydan, Hâletu'd-Darûra fi'ş-Şerîatil İslâmiyye (Mecmûatu Buhüsil-Fıkhiyye, along with his 8 articles) (Beyrut,1986), s. 184-195.
[437] R Vogler, *A world view of criminal justice* (Burlington: Ashgate, 2005), 97.
[438] Ibid.
[439] Ibid.
[440] See above n 373.

the killer can be found innocent and free from punishment.[441] These situations correspond to the principles of innocence for killing in self-defence under Islamic jurisprudence.

The first and foremost principle stipulates that killing in self-defence is permissible under Islamic jurisprudence and neither blood money nor retribution is mandatory if an attacker takes action to kill the defender, while the defender is deprived of any opportunity to escape albeit he has taken strenuous efforts to escape and consequently is forced by the circumstances to kill the attacker. [442] The key rationale underlying the above-captioned principle originates from the fact that such killing in self-defence is necessitated by the murdered individual's first action to kill the other and that there was no other alternatives to avoid the killing in response. Moreover, Udeh confirms that an obligation to act in self-defence arises under the aforementioned circumstances.[443] However, it can be inferred that such obligation does not emerge if it was attainable for the defender to repel the attack without killing the attacker, either by way of shouting or calling for help.

The second principle of killing an attacker in self-defence articulates that any killing taken place in a house, shop, or store which has been committed with an intent to prevent the attacker from stealing the defenders possessions is permissible under Islamic jurisprudence, because it can be qualified as an individual's right to defend one's property.[444] In this connection, Islamic jurisprudence regulates that the legal owner of the property who

[441] Abdulkâdir Üdeh, et-Teşrîu'l-Cinâî'l-İslâmî, Kâhire (1959), 1/473, 489.
[442] See above n 373.
[443] See above n 443.
[444] P L Reichel, *Comparative criminal justice systems: A topical approach* (Upper Saddle River, NJ: Prentice Hall, 2002), 67.

killed the burglar cannot be considered a murder, because he is entitled to enjoy a lawful defence of property. [445]

The third important principle of killing in self-defence under Islamic jurisprudence provides that if an individual demonstrate resistance against another individual who makes attempts to rape his or her honour in his or her residence or somewhere else, it is permissible to kill the perpetrator as a result of endeavouring to protect his or her honour. [446] Under such circumstance, Islamic jurisprudence requires no blood money or retribution, because the defence of one's honour is considered under Islamic jurisprudence a lawful defence. [447] The key reason why such killing is considered a lawful defence stems from the fact that killing the aggressor in order to defend his or her honour is recognised as the final resort.[448]

Not opposed to Udeh and other researchers of Islamic criminal law, Warren maintains that the killing in self-defence as the defence of dignity, life, freedom, family, and property, is often postulated as legitimate killing.[449] Warren points out that the principles of legitimate killing in self-defence are well-developed in many Islamic countries, such as Iran. [450] Thus, in Iran the principles of legitimate killing in self-defence are prescribed both under the law of Shari'ah and law of Iran. The key principles, which can also be viewed as the key prerequisites to legitimate killing in self-defence, include illegality of aggression and imminence of attack.

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[445] See above n 373.
[446] See above n 373.
[447] See above n 446.
[448] M C Bassiouni, *The Islamic criminal justice system* (New York: Oceana Publications, 1982), 18.
[449] C S Warren, Islamic Criminal Law: Oxford Bibliographies Online Research Guide (Oxford University Press, 2010), 31.
[450] See above n 373.

In like manner, the same principles of killing in self-defence under Islamic jurisprudence are confirmed in the publication by Mansoor.[451] The scholars argue that the issue of killing in self-defence is subject to judicial proceedings. However, there are numerous cases where the defender was found to have acted in self-defence resulting in the aggressor's death.[452] That is, the judiciary in Islamic countries is prone to recognise and apply the principles of killing in self-defence. Moreover, some Islamic countries have adopted legal statutes which contain articles on specific cases where international killing is recognised as self-defence. [453] That is, not only the traditional provisions of the law of Shari'ah, but also contemporary Islamic law statutes acknowledge the existence and practical application of various principles of self-defence, including the principles of killing in self-defence. [454]

4. The Practical Application of the Principles of Self-defence by Islamic Jurists, Judges, Lawyers and other Participants of the Legal Process

As the foregoing discussion must suggest, the question of self-defence is regulated in Islamic jurisprudence under various perspectives and angles.[455] That is, the legal basis of self-defence is derived from the *Quran* and other primary sources of Islamic law. [456] Also, it has been ascertained that the *Quran* and other sources of Islamic jurisprudence defines the right to self-defence in a clear and affirmative matter. [457] There exist problems in the practical actualisation of the Quranic verses, principles of Islamic jurisprudence and other sources of

[451] F Z Mansoor, Criminal law and the rights of the child in Muslim states: a comparative and analytical perspective (BIICL, 2010), 142.
[452] S Tellenbach, "Islamic Criminal Law," The Oxford Handbook of Criminal Law (2014), 18.
[453] Ibid.
[454] Ibid.
[455] See above n 391,19.
[456] See above n 373.
[457] Ibid.

Islamic law in practice without deducing or referring to a practical rules and specific requirements of such actualisation. To that end, it is very urgent to explore how the principles and essential characteristics of self-defence are applied by Islamic judges, lawyers, jurists and other participants of the legal process. [458]

In this connection, Malekian writes that the principles of self-defence are often interpreted and applied by Islamic legal practitioners as principles of self-protection. That is, Malekian juxtapose the two legal concepts 'self-defence' and 'self-protection' in terms of the legal use of the concept of self-defence in practice. In this connection, it needs to be clarified that the term 'protection' means 'the act of protecting.'[459] That is, the concept of protection implies that certain protective actions are required against a real and actually occurring threat. On the other hand, the concept of defence denotes 'a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question.'[460]

In this light, it is extremely interesting to note that, while the common law differentiates between the concepts of protection and defence, Islamic lawyers tend to make parallels between them. [461] As a matter of fact, Islamic legal professionals do not recognise the difference between the concept of self-defence as an act of acting protectively against an actually threat and as a legal right which can be applied only under certain circumstances and states. [462] Thus, self-defence as self-protection means dynamics and active conduct which is directed at the protection of existent legal rights. In that vein, self-defence as self-

[458] Ibid.
[459] Black's Law Dictionary, n, 1343.
[460] Black's Law Dictionary, n, 1482.
[461] See above n 373.
[462] Ibid.

protection cannot be deemed unjustified.[463] The justifiability of self-defence as self-protection originates from its moral rationale – to protect other rights, such as the rights to life, health, property, and honour.[464] Also, on the other hand, Islamic lawyers consider self-defence as a legal right. The legal nature of this right can be inferred from the Quran. According to the majority of Islamic jurists, such as schools of Hanafites, Malikites and Shafi'ites, the right of self-defence is an obligation in Shari'ah (wajib), it is not dynamic.[465] Besides, self-defence as a legal right is not absolute but relative. Moreover, this right is not deprived of restrictions and limitations.

The problem is that the juxtaposition of self-defence as an act of protection and self-defence as a legal right is likely to remove the restrictions and limitations which are intrinsic to self-defence as a legal right.[466] The fact is that self-defence as self-protection empowers a defender to act as a judge on its own cause in any special sense.[467] Therefore, self-defence as self-protection makes any act of protection justifiable regardless of the consequences. In this connection, Islamic jurists are prone to justify the applicability of self-defence as self-protection in both personal and state levels.[468] To be more precise, self-defence as self-protection and right is regarded by Islamic jurists as an integral right in individual freedom of a person or independent sovereignty of states.[469] For these reasons, jihad, for instance, is considered by Islamic legal professionals as a defensive war and not

[463] Ibid.
[464] See above n 187.
[465] Ibid, 129.
[466] See above n 373.
[467] Ibid.
[468] Ibid.
[469] Ibid.

an aggressive war. Hence, it follows that self-defence as self-protection justifies application of force and violence regardless of consequences. [470]

Important insights into the practical application of the principles of self-defence by Islamic lawyers can be made after a diligent review of how various Islamic legal schools interpret and utilise different principles and essential characteristics of the concept of self-defence. [471] In this sense, Peters writes that each major school of Islamic criminal law adopts its own approach to understanding and application of principles of self-defence. [472] As far as the issue of *mens rea* is concerned, all Islamic lawyers concede that there are three basic requirements for having legal punishment applied to a perpetrator of crime. [473] That is, it is essential that the offender have been empowered to commit or not commit the act (*qudra*), have been knowledgeable (‘*ilm*) that the act in question has been an offence, and has been carried out with a specific intent in mind (*qasd*).[474]

To continue the discussion of the practical application of principles of self-defence by Islamic lawyers, it is deemed wise to pay attention to the fact that Islamic lawyers do not consider self-defence as an absolute right or legal doctrine; however, they are prone to believe that the same rules of self-defence are applicable to all individuals. [475] In this connection, it is extremely interesting to note that the concept of mens rea constitute the core of the concept of self-defence under Islamic jurisprudence. [476] Thus, Muslim lawyers

[470] Ibid.
[471] Ibid.
[472] Ibid.
[473] Ibid.
[474] Ahmad b. Idri ıs Qari afiı, Anwi ar al-buri uq fi ı anwi aлal-furi uq, 4 vols. (Beirut: Alam al-Kutub, n.d.), vol. I, 162.
[475] See above n 373.
[476] Ibid.

are inclined to think that the theory of *mens rea* helps determine whether offences resulting from self-defence are punishable or not. [477]

Besides, by applying the concept of *mens rea,* Muslim lawyers verify whether the theoretical basis for the concept of uncertainty (*shubha*) can be viewed as a legal defence: 'actual or presumed ignorance of the unlawfulness of an act is a legal defence in cases of homicide and *hadd* offences.'[478] All things considered, it is deemed wise to compare how different schools of Islamic criminal law interpret and apply the concept of *mens rea* in relation to the category of self-defence.

As far as the issue of age is concerned, it needs to be pointed out that the schools of Hanafites, Malikites, Shafi'ites, and Hanbalites differ in their views on the age before which puberty cannot be established. [479] Also, different schools of Islamic law demonstrate discrepancies in the interpretation of age after which absence of puberty cannot be established. [480] Thus, for instance, the school of Hanafites recognizes that the age after which absence of puberty cannot be established constitutes 15 years. From the contrasting point of view, Malikites contend that the age after which absence of puberty cannot be established constitutes 18.

By contrast, Hanafites, Shafi'ites, and Hanbalites are prone to believe that the age after which absence of puberty cannot be established is 15. [481] In this connection, it is possible to determine that different schools of Islamic law specify disparate age after which absence of puberty cannot be established. Hence, it follows that there is no a unanimous or

[477] Ibid.
[478] See above n 188.
[479] See above n 373.
[480] Ibid.
[481] Ibid.

standardised approach to the practical application of the principles of self-defence under Islamic jurisprudence. [482]

Nevertheless, different Islamic jurists, including representatives from various schools of Islamic law tend to concede that there is no *mens rea* in the situation when the perpetrator of a criminal offence is devoid of the intellectual capacity to realise completely the implications of his behaviour. [483] In other words, there is no dispute among Muslim lawyers over the fact that the phenomenon of minority ceases to exist with 'physical puberty'. [484] As the case stands, each school of Islamic law suggests that children are deprived of the possibility to reach puberty prior to a specific age and must have attained it after a specific age. This notwithstanding, the Shiite lawyers do not fix a minimum age.

Analysing the factor of age further, it is found necessary to point out that the factors of insanity and minority make the imputation of crimes to the offender impossible and illegalise his conviction. [485] In view of the above, it is doable to make inference that the factors of insanity and minority also make impossible the conviction of an individual who has found to apply excessive force in self-defence. [486] Nevertheless, some Islamic jurists are inclined to think that insanity and minority do not preclude financial liability.

Besides, it is also possible to agree with Peters and other researchers of Islamic criminal law that the state of unconsciousness removes criminal responsibility, unless the unconsciousness was the result of drunkenness. [487] To that end, it needs to be theorised that the factor of unconsciousness is also applicable to the concept of self-defence. The

[482] Ibid.
[483] Ibid.
[484] Ibid.
[485] Ibid.
[486] Ibid.
[487] Ibid.

Islamic lawyers are disposed to think that unconsciousness removes criminal liability for the harm inflicted as a result of applying violence in self-defence, unless such unconsciousness was a result of drunkenness.[488] However, in practice, it may be difficult for Islamic lawyers to establish the linkage between unconsciousness and self-defence as a legal right and self-protection.[489] The paradox is that the right to apply force in self-defence requires conscious decision which is based on the necessity of bringing aggression to an end.[490] If a self-defender is unconscious with regard to the purpose and objectives of his or her actions, it will be questionable whether he has possessed sufficient capacity to act in self-defence.

In other words, it is not correct to consider the acts of self-defender not punishable by virtue of his or her unconsciousness.[491] As a matter of fact, Islamic lawyers are not disposed to characterise a self-defender as unconscious, because of the fact that the only requirement in respect of the perpetrator of violence, even if the perpetrator acts in self-defence, is the possession of reason (*'aql*), or, in other words, the capacity to understand that the perpetrator has applied violence correctly or wrongly.[492] Thus, according to Islamic lawyers, it is impossible to conduct the act of self-defence, or, in other words, it is unachievable to properly actualise the right of self-defence, without possessing a reasonable mind.

In like manner, the applicability of self-defence in practice under Islamic jurisprudence is tightly linked to the concept of uncertainty (*shubha*). The relationship between uncertainly and self-defence are viewed by Islamic lawyers quite differently.[493] The complexity of such

[488] Ibid.
[489] Ibid.
[490] Ibid.
[491] Ibid.
[492] Ibid.
[493] Ibid.

relationship is dictated by the fact that the notion of *shubha* may be equally presented as a defence from criminal liability itself, as well as an essential element of the right to self-defence under Islamic criminal law. [494] For instance, the practical reflection of uncertainty may be derived from the situation when a defender is uncertain with regard to the unlawfulness of the offender's act. In other words, sometimes it is fairly difficult to determine whether it is the right time to apply force in self-defence. [495]

Notwithstanding the disparity of interpretations of uncertainty in the framework of Islamic legal scholarship and practice, the majority of Muslim jurists tend to concede that the concept of uncertainty is derivative from the Prophet Mohammed's saying that all fixed punishments need to be warded off from the Muslims on the influence of *shubha* as much as possible.[496] To that end, Islamic scholars explicate that the doctrine of uncertainty (*shubha*) have pertinence only in relation to *hadd* crimes and homicide.

Besides, the terminology and classification of the various types of uncertainty, as well as the examples of utilising the defence of uncertainty, especially in self-defence cases, vary among various schools of Islamic law. [497] However, Islamic lawyers have no dispute over fact that there are two different types of uncertainty: uncertainty as to the facts and uncertainty as to the law. [498] As far as the first type of uncertainty is concerned, Islamic jurists point out that uncertainty as to the facts takes place if an individual believes that does not commit an offence because he has been justifiably mistaken in the identification of objects or persons. [499] On the other hand, uncertainty as to the law occurs if an individual believes

[494] Ibid.
[495] Ibid.
[496] See above n 188.
[497] See above n 373.
[498] Ibid.
[499] Ibid.

that his conduct is permissible, because the permissibility of such conduct stems from an incorrect interpretation of the Islamic law. [500]

To put it briefly, Islamic jurists recognise the existence of uncertainty regarding the facts if an individual attacks what he believes to be an animal or a dead body, but factually murders a living individual. [501] In like manner, the existence of uncertainty may be proved in the situation when a blind man applies violence in self-defence by believing that the victim of his violence was about to attack him. [502] To proceed further, uncertainty concerning the law can be viewed as an outcome of ignorance of either the details of the law or the essentials of the law. Such ignorance may imply ignorance of rules which rest on clear texts from *habith* or Koran or on consensus (*ijma*). [503] In this connection, uncertainty, as a driver of self-defence should be recognized as excusable if the offender is a recent convert to Islam, and arrives from outside the Islamic world, or, otherwise if he recently arrived from a less civilized world. [504]

To continue the analysis of Peter's explanations of how various principles of self-defence are applied by Islamic jurists, it is fairly important to attract the readers' attention to the fact that one of the fundamental principles of self-defence as a legal category is the principle of proportionality. [505] According to Peter, all Muslim jurists consent that killing a perpetrator in defence of life, property or honour is legit and reasonable if the act of self-defence is proportional to the acts of the attacker, that is, if such an act does not exceed the level of violence sufficient for the prevention of the aggression.[506]

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[500] Ibid.
[501] Ibid.
[502] Ibid.
[503] Ibid.
[504] Ibid.
[505] Ibid.
[506] See above n 187, 123-124.

In perspective of the above, it is achievable to reach the conclusion that the rule of proportionality indicates that the mischief which is dispensed by method for self-protection must be relative to the damage which is counteracted as an aftereffect of self-preservation. [507] The larger part of lawful researchers has a tendency to trust that the estimation of mischief to be averted and control of a cautious activity constitute the system of self-protection. [508] For Muslim attorneys, the guideline of proportionality implies that there is a straightforwardly corresponding relationship between unlawful assault and the privilege to self-preservation. This implies that the start of the assault sanctions the privilege to self-protection. [509] On the other hand, it is conceivable to estimate that the privilege to self-protection does not come from the impression of a danger and it doesn't keep on existing after the discontinuance of the danger.

To that end, it should be called attention to that Muslim legal scholars likewise perceive another rule of self-protection under the Islamic law, for example, the standard of anticipation. [510] It has as of now been built up in the structure of past talks that the *Quran* as the principle wellspring of the Islamic law makes self-preservation obligatory in specific cases. [511] Point of fact, the *Quran* recommends that an individual is obliged to protect one's life against encroachments, even to the detriment of the assailant's life. [512] On the premise of the previously stated Quranic verses, Islamic legal counsellors perceive and apply the standard of avoidance as a crucial rule. This guideline can be seen as a commitment to turn away damage to one's life through the curse of mischief on the aggressor. [513]

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[507] Surat al-Baqarah V:195.
[508] See above n 373.
[509] MY Al-Bahooti, *Sharah Muntahi Al-Iradat* (Matbah Ansar, 1947) 378.
[510] See above n 373.
[511] Ibid.
[512] Ibid.
[513] See above n 188.

In this association, Muslim attorneys are inclined to trust that the resistance of one's life is dependably a legitimate demonstration, even for the situation when an individual, while starving, murders the manager of sustenance keeping in mind the end goal to spare his life, after the last's dismissal to furnish him with this nourishment.[514] Additionally, the guideline of counteractive action keeps up that the damage to one's life as a consequence of starvation may be forestalled by method for taking the life of a man who blocks salvation.[515] In this association, the guard is legal just if the casualty led an unlawful demonstration against the executioner.

In this manner, another standard of self-protection under the Islamic law is the unlawful conduct of the casualty. As it were, the demonstration of self-preservation will be viewed as legal just if the casualty of the safeguard shows unlawful behaviour. On account of starvation, the unlawful behaviour of the casualty is his refusal to give the starving individual the sustenance fundamental for his survival.[516]

In addition, the demonstrations of roughness which are led as self-preservation ought to be regarded legal because of the way that the assaulter has lost his lawful insurance ('isma) right now of encroachment on the other singular's life, chastity, or property.[517] In this sense, Oudah composes that disciplines by educators, folks or demonstrations of open obligation don't exact an unlawful assault under the Islamic law and along these lines there is no privilege to self-preservation against such directs.[518] In any case, if the performer goes past his power and acts outside the power and reasons ridiculous damage, such on-screen character will be obligated for unlawful strike under the law of Shari’ah.

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[514] See above n 373.
[515] Ibid.
[516] See above n 188.
[517] See above n 373.
[518] Ibid.

Likewise, the Muslim legal counsellors are inclined to trust that the standard of proportionality does not so much goad the shield to apply such measure of power which is proportionate to the measure of danger. [519] Along these lines, the Muslim legal scholars illuminate that a protector is somewhat obliged to apply the base conceivable measure of the power in unavoidable circumstances if other sensible courses for security are not accessible.[520] That is, if the attacker looks to execute the guard, the shield does not need to slaughter the aggressor consequently. [521] Contrariwise, it is occupant on the protector to the assailant through the least conceivable level of power.

To proceed with the exchange, a substantial number of Muslim legal advisors give extra translation and utility to the standards of self-preservation. In this way, Al-Bahooti, and Al-Shibramisi compose that the Muslim legal scholars have changed the regulation of self-protection into the principle of pre-emptive self-preservation. [522] The recent takes starting points from numerous hundreds of years back. The regulation keeps up that a guard is not obliged to sit tight for the attacker to assault first with a specific end goal to understand his entitlement to self-preservation. [523] That is, the protector is qualified for apply the pre-emptive power with all due respect with the reason to capture the foreseen assault.

The Muslim attorneys are slanted to feel that the pre-emptive self-preservation will be legitimate just if the guard has sensible grounds to trust that he is going to turn into the prompt casualty of an unlawful assault, if neglected to apply the pre-emptive power. [524] As indicated by the Muslim legal advisers, it is officeholder on a lawyer of protection to

[519] Ibid.
[520] Ibid.
[521] Ibid.
[522] Ibid.
[523] Ibid.
[524] Ibid.

demonstrate the presence of sensible justification for the shield to trust in particular circumstances bringing forth right of self-preservation. [525] This implies that just suspicious grounds are not contemplated while demonstrating the presence of the privilege to pre-emptive self-protection. Taking after the contentions of the Muslim legal counsellors, it is conceivable to gather that the privilege to pre-emptive self-preservation will be advocated under the Islamic law just if a lawyer of guard or a safeguard demonstrates the presence of specific causes, conditions and reasons which have made offered ascent to the conviction about the prompt assault of the shield. [526]

Another state of self-preservation which is not expressly got from the Islamic standards of self-protection yet has been expounded through the lawful practice is the obligation of a safeguard to withdraw. This obligation is firmly connected with the prerequisite to apply the most reduced conceivable level of power. [527] The truth of the matter is that the obligation to withdraw is not likewise comprehended by diverse schools of the Muslim law specialists. [528] The dominant part sentiment is that the protector is under the commitment to direct any accessible conduct keeping in mind the end goal to spare his life by retreat. [529] As indicated by the larger part of legal counsellors, the obligation of a shield to spare his life, as opposed to incur hurt on the attacker. That is, it is occupant on the shield to utilize the mildest method for resistance which may not be joined with the power.

Notwithstanding this, the Shafite's school of Islamic law propounds that if the protector is mindful that he is fit to spare his life by retreat, the prerequisite of retreat turns into the safeguard's commitment. In any case, if the protector has questions, the Islamic law licenses

[525] ZY Al-Novi, Riyadh Al-Salheen (Dar Al-Fiker, 1993), 251.
[526] See above n 373.
[527] See above n 195, 80.
[528] See above n 373.
[529] Al-Qalubi, Hashyat al-Qalubi ala Sharah Minhaj (Maktaba Al-halbi, 1956) 206-07.

him to stay and go up against the assault.[530] Then again, the Malkite's school of Islamic law proposes that a shield is obliged to have plan of action to withdraw at whatever point such withdraw does not exact any damage on him. Aside from the material and physical harm, the Malkites consider that the mischief includes any social damage to the notoriety of the guard. [531]

By difference, the Shafites are slanted to imagine that the retreat is the safeguard's commitment just in the circumstance where the aggressor is an honest individual, though if the attacker is a backslider or an outsider foe, the retreat of the shield will be assessed as an unlawful direct and break of the obligation to stay and battle.[532]

5. Conclusion

After everything has been given due consideration, it is necessary to generalise that self-defence under Islamic jurisprudence has specific legal basis, specific principles, and peculiarities in their practical application of these principle by different schools of Islamic legal thought. It was ascertained that not only self-defence, but also killing in self-defence The first and foremost principle stipulates that killing in self-defence is permissible under Islamic jurisprudence and neither blood money nor retribution is mandatory if an attacker takes action to kill the defender, while the defender is deprived of any opportunity to escape albeit he has taken strenuous efforts to escape and consequently is forced by the circumstances to kill the attacker.

[530] I Farhoon, Tabsarat al-Hukkam (Maktba Mustafa Al-babi Al-halbi) 357.
[531] See above n 373.
[532] Ibid.

CHAPTER 3

LITERATURE REVIEW

1. Introduction

The purpose of this chapter is to conduct a review of pertinent academic publications and pieces of relevant jurisprudence in order to ascertain the similarities and discrepancies in the regulation of provocation and excessive self-defence under English criminal law and Islamic criminal law.

In its broad sense, the concept of the literature review entails an exploration of the previous research into a subject. The purpose of this is to review and evaluate the knowledge of previous studies, including their substantive findings. Also, a literature review provides theoretical and methodological contributions to the researched topic.

These contributions are dependent on the nature of the literature review as a secondary data collection method. This means that a literature review does not report original empirical findings; instead, it is a reconsideration and evaluation of already-known findings. Despite this, a literature review plays a very important role in preparing, orienting and verifying the results of primary data collection designs.

Although Al Ajlan made comparisons between public and private self-defence, he did not extend his comparisons to Western law.[533] Almatrodi has studied private self-defence and its implication in Islamic law, but he failed to consider its comparison with other laws or the circumstances in which the right of private defence is exercised.[534] Javed compared

[533] Dr Abdul Allah Suleiman Al Ajlan. 'Self-Defence and Provisions in Islamic Jurisprudence' [2010] 137–[2] Justice Magazine [Arabic] [Author's translator]
[534] See above n 225.

Western and Islamic law in terms of self-defence and intoxication; however, this was a descriptive study that lacked any qualitative data to support its objectives.[535]

Moreover, this study focused on the intention and the impact of criminal liability in the crime of murder, but this study failed to take into consideration comparisons with other laws (Bader Al salyh. 'The Intention and the Impact of Criminal Liability in Crime of Murder in Islamic Criminal Law with the application in the High Court in Riyadh' [2002] PhD, College of Prince Naif for Security Sciences).[536]The studies were predominantly written in Arabic. Moreover, a comparative approach has not been undertaken to compare the established principles of self-defence in Western law and the deductions of the Muslim jurists.[537,538] This study therefore attempts to make the principles of self-defence in Islamic law comprehensible in order to test their compatibility with Western law.

2. Similarities and differences between English law and Islamic law regarding provocation

Under English law, the concept of provocation is frequently used to denote a mitigatory defence implying a complete loss of control as a reaction to another individual's provocative behaviour sufficient to convert what would otherwise have been murder into manslaughter.

Both UK statutory law and common law recognize provocation as a defence. Under UK common law, it is incumbent on the defence to provide the court of justice with evidence of provocation, whereas the burden of proof is on the prosecution to establish the *actus reus* and *mens rea* of the crime at issue, for instance, murder. Under common law, one of the

[535] See above n 57.
[536] See above n 289.
[537] See above n 294
[538] Nahar Al-Otaibi, Impact of the nescience in dropping criminal responsibility in Shariah *(PhD Prince Nayef Security College*, 2002) (Arabic) (Author's Translation)

following circumstances may qualify as provocation in criminal cases: a) a grossly insulting assault; b) witnessing an Englishman being unlawfully deprived of his liberty; c) witnessing an attack on a relative; d) a father discovering someone committing sodomy on his son; e) a husband discovering his wife in the act of adultery[539].

UK statutory law made amendments to the common law regulation of provocation in criminal law cases. Thus, according to section 3 of the Homicide Act 1957, provocation must be regarded as something said or done or both which has caused the defendant to lose his self-control[540]. It should be noted that not only the fact of provocation should be taken into account; its effects on the defendant's behaviour must also be considered by the jury when deciding on the liability of the perpetrator.

The aforementioned statutory provisions on provocation were repealed and superseded by sections 54 to 56 of the Coroners and Justice Act 2009[541]. According to the new statutory provisions on 'provocation', that term is now substituted for the concept of 'loss of control'.

Also, provocation is now viewed as not a mitigatory defence but as a partial defence. To be more precise, s 54 of the Coroners and Justice Act 2009 identifies provocation as an individual's acts or omissions in committing or being a party to a killing resulting from the individual's loss of control[542]. Also, loss of control is defined by the Coroners and Justice Act 2009 as a qualifying trigger[543].

[539] *Homes v DPP* (1946) AC 588.
[540] Homicide Act 1957.
[541] Coroners and Justice Act 2009.
[542] Ibid
[543] Ibid.

In Pakistan, Articles 203a to 203j of the constitution built up a Shari'ah court with the ability to pass judgment on any law or government actions to be against Islam, and to review court cases for adherence to Islamic law. The penal code includes elements of Shari'ah.[544]

In contrast to English law, provocation is associated with an 'accident' or a 'mistake', not a loss of control. It can be said with confidence that the law of Pakistan takes 'human infirmity' into account more than any other legal system. The legal injunctions of Islam, considered collectively, are proof enough of this concern. The Prophet (pbuh) is reported to have said: '(The liability) for three things has been lifted from my Ummah: mistake (khata), forgetfulness (nisyan) and duress/coercion (ikrah), and also, 'The Pen has been lifted for three things: mistake, forgetfulness and duress'[545].

UK common law has established the reasonable person test in order to measure the gravity of the provocation. This test aims to verify whether a reasonable individual would have acted as the defendant did. In *DPP v Camplin* (1978), it was ruled out by the court that the age and sex of the accused could be ascribed to the reasonable person test when the jury took into consideration the defendant's power of self-control[546]. In other words, the reasonable person has to possess the specific characteristics of the accused.

Other instances of common law have provided that it is incumbent on the judge to direct the jury to consider whether an ordinary individual with ordinary powers of self-control would have responded to provocation as the defendant did and that no exception should be made for any features which might have made him or her more volatile than the ordinary

[544] Jonathan Fox (2008-05-19). A World Survey of Religion and the State. Cambridge University Press. p. 200. ISBN 978-1139472593. Retrieved 2013-02-18.
[545] See above n 295.
[546] *DPP v Camplin* (1978) AC 705 (HL).

individual[547]. According to Fitzpatrick and Reed (2000), under English criminal law, provocation is an acceptable defence for murder only[548].

By contrast, criminal law in Pakistan and Saudi Arabia recognizes provocation as an exception, not merely as a defence. It should be highlighted that the plea of grave and sudden provocation is made under exception I of section 300 of the Penal Code of 1860[549]. Under this exception, 'culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident' [550].

3. Similarities and differences between English law and Islamic law regarding excessive self-defence

The concept of excessive self-defence is regulated, either explicitly or implicitly, in many countries. Scholars interpret the phenomenon of excessive self-defence as an acceptable defence in situations in which the individual attacked 'exceeds the limits of necessary defence' (2013)[551]. As far as English criminal law is concerned, it should be noted that the Privy Council in *Palmer v the Queen* denied the existence of excessive self-defence[552].

In this case, the concept of excessive self-defence might have evolved from the right of self-defence, which exceeded the degree of normal self-defence and inflicted death on the assailant. The key idea of excessive self-defence might have been not excuse from

[547] *R v Morhall* (1995) 3 AER 659 (HL) and *Luc Thiet Thuan v R* (1997) AC 131 (PC).
[548] Fitzpatrick, B, and Reed, A (2000) 'Provocation: a controlled response' *Transnational Lawyers*, Vol. 12.
[549] Penal Code of Pakistan (1860).
[550] Ibid.
[551] Bohlander, M, and Reed, A (2013) Loss of control and diminished responsibility: domestic, comparative and international perspectives, Ashgate Publishing.
[552] Sornarajah, M (1972) 'Excessive self-defence in commonwealth law', *The International and Comparative Law Quarterly,* Vol. 21 (4), 758.

criminal liability but, rather, a mitigatory defence which reduced the offence from murder to manslaughter.

English appellate courts have also rejected the existence of such a defence. In *R v Hassin* (1963), the court depicted the concept of excessive self-defence as 'novel at the present time'[553]. The existence of excessive self-defence was also rejected in *R v Cascoe* (1970)[554]. However, despite the Privy Council's rejection of the existence of excessive self-defence under English law, some scholars theorize in favour of its recognition.[555].

Moreover, the existence of excessive self-defence is widely acknowledged in the Commonwealth jurisdictions. Both the Canadian and Australian courts have ruled that English law supports excessive self-defence. In their decisions, the courts in these countries have developed, in excessive self-defence, a new, qualified defence for murder.

Comparing and contrasting English law with Islamic law, it should be pointed out that in Islamic countries such as Pakistan or Saudi Arabia, the defender is permitted only to defend themselves, not to punish the attacker. Shari'ah, similarly to English criminal law, does not consider the act of self-defence to warrant punishment[556].

Additionally, the opinions of Muslim jurists, as well as the evidence from the Holy *Quran* and the *Sunna*, indicate that victims of unlawful attack are permitted to apply only reasonable force for personal defence. If the defender goes beyond this limit and applies force exceeding that which is necessary for this objective, he will be liable. However, from the logical point of view, the liability of such a defender will be mitigated if there is undisputed

[553] *R v Hassin* (1963).

[554] *R v Cascoe* [1970] 2 All E.R. 833.
[555] Hogan, T (1969) *Criminal law*, London, 223.
[556] See above n 321, 103.

evidence of a genuine necessity for the exercise of the right of personal defence and that the defender exceeded the necessary level of force[557].

4. Summary

After due consideration, it can be seen that there are both similarities and discrepancies in the regulation of provocation and excessive self-defence under both English criminal law and Islamic criminal law. The key similarity lies in the fact that both English criminal law and Islamic criminal law recognize provocation as a mitigatory defence in the criminal process.

Also, the key discrepancy in the regulation of provocation originates from the fact that English criminal law associate's provocation with the loss of control, whereas Islamic criminal law addresses provocation as a mistake or an accident. On the other hand, English criminal law does not explicitly recognize excessive self-defence as an excuse for criminal liability or as a mitigatory defence, whereas Islamic criminal law recognizes excessive self-defence as such. This notwithstanding, in many countries of the Commonwealth, such as Canada, Australia and India, the concept of excessive self-defence has been developed in the framework of case law.

[557] See above n 195.

CHAPTER 4

METHODOLOGY

1. Introduction

The overall purpose of this chapter is to evaluate and explain the research methods employed in the framework of this study and to justify their eligibility. Before commencing the analysis of pertinent research methods, it is essential to reiterate the key objectives of the research. As stated in the introductory chapter, the present dissertation is designed to verify whether the concept of self-defence resulting in murder is justifiable under the Islamic juridical concepts of '*qatl shibh al- 'amd*' (unintentional murder) and '*qatl al-khata* (murder by mistake). Moreover, the current study shed light on the concept of self-defence as either an existent or non-existent doctrine of Islamic jurisprudence – that is, the research will help to ascertain the existence or absence of the doctrinal basis of self-defence under Shari'ah law. Finally, the research is intended to establish both the parallels and disparities between the Islamic legal understanding of self-defence and the legal doctrine of self-defence under English law. In other words, the concept of self-defence in Shari'ah and English law are compared and contrasted.

Taking into consideration that the study aims at the all-embracing and comprehensive study of the phenomenon of self-defence under Islamic jurisprudence coupled with the comparison and contrast of self-defence under Islamic and English law, it is vital to elaborate a very complex but specialised legal methodology in order to fully satisfy all of the research objectives. Another complexity of the methodology is that it is not only manifold, but it is also multi-faceted. This means that, apart from the variety of research

methods, the pertinent methodology incorporates several levels or layers of research procedures. All of the specificities of the research methodology will be discussed step-by-step.

2. Research design

Adhering to the conventional idea that academic methodology starts with the formulation of a research design,[558] the researcher decided to incorporate a research design as a part of this methodology. Establishing a research design was the initial step of composing a methodology because such a step became inevitable after the research topic had been formulated and clarified.[559]

According to Saunders et al., a research design must be considered the general plan of how to proceed with providing answers to research questions; this implies that a research design entails a roadmap for answering research questions and fulfilling research objectives. Following Saunders et al.'s argument, it is possible to infer that the chosen research design must not only reflect the research objectives derived from the research questions, but it must also indicate the precise sources from which to collect evidence.

Taking into account that this study is jurisprudential, it is essential to search and retrieve data not only from secondary sources such as books and scholarly journals, but also from primary sources such as the *Quran*, *Sunna* or legislation and court cases. Besides, the research design must evaluate research constraints such as ethical issues, time, location, access to data and money, etc.[560] The value of a research design in the context of this study lies in the fact that it incorporates the general plan for answering each research

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[558] MNK Saunders, et al, *Research methods for business students,* (Pearson Education India, 5fh ed, 2011), 159-160.
[559] PN Ghauri, and KGronhaug, *Research methods in business studies: A practical guide* (Pearson Education, 2sd ed, 2002) 47-48.
[560] See above n 559, 159-160.

question one by one; thus, a research design should be reduced neither to a single data collection scheme nor to a single data analysis procedure. Academic legal research is different from professional legal research (legal practice), as academics and students normally conduct the former while qualified legal practitioners normally conduct the latter on behalf of the government and its institutions.

In general, both practices demand an equal amount of input and quality of work; however, scholarly research is a significantly different endeavour compared to professional research such as the law reform commission.[561] The researcher chose a flexible (qualitative) research design after considering the complexity, length and appropriateness of the four possible types of research design. As a result, the researcher ascertained that the current research's topic should be better expressed in the form of the following hypothesis: 'Islamic legal practice substantially extends the Quranic meaning of self-defence'. This research hypothesis is tested via a flexible (qualitative) research design because fixed (quantitative), experimental and quasi-experimental designs were deemed incapable of ensuring a comprehensive analysis of Islamic jurisprudence.

The key specificities of a flexible (qualitative) research design in the framework of the present study should be summarised as follows: First, in contrast to other types of research designs, a flexible research design made it possible to conglomerate all methodological procedures and issues into a single plan that could be changed, altered or improved while the project was underway.[562] Second, not being pre-planned in its nature, a flexible (qualitative) research design ensured that the details and characteristics of research methods evolved depending on the initial research results. Quantitative, experimental and

[561] Michael McConville and Wing Hong Chui , *Research methods for* law (Edinburgh University Press 2007), 17.
[562] Robson, C, *Real word research* (Oxford: Blackwell, 2002), 140.

quasi-experimental research designs would not have guaranteed the inclusion of additional or different details into research methods because those designs are always pre-planned.[563] Third, a flexible (qualitative) research design made it possible for readers to become more knowledgeable about the concept of self-defence under Islamic jurisprudence because all data, facts, evidence and findings were presented in the form of an easily readable, narrative and logically organised report, in lieu of numerical tables, formulas, figures or experimental/quasi-experimental data sheets. A more detailed analysis of the benefits of a flexible (qualitative) research design will be evaluated in the subsequent sections of this chapter.

2.1 Research process

It is essential to attain a clear and unbiased understanding of what a research process is in order to develop all research stages correctly and appropriately; Saunders et al. best interpret the concept of a research process in their publication, characterising it as a series of interdependent stages of research that are organised in a linear and sequential manner.[564] The researcher borrowed and adjusted Saunders et al.'s original process scheme for the purposes of this study. A summary of the current research process is illustrated in the ensuing figure.

[563] DA De Vaus, Research design in social research (SAGE, 2001), 26.
[564] See above n 559, 12.

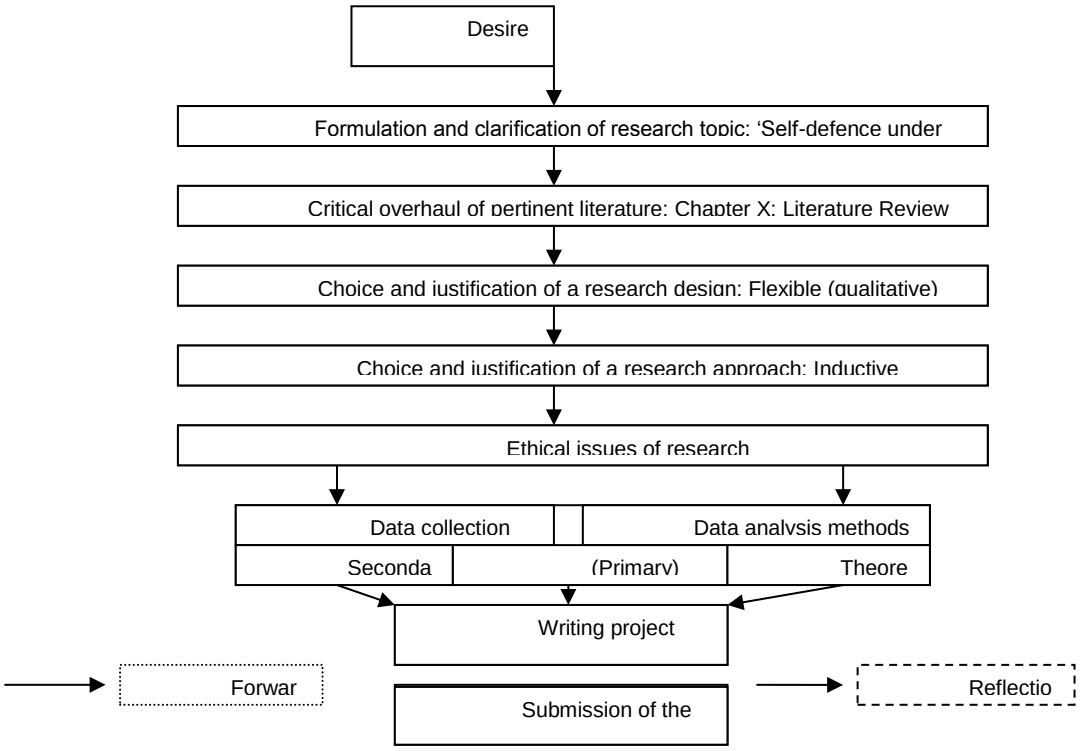

Figure 1: The research process

The research process reflected in Figure 1 is driven by a specific research purpose. As stated in the introductory chapter, the overall purpose of the research is to explore the concept of self-defence through the prism of Islamic jurisprudence, particularly in relation to the notions of '*qatl shibh al- 'amid*' (unintentional murder) and '*qatl al-khata*' (murder by mistake). This implies that the purpose of the research is exploratory.

Academics distinguish three general types of research purposes: a) exploratory, b) explanatory and c) descriptive.[565] The first type was the most relevant to the context of this research. According to Robson, an exploratory study focuses on what takes place in order to find new insights, ask questions and assess phenomena in a new scientific light.[566] In the context of this study, the exploratory character of research entailed constant emphasis on

[565] See above n 559, 6.
[566] See above n 563, 59.

the ‘living’ concept of self-defence under Islamic jurisprudence, which led to a comprehensive study of this concept by having recourse to multiple sources of Islamic law such as the *Quran*, *Sunna*, *Ijma* and case law with a single purpose in mind – to make insights into the phenomenon of self-defence. In the present project, an explanatory type of research was rejected because it was deemed less potent in assessing the concept of self-defence under Islamic jurisprudence in a new light. According to Saunders et al., explanatory studies accentuate the relationships between variables and thus are more reliant on quantitative research methods in which statistical evidence helps to achieve a clearer view of the relationship or to explain the reasons why something happens.[567] A flexible (qualitative) research design was chosen for the purpose of the present study, as an explanatory type of research was less consistent and productive than an exploratory one. Finally, descriptive research focuses on an accurate description of events, individuals or situations in order to have a clear view of the phenomena being studied on which it is necessary to collect data.[568] In the framework of this study, it was decided that, albeit the concept of self-defence required an accurate description before collecting data on the issues at question, the operation of description could never be sufficient for the provision of exhausted answers to the questions of what and how. Therefore, an exploratory purpose was chosen as a guideline for the research process.

2.2 Research philosophy

The first and foremost element underlying the chosen flexible research design is a research philosophy. In the study by Saunders et al., a research philosophy is a mandatory

[567] See above n 559, 132.
[568] See above n 563, 59.

element of the 'research onion'.[569] In its broad sense, the category of research philosophy relates to the development, i.e. the accumulation of knowledge in a particular field, as well as to the specific nature of such knowledge.[570] Saunders et al. specify a wide range of research philosophies to choose from, including positivism, realism, subjectivism, objectivism, functionalism, pragmatism, radical humanism, interpretivism and radical structuralism.

This study adopted the principles of positivism. It is very time-consuming to treat all research philosophies equally by providing arguments for and against each of them; instead, it is more reasonable to state arguments justifying the choice of positivism from the variety of many other research philosophies. Therefore, the foremost argument in favour of positivism originates from the fact that this research philosophy stipulates work with an observable social reality, while the end-product of positivist research can be 'law-like generalisations similar to those produced by the physical and natural scientists'.[571] Taking into consideration that the present study is in the domain of law, law-like generalisations are consistent with its general purpose. Tracy points out that a positivist philosophic paradigm is based on the presupposition that 'a single true reality already exists' in the present world and is waiting to be discovered.[572] The researcher found that this quality of positivism to facilitate the discovery of self-defence as a doctrine of Islamic law. In other words, the concept of self-defence was regarded as a real-life phenomenon that existed as a true social reality rather than an abstract notion. In this connection, it was possible to explore self-

[569] See above n 559, 128.
[570] Ibid 101.
[571] D Remenyi, B Williams, A Money, E Swartz, *Doing Research in Business and Management* (Sage Publications, London, 1998), 32.
[572] SJ Tracy, Qualitative research methods: Collecting evidence, crafting analysis, communicating impact (John Wiley & Sons, 2012), 39.

defence not only via theoretical research (study of Islamic jurisprudence and secondary sources), but also by way of observation and the empirical study of actual cases of self-defence.

For this purpose, the positivist paradigm was accompanied by the case study research technique. To put it briefly, case study facilitated the observation, evaluation and prediction of self-defence as an empirical phenomenon and furthered the creation of tangible, material knowledge.[573] Augmenting the positivist research philosophy with the case study technique addressed the phenomenon of self-defence by way of mirroring reality, not just by way of the doctrinal study of legal texts.

In contrast to an interpretivist philosophy, which entails an explanatory format of study and aims to approach the social reality through the eyes of the people being studied, the philosophy of positivism did not adhere to the multiple perspectives of social reality but relied on the 'one reality' of self-defence in the framework of Islamic jurisprudence.[574] Further, neither constructivism nor objectivism were considered to be the most appropriate research philosophies for the purpose of this study. Objectivism provides that the existence of social entities is separate from the people within them. Such a paradigm could not be adopted in the framework of this study because the concept of self-defence was to be approached as a people-related phenomenon. For example, the first research question required analysis of the Islamic juridical concept of self-defence both through the prism of Islamic law and through the eyes of people such as Islamic judges, jurists, lawyers and other participants in the legal process. As far as the philosophy of constructivism is concerned, its key idea is that a research phenomenon has no independent reality because it is merely

[573] Ibid 40.
[574] Greener, SJ, Qualitative research methods: Collecting evidence, crafting analysis, communicating impact (John Wiley & Sons, 2012),17.

constructed in the minds of those who think about it.[575] Certainly, such a paradigm could not be tolerated in the framework of this study because the concept of self-defence would never be regarded as being constructed in the minds of those who think about it. The fact is that the existence of Islamic jurisprudence evinces that self-defence is existent 'on paper' to the same extent as in people's minds.

Finalising the discussion of research philosophies, positivism was chosen because it is a traditional paradigm for social sciences.[576] Law is a social science; hence, the adoption of a fully-fledged positivist stance is natural for legal research. Positivism was expected to give birth to general ('covering') laws that could predict the development of the Islamic juridical concept of self-defence with high probability, or even with absolute certainty. This is particularly because positivism in this study relied on pure legal research (doctrinal study), unbiased empirical research (case study) and comparative study, which were free from the researcher's preferences and values. Adopting the philosophy of positivism, the researcher aimed to preserve a disinterested and value-free stance as much as possible.

2.3 Research approach: Deduction versus induction

A research approach also constitutes a significant element of any research design. In their comprehensive study on research methods, Saunders et al. differentiate between two types of research approaches: deductive and inductive.[577] Some scholars are prone to believe that the question of research method is of secondary significance to the questions of which research philosophy and research approach are applicable to a concrete study.[578] Additionally, it is possible to infer that choosing an appropriate research philosophy and

[575] Ibid 17.
[576] CM Fisher, and J Buglear, Researching and writing a dissertation: an essential guide for business students (Pearson Education, 2010), 68.
[577] See above n 559, 143.
[578] See above n 577, 68.

research approach are interrelated decisions. After a pertinent research philosophy has been chosen, it is necessary to shift the focus to a research approach. Briefly speaking, choosing a research approach in the framework of this study was associated with answering the question of whether the research in question would be carried out first as the development of a research theory and next as the verification of research hypotheses with the help of that theory (deductive approach), or whether it would merely be a collection of data and development of research theory in the final analysis after analysis of the data (inductive approach).

Scholars concede that a deductive approach is associated with positivism, whereas an inductive approach is connected with interpretivism.[579] A deductive research approach made it possible for the researcher to formulate a research hypothesis by applying a research theory. After the research theory was chosen, a variety of information, data and evidence was collected in order to verify the validity of the research hypothesis.[580] An inductive approach was rejected in the framework of this study because while being a flexible approach, it relied on inductive arguments and could never produce 'law-like' generalisations.[581] In contrast to an inductive approach, which works over a specific idea to generalise the case, a deductive approach rests on the general idea. Taking into consideration that the scope of this research was adjusted to the all-embracing and comprehensive study of the phenomenon of self-defence under Islamic jurisprudence, it was more important to attain the general idea in lieu of the specific idea. The emphasis on the general idea implies that it was essential to explore the concept of self-defence under Islamic

[579] See above n 559, 143.
[580] J Gill, and P Johnson, *Research methods for managers* (Sage, 2010), 114.
[581] DM Mertens, Research Methods in Education and Psychology: Integrating Diversity with Quantitative and Qualitative Approaches (London, Sage, 1998), 162.

jurisprudence rather than to interpret the concept in the light of specific factors, circumstances, events and preconditions. According to Saunders et al., a deductive approach entails deduction.

Deduction means the process whereby a relationship between variables within a research hypothesis are searched and explained.[582] The process of deduction was essential in the framework of this study, as it helped to divide a research hypothesis into variables and to show the nexus between the variables. This study's research hypothesis is as follows: Islamic legal practice (independent variable) substantially extends the Quranic meaning of self-defence (dependent variable). Applying the process of deduction to the aforesaid research hypothesis, it was possible to deduce two variables (concepts): an independent variable and a dependent variable.[583] The independent variable implied the cause and input to be verified in order to establish whether it was a genuine cause. In this study, the independent variable was deduced as the following operation term: Islamic legal practice. On the other hand, the dependent variable meant the output and effect to be verified in order to establish whether it was a genuine effect (consequence). In this research, the dependent variable was expressed as the following operational term: the Quranic meaning of self-defence. To sum up, the underlying idea of the deductive research approach was to establish whether the dependent variable was caused by the independent variable.

2.4 Primary data collection methods (qualitative research strategies)

The concept of a qualitative research strategy may be associated with the notion of a research method. According to Yin, every research is based on a research strategy that corresponds with the purpose of the research, such as exploratory, descriptive or

[582] See above n 559, 145.
[583] Ibid.

explanatory[584]; further, the choice of the deductive or inductive approach determines the specificities of a research strategy. There is no doubt that the selection of a proper research strategy is guided by research questions and objectives. Also, some research strategies can be used in conjunction. According to Saunders et al., there are several major research strategies to choose from, including experiment, survey, case study, grounded theory, action research, archival research and ethnography.[585] In addition to this, Cohen et al. and Trochim recognise the following research strategies: observation and meta-analysis.[586] Some of the aforementioned strategies are pertinent to qualitative research (case study, grounded theory, observation, etc.), whereas others are used in the framework of quantitative research (survey, experiment, meta-analysis, etc.).[587]

Taking into consideration that this study was conceived as a flexible (qualitative) research, the following research techniques were employed: case study and unstructured interviewing. As far as the case study technique is concerned, it is necessary to differentiate between the concepts of 'case' and 'case study'. According to Gerring, the term 'case' means 'a spatially delimited phenomenon (a unit) observed at a single point in time or over some period of time'.[588] In this connection, Gerring is prone to believe that every single case may entail a single observation or multiple (within-case) observations. The concept of a case study must also be defined; thus, Gerring describes case study research as 'the intensive study of a single case where the purpose of that study is – at least in part – to shed light on

[584] RK Yin, *Case Study Research: Design and Methods* (3rd edn), London, Sage, 2003), 56.
[585] See above n 559, 163-164.
[586] L Cohen, L Manion, and K Morrison, *Research methods in education* (Routledge, 2007), 456; W Trochim, 'Observation' (2006), http://www.socialresearchmethods.net.
[587] A L, Strauss, and J M Corbin, *Basics of qualitative research: techniques and procedures for developing grounded theory* (Sage Publications, 1998), 65; B G Glaser, and A L Strauss, *The discovery of grounded theory* (Aldine Transaction, 2006).
[588] J Gerring, *Case study research: principles and practices* (Cambridge University Press, 2007), 19.

a larger class of cases (a population)'.[589] Also, case study research may focus on several cases, that is, multiple case studies. Not opposed to Gerring, Cohen et al. define case study as a research technique that helps the researcher to determine the cause and effect and to observe the effects in real-life contexts with the help of empirical research.[590] In the framework of this research, case study helped to achieve the following benefits: First, it was possible to explore the phenomenon of self-defence in a real-life rather than statistical context when a special emphasis was placed upon Islamic jurisprudence and English law. Second, case study helped to mitigate the complexity of the case by way of stressing the doctrinal basis for law-like generalisations. Third, case study could serve multiple audiences because it actually diminished the readers' dependence on implicit presumptions while the overall process of research was still accessible. In other words, case study made it possible for readers to judge the implications of the study for themselves. The following two cross-cases were addressed by means of case study in the present research: a) self-defence under Islamic jurisprudence and b) self-defence under English law.

Unstructured interviewing was another qualitative research strategy utilised here. In its broad sense, the unstructured interview technique may be depicted as in-depth, naturalistic, narrative or non-directive.[591] Trochim distinguishes three types of interviews applicable in the framework of academic research: 1) structured interviews, 2) semi-structured interviews and 3) unstructured interviews.[592] The first two types of interviews are applicable in the framework of quantitative research and thus are not consistent with the current study. As far as the research strategy of unstructured interviewing is concerned, this

[589] Ibid 20.
[590] See above n 587, 253.
[591] L Blaxter, C Hughes, & M Tight, *How to research* (Open University Press, 2010), 193.
[592] W Trochim, 'Research methods knowledge base' (2006), http://www.socialresearchmethods.net/kb/destypes.php.

technique, in contradistinction with structured and semi-structured interviews, does not rely on a predefined set of questions to be asked to the participants, such as in structured or semi-structured interviews. Instead, unstructured interviews are aligned with the principles of qualitative research and are employed as an informal conversation with a social context between two participants. Being a social conversation, an unstructured interview adheres to its own interactional rules, which may be more or less recognisable by the participants.[593] The core idea underlying the employment of unstructured interviewing in the framework of this study was the idea of discovery, unveiling and the generation of the absolutely new and free vision of the concept of self-defence in Islamic jurisprudence. As an informal interview, unstructured interviews were expected to be in-depth and with no predetermined sets of questions to adjust to the situation.[594] That is, an interviewee was expected to freely generate his or her views on the issues in question and to convey the views to the interviewer, whereas the interviewer was not restricted by a set of predefined questions but was encouraged to improvise and formulate questions by taking into account the mood, style, peculiarities and direction of the conversation. One of the main benefits of incorporating unstructured interviewing into this study was the fact that the interviewer became more adept at interviewing by way of having the possibility to adjust the strategies appropriate for eliciting responses and, particularly in the case of this study, of making interviewees talk about the sensitive topic of self-defence under Shari'ah law, hence revealing more about their personal stances.[595]

[593] See above n 592, 193.
[594] See above n 559, 375.

[595] See above n 592, 193.

In summary, unstructured interviewing was employed through the following steps: 1) selection of and contact with interviewees, 2) conversation with the interviewees, 3) recording the conversation, 4) analysing the recording and 5) making inferences and final conclusions.

2.5 Data collection and analysis procedures

According to Saunders et al., data collection is associated with specific techniques and procedures that are applied in the last level of research.[596] It is possible to differentiate between two types of data collection: primary data collection and secondary data collection. Both types of data collection were utilised in the framework of this study. Primary data collection was actualised by means of primary data collection methods that is, by case study and unstructured interview. Secondary data collection was carried out by way of applying comparative analysis, synthesis, categorisation and review (to be discussed in the next section).

As far as primary data collection is concerned, the data collected by means of primary data collection methods (case study and unstructured interviewing) were primary evidence and facts about the concept of self-defence in Islamic jurisprudence and under English law. These facts and evidence were 'raw' and free from previous interpretations. By contrast, secondary data concerning self-defence in Islamic jurisprudence and English law was collected from secondary publications such as books and journals and thus was based on other scholars' interpretations and evaluations. The following fundamental principles were fulfilled during primary data collection. The first and foremost principle was the principle of disinterestedness. This principle required that the researcher withhold from unfolding his

[596] See above n 559, 472.

personal opinions and views with regard to the research topic (as opposed to lacking interest in the research topic).[597] This principle was fulfilled successfully, and no personal attitude regarding the concept of self-defence under Islamic jurisprudence was revealed. For example, the researcher did not illustrate whether he was prone to view self-defence as a doctrine of Islamic jurisprudence or as something else – only research findings were taken into consideration. The second principle fulfilled in the framework of primary data collection was the principle of confidentiality and anonymity. In the context of this study, the category of anonymity meant no personal data of interviewees had to be revealed. According to Fisher et al., anonymity is fulfilled when the names and locations are changed or withheld but the sex of informants is not changed or withheld.[598] The third principle was that of fair and lawful storage of data. All research data was stored in password-protected folders on the researcher's personal computer.

After the primary data was collected, it was analysed. There are two types of primary data analysis: qualitative data analysis and quantitative data analysis.[599] Taking into consideration that only qualitative primary data collection methods were employed in the framework of this research, it was possible to stick to qualitative data analysis. Babbie characterises qualitative data analysis as 'the non-numerical assessment of observations made through participant observation, content analysis, in-depth interviews and other qualitative research techniques.[600]

Following Babbie's interpretation on how to apply qualitative analysis, the following steps were taken in the framework of this study: 1) non-numerical examination and

[597] See above n 577, 78.
[598] See above n 577, 80.
[599] E Babbie, *The practice of social research* (Thomson Wadsworth, 2007), 377.
[600] Ibid 377.

interpretation of empirical evidence from case study and interviewees' responses;

2) searching for and evaluating discovered patterns of relationships between research variables in terms of the research hypothesis and 3) conversation analysis – 'a meticulous analysis of the details of conversation, based on a complete transcript that includes pauses, hems and also haws'.[601]

2.6 Secondary research methods

There are several reasons why secondary data was utilised in the framework of this study. First, it was unreasonable to reduce the conducted research to primary data collection procedures because the collection of primary data was deemed time-consuming, expensive and difficult. Second, it was decided that there was never enough data to make proper conclusions and provide comprehensive answers to research questions. Third, it made sense to collect secondary data because pertinent data had already been collected by previous scholars and existed in some form. Fourth, it was expected that secondary data would either cast light on or complement the primary data collected before. Fifth, it was essential to collect secondary data because such data could modify, confirm or contradict the research findings. Sixth, it was imprudent to refrain from collecting secondary data because it was impossible to carry out a research study in isolation from what previous scholars had already done. Seventh, secondary data allowed the researcher to focus his attention on interpretation and analysis. Eighth, the collection of secondary data was justifiable because, as a rule, more data should be collected than is ever used.[602] The following secondary data collection strategies were used in the framework of this study:

[601] Ibid 383.
[602] See above n 592, 192.

categorisation, comparative analysis, synthesis and review. Each of these strategies needs to be briefly discussed.

The technique of categorisation was considered an important secondary data collection and analysis tool. Scholars define the term 'categorisation' as the process in which 'ideas and objects are recognised, differentiated and understood'.[603] In the framework of this research, the method of categorisation was expected to facilitate the prediction, inferences and decision-making by way of recognising, differentiating and understanding the key ideas and principles underlying the concept of self-defence under Islamic jurisprudence. The categorisation used in the current research should also be understood as conceptual clustering.[604] Conceptual clustering made it possible to formulate a conceptual description of self-defence and to discern the clusters (classes of salient features) of self-defence under Islamic jurisprudence. After this, the classes were grouped in accordance with the descriptions.

Comparative analysis combined the specificities of analysis and comparison. The analysis was actualised as a logical division of the issues in question into smaller parts and elements, whereas comparison was used to detect and quantify the relationships between two or more features (variables) via observation, confrontation and collation.[605] In practice, comparative analysis was actualised as the collation and confrontation of the salient features of self-defence under Islamic jurisprudence and English law. The overall purpose of comparative analysis was to verify the similarities and discrepancies in the regulation of self-defence under the two different jurisdictions.

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[603] Miller et al, *Categorization* (VDM Publishing House Ltd, 2010), 38.
[604] Ibid.
[605] AE Egger, and A Carpi, 'Data: analysis and interpretation' (2008) *Visionlearning* 1.

Synthesis was another important secondary data collection technique used in conjunction with comparative analysis. Synthesis should be understood as a logical operation totally opposite to analysis that results in the combination of individual components and elements into something consistently new.[606] In the framework of this study, the research strategy of synthesis played a twofold function. Thus, on the one hand, the researcher expected that synthesis would verify and correct the results of preceding comparative analyses. On the other hand, the researcher believed that synthesis would help to generate a new theory on the doctrinal nature of self-defence under Islamic jurisprudence by way of combining various parts of evidence retrieved via comparative analysis.

Review was utilised in the framework of the literature review. The overall purpose of this method was to critically evaluate past publications concerning self-defence under Islamic jurisprudence in order to detect and fill possible gaps and inconsistencies in previous research.[607] The overhaul of previous secondary sources was carried out in a thematic, not chronological, manner. Besides, the method of review was conceived to orient and prepare the subsequent primary data collection methods of case study and unstructured interviewing.

3. Limitations of the research methods

The current study is restricted to the qualitative exploratory research of the concept of self-defence under Islamic jurisprudence and English law – that is, the present investigations were reduced to the qualitative research. Neither experimental designs nor quantitative research methods were applied in the framework of the present study.

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[606] T Ritchey, *Analysis and Synthesis* (1996), <http://www.swemorph.com/pdf/anaeng-r.pdf>.
[607] See above n 351, 95.

4. Summary

This chapter evaluated and explained the research methods employed in the framework of this study and justified their eligibility. Sticking to the conventional idea that every serious academic methodology starts with the formulation of a research design, it was necessary to incorporate a research design as part of this methodology. Such a crucial first step became inevitable after the research topic had been formulated and clarified. Each element of the chosen research design, such as research philosophy, research approach, research strategy, etc., was analysed in detail.

CHAPTER 5

RIGHT OF PRIVATE DEFENCE

1. Introduction

The main purpose of this part of research is to explore, ascertain and explain the existence, as well as all the pros and cons, of the right of private defence under Shari'ah and English law. The first component of the project is purposed to construe the necessity and rationale underlying the right of private defence. Then, the study is logically divided into two parts. The first part of the study is utterly dedicated to the revelation and investigation of various issues and problems related to the right of private defence under English law. The second part of the analysis unveils peculiarities, strengths, and weaknesses of the right of private defence under the Shari'ah, or, in other words, under the Islamic law. Finally, comprehensive conclusions to this chapter are provided.

In light of this, the current study is conceived to provide a solution to the following problem statement: The right of private defence under English law has the same rationale as the right of private defence under Islamic law – the protection of natural values against a criminally punishable assault.

2. People need the right of private defence

Prior to delving deep into the nature of private defence as a right under English law and Shari'ah, it is first necessary to ascertain the rationale underlying the existence of this right—to ask why people need the right of private defence. To answer this question, it is essential to review the core benefits and unique features that can be attributed to the right of private defence irrespective of jurisdiction. Bakircioglu writes that private defence is not

merely an individual right, but rather a complex doctrine that determines the mode of existence of both the individual and collective rights to self-defence under either domestic law or international law.[608] This means that the concept of private defence operates at the doctrinal level and not merely as a statutory entitlement or judicial principle. Thus, as a doctrinal phenomenon, private defence is frequently based upon various theoretical justifications and philosophical principles that show the need for its practical application in every society. More specifically, the doctrine of private defence may rely upon Hobbes' theory of social contract, whereby the individual right to self-preservation is asserted. According to Hobbes, in the state of nature every individual will, and is allowed, to lawfully apply his or her own strength and art for caution against all other individuals.[609] Hobbes underpins his argument with the proposition that every individual is equal because nature makes everyone equal in both faculties of mind and body. By following Hobbes' observations, the conclusion can be reached that the natural equality of humans entitles every individual, even the weakest, to actualize his or her potential strength to kill the strongest in order to protect his or her life. Hobbes' understanding of the natural equality of humans as the underlying basis for private defence implies that killing in self-defence may be carried out by various means—either by secret machination or by confederacy with other people who appear to be threatened by the same menace or risk.[610]

An interesting theoretical approach to the value and significance of private defence may also be discerned in Montesquieu's studies. In his work of philosophical thought, *The*

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[608] O Bakircioglu, 'The right to self-defence in national and international law: the role of the imminence requirement', (2009) "*The Ind. Int'l & Comp. L. Rev.* 19.
[609] T Hobbes, *Leviathan: or, the matter, forme & power of a Commonwealth, ecclesiastical and civil* (A.R. Waller ed., Cambridge University Press, 1904), 115; Kinji Akashi, 'Hobbes's relevance to the modern law of nations' (2000) 2.
[610] Ibid 115.

Spirit of the Laws, Montesquieu maintains that every individual possesses the right of natural defence, but that this does not imply a need to attack. Instead of attacking another individual, the defender needs only have resort to appropriate tribunals. However, Montesquieu acknowledges that, under certain conditions, people cannot exercise their right of defence via tribunals as immediate death or serious injury would inevitably become the outcome of waiting for the law to operate, and, therefore, the recourse to force may be viewed as justifiable and necessary.[611] A similar vision of the inevitability and justifiability of private defence under extreme conditions is demonstrated in Blackstone's *Commentaries on the Laws of England*. In this piece of authoritative academic scholarship, it is explicitly affirmed that the right of natural defence does not necessarily entail the act of attacking as, in lieu of attacking another individual for past or impeding harm, the defender needs to have resort to the relevant courts of justice. This notwithstanding, Blackstone's *Commentaries on the Laws of England* clearly states that an individual is not deprived of the right of preventive defence, but only in sudden and violent cases when specific and immediate harm or suffering would be the result of idling. Finally, Blackstone arrives at the conclusion that to perform murder by the plea of self-defence, it must be perceived by the defender that he or she could not have recourse to any other possible way of escaping from the attacker.[612]

These theoretical ideas and interpretations of private defence as a phenomenon enrooted in natural law, rather than the positivist law of sovereign states, highlight the natural need for private defence. Moreover, the doctrinal character of private defence helps deduce a number of rules that make private defence applicable to every society and culture,

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[611] Baron De Montesquieu and Jean Jacques Rousseau, 'The Spirit of Laws' (Robert Maynard Mutchins ed., Encyclopedia Brittanica, 1952), 62.
[612] William Blackstone, *Commentaries on the Laws of England* (5th ed., Cavendish Publishing Limited, The Glass House, 2001), 13.

irrespective of the discrepancies in legal systems and political regimes. For instance, all the theories that intertwine and interplay in the framework of the doctrine of private defence underscore the principle of imminence that makes private defence necessary for all people in general and for each individual in particular. The rule of imminence suggests that a sovereign state must not establish a monopoly on force when the danger is imminent. However, the rule of imminence clearly delineates the boundaries of private defence as a natural right by implying that this right can be invoked only if the danger is imminent. This means that the doctrine of private defence does not deny the state authority to ensure that putative defenders are not taking innocent lives by virtue of their speculative and subjective reasoning. Regarding this, Locke writes that it is not reasonable for individuals to be judges of the fates of other individuals and, hence, governments are divine appointees to restrain the partiality and violence human beings.[613] The natural but restrictive origins of private defence have also been recognized and expounded upon by Grotius. The philosopher highlighted that the existence of a government helps ensure that personal interests do not cloud the mind of the individual seeking justice through the actualization of his or her natural right of private defence.[614]

The aforesaid statements and arguments have also been adopted and expanded upon by the theorists, lawyers and practitioners of our time. The key rationale for referring back to the philosophers of the past is to re-assert that people's need for the right of private defence rests on a very strong contention that cannot be easily refuted—that the right of self-defence is a human right. Regarding this, Kopel, Gallant and Eisen write that it is not unnatural or inhumane for people to protect themselves, their families and property against

[613] J Locke, *The Second Treatise of Government* (C.B. Macpherson ed, Hackett Publishing Co. Inc.
[614] H Grotius, *The Law of War and Peace* (Francis W. Kelsey, 1925), I/III.

unlawful attacks and infringements.[615] The nature of self-defence as a human right is also dictated by the fact that this right acts as a limitation or restriction to the sovereign power of the state to regulate the application of force. In other words, the right of self-defence protects people's interests and needs against state abuse by allowing and prohibiting the recourse to force.[616] People need the right of self-defence in order to freely protect themselves in circumstances where the state unreasonably disallows people's recourse to force.

Aside from these theoretical facets, people's need for private defence may also be illustrated from a more practical perspective. Botsford writes that the right of self-defence is not merely a natural right, but also a necessary right that helps reduce the level of crime in society.[617] Specifically speaking, the author asserts the right of people to carry guns and apply them in self-defence—in the United Kingdom or any other country—by virtue of the fact that those societies that tolerate private defence tend to experience lower levels of crime and criminality when compared to those where the rights to private defence and to ownership of guns are suppressed by the state. According to the scholar, the underlying reason that the promotion of private defence diminishes the level of crime stems from the fact that the entitlement and actual ability of an individual to protect him or herself and his or her family or property discourages criminal activities against such individuals. Therefore, if the whole society is granted and guaranteed the right of private defence, violent crimes in the society will be discouraged because the perpetrators of such crimes will be less likely to

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[615] DB Kopel , P Gallant, and J D Eisen, 'The human right of self-defence' BYU Journal of Public Law, Vol. 22,

[616] *In re Hirota and Others*, 15 Ann. Dig. & Rep. of Pub. Int'l L. Cases 356, 364 (Int'l Mil.. Trib. For the Far East, 1948).

[617] D Botsford, 'Why the right to armed self-defence against criminals and against tyrants should not have been suppressed in Britain and how it might gradually be re-established: an expanded version of a talk given to the Cambridge University Free Society – November 5th 1996', Political Notes No. 133, Librarian Alliance, 8.

take chances against the so-called victims, who are lawfully permitted to apply force in response or as a pre-emptive measure.

In elaborating further, the practical value and need of private defence may also be asserted from the standpoint of householders. Lipscombe writes that, in many jurisdictions, including the United Kingdom, a householder who confronts and kills an intruder may be liable to a charge of manslaughter or murder.[618] If the intruder has only been inflicted with injuries, the householder may be charged with wounding, assault or even attempted murder. This notwithstanding, under English law, the householder is granted a complete defence and will be acquitted if the force he or she applied against the intruder was reasonable and was exercised either in defence of him or herself or another or in the prevention of crime. Although the problem of private defence under English law will be elaborated upon in the next part of this study, it should be highlighted that the provision of such complete defence for householders is reasonable and justifiable because of the circumstances under which householders confront intruders. The dwelling of every individual is his or her sanctuary—the place where, under ordinary circumstances, an individual should be least vulnerable and should not expect an attack against his or her person or property. However, when an intrusion and attack occur, usually it is not easy to avoid a confrontation and retreat in lieu of applying force in self-defence. To that end, the need for private defence for householders is absolutely reasonable and justifiable.

[618] S Lipscombe, 'Householder and the criminal law of self defence' SN/HA/2959 (House of Commons Library, 2013), 12.

3. Right of Private Defence Under English Law

3.1 Private defence justification or excuse

Having given insights into the general necessity for the right of private defence, the focus will now turn to the problems and specificities of the regulation of this right under English law. The first issue to be considered is whether the right of private defence should be viewed as a justification or excuse under English law. Smith points out that there are several reasons why it is important to differentiate between a justification and an excuse and that the lack of a proper understanding of this distinction will inevitably prevent us from grasping the inner essence and peculiarity of private defence as both a right and a defence under English criminal law.[619] The scholar reasons that the old common law of England discerned between the concepts of justification and excuse in the law of homicide. Certain types of homicide, such as that carried out by a public hangman in the course of executing the sentence of a court, were deemed *justifiable*. That is, in the aforesaid case, the law requires the hangman to kill the convicted. A wide spectrum of killings, such as killing by misadventure, were considered *excusable* under old English common law. Although the latter type of killing was not required under English law, it was universally regarded as deplorable and was not amounted to a crime. Both justification and excuse under old English common law gave rise to the acquittal of a homicide charge. This notwithstanding, if the homicide was merely excusable and not justifiable under the old common law, the goods of the perpetrator were forfeited. However, in 1828, the forfeiture of goods was abolished and since that time there has been no discrepancy between the different defences for homicide or any other criminal offences.[620]

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[619] J C Smith, Justification and excuse in the criminal law (The Hamlyn Trust, 1989), 7.
[620] Ibid 7.

Despite differences between justification and excuse under the old English common law, the defence of private defence, if timely and successfully invoked, leads merely to a verdict of not guilty. Hence, although the old English common law distinguished between the concepts of justification and excuse, the differences were merely formal and did not substantially affect the status of the person who raised the defence of private defence. However, at the end of the twentieth century, a revived growth of interest in the difference between excuse and justification can be observed.[621] At that time, academics from various common law counties, particularly the United States, emphasized that, despite the common result of a justification and excuse in terms of criminal liability—the acquittal of the defender—there are still two or three substantial consequences that necessitate making distinctions between the two concepts when addressing the problem of private defence. First, it is highlighted by the authors that excusable acts may be resisted by an individual who is threatened by such acts, whereas justifiable acts may not be lawfully resisted. Second, excusable conduct may not be lawfully assisted by another individual, whereas justifiable acts may be assisted by third parties. Third, if the facts of a case set forth a justification for the defender, the defender is justified even if he or she is unconscious of those facts, whereas the defender is not excusable unless he or she is completely aware of the facts that provide him or her with an excuse.[622]

The analysis of English case law below helps ascertain how the categories of justification and excuse apply to cases of private defence in the present time. Thus, in *Arshad v Procurator Fiscal*, the court held that the question of self-defence in the case should be viewed through the prism of excuse.[623] In elaborating on the case, the court

[621] G Fletcher, 'Rethinking criminal law', Chapter 10, P. Robinson (1982) 82 Col. Law Rev. 199.
[622] Ibid.
[623] *Arshad v. Procurator Fiscal* [2006] ScotHC HCJAC 26.

showed that self-defence would be considered a reasonable excuse if it was committed under circumstances that made it lawful and, otherwise, the act should be deemed unlawful. Apart from associating self-defence with excuse, the court delineates self-defence as a *reasonable* excuse. That is, the presence of the term *excuse* is not sufficient for finding the defender innocent, because the concept of excuse has a subjective coloration unless it is accompanied by the term *reasonable*.

To continue, the issue of self-defence as a justification or an excuse has also been raised in *Attorney-General's Reference No 2* of 1983.[624] The aforesaid reference discusses the availability of self-defence to a defendant charged with crimes under section 4 of the *Explosive Substances Act 1883* and section 6k of the *Offences Against the Person Act 1861*. The facts of the case reveal that the defendant appeared before the Crown Court on October 13, 1982, facing an indictment containing four counts. Counts 2 and 4 of the indictment were withdrawn from the consideration of the jury within the course of the trial and the jury rendered verdicts of not guilty on counts 1 and 3.[625] The issue of self-defence was one of the major issues raised in the framework of the case, though the prosecution alleged that self-defence was not available as a defence to any of the counts in the indictment. In analysing the issue of self-defence, the court uses the term *justifiably* in the context of the defendant's state of mind—the defendant was *justifiably* afraid that he and his property might be the subject of subsequent attacks. In this sense, self-defence may be viewed as a justification if it is carried out under the conditions of a *justifiable* fear of attack. On the other hand, the court in the case also refers to the classic exposition of self-defence in *Palmer v R*, according to which self-defence should not be construed as a justification, but as an

[624] Attorney-General's Reference No 2 of 1983 [1984] EWCA Crim 1 (03 February 1984).
[625] Ibid.

excuse. Specifically, the court in *Palmer v R* clearly articulated that any individual who, without lawful authority or *reasonable excuse*, has in any public place any offensive weapon will be guilty of a crime.[626] Moreover, the court highlighted that it is incumbent on the accused person to provide the proof of either lawful authority or reasonable excuse. Here, it is possible to make two important inferences. First, the classic exposition of self-defence under English law is applicable to both pre-emptive and accidental self-defence. Second, the classic exposition of self-defence postulates that the phenomenon of self-defence may be manifested in two forms—in the form of a justification, when a defender acts with lawful authority, and in the form of an excuse, when a defender acts with some reasonable excuse, but without a direct authorization by law. In summary, English law treats self-defence as both a justification and an excuse depending upon the circumstances in which the right of self-defence has been actualized.

The contention that self-defence has a twofold nature under English law may also be substantiated by a wide range of other cases such as *Bird*, *Croly v Her Majesty's Advocate*, *Forrester v Leckey*, *Helen John v Procurator Fiscal*, *McCluskey v Her Majesty's Advocate*, *N v Director of Public Prosecutions*, *Sigismund Palmer v The Queen*, *Yaman & Anor v R*, etc. For example, in the *Bird* case, the court speaks of *reasonable* self-defence as an acceptable defence in criminal law.[627] That is, the term *reasonable* means that self-defence has the nature of an excuse because it can be actualized, even if the defender has no authority to act in self-defence under law, but under reasonable circumstances may opt out to using force against the attacker. To be more precise, the facts of the case reveal that self-

[626] *Palmer v R* (1971) A.C. 814, 831-832.
[627] *Bird* [1985] EWCA Crim 2 (22 March 1985).

defence cannot be deemed reasonable if the person acted in retaliation against the preceding attack.

In *Croly v Her Majesty's Advocate*, the court underscored that self-defence as an excuse may be reasonable only if the defender is deprived of any other possibility to avoid violence such as the possibility of retreat.[628] In other words, the reasonableness of self-defence as an excuse would be undermined if the defender had an actual opportunity to escape the attack. However, this principle is not applicable to self-defence as a justification, because law may prescribe certain conditions under which the application of force in private defence is lawful and justifiable irrespective of the defender's actual awareness of escape routes or alternative options. However, the question of retreat and escape routes as a prerequisite to the lawful invocation of self-defence as a reasonable excuse from criminal liability is analysed differently in the *Bird* case. Here, it needs to be asserted that although the court denied the legitimacy of wrapping up an attack in the cloak of self-defence, it did not recognize the actuality of defender's duty to retreat. Specifically speaking, the court stated that the person invoking the affirmative defence of private defence should clearly illustrate that by her action she had no intention to fight. According to the court, the demonstration of the lack of intention to fight suffices in any case of self-defence because the duty to retreat is no longer existent under English common law.[629] *R v Cannes* follows the *Bird* case by denying the duty to retreat and establishing the twofold nature of self-defence. However, it is extremely interesting to note that, on the one hand, self-defence may be considered a justification under conditions whereby the defender is prepared to disengage and make some physical withdrawal from the confrontation and, on the other

[628] *Croly v Her Majesty's Advocate* [2004] ScotHC 28 (11 May 2004), 12.
[629] See above n 522.

hand, self-defence may be viewed as an excuse when the defender is not retreating or escaping the confrontation by killing the attacker in order to avoid being killed him or herself.

In *Forrester v Leckey*, the court came to consider that self-defence as a justification occurs only when a statutory provision directly entitles an individual or group of individuals to apply force within strict limitations.[630] However, the court deems it wise to focus more upon self-defence as an excuse. The application of force is one of the facets of self-defence that raises the importance of viewing self-defence as an excuse rather than as a justification. In the aforesaid case, it is highlighted by the court that the force used in self-defence cannot be what the accused believes to be reasonable, but must be based upon reasonable grounds.[631] This means that the defender does not find a justification for using the force under some law, but relies on some objective reasonable ground that may excuse his or her otherwise prohibited conduct.

In *Helen John v Procurator Fiscal, Dumbarton*, the court suggested that the concept of reasonable excuse should be regarded as the first step towards invoking self-defence as a justification.[632] In other words, the court reasoned that it was impossible to justify an act in self-defence unless the defender first found and proved the existence of some reasonable excuse for her act. Specifically speaking, the court viewed the defence of self-defence as a complex procedural issue that consisted of several steps. According to the court's reasoning, the first step in successfully invoking self-defence lies in providing a reasonable excuse for wilful, reckless or intentional conduct. In other words, self-defence cannot be reached the point when it is considered a justification unless it is first demonstrated and

[630] *Forrester v Leckey* [2005] NICA 26 (20 May 2005).
[631] Ibid 21.
[632] Helen John v. Procurator Fiscal, Dumbarton [1999] ScotHC 194 (23rd July, 1999).

alleged as an excuse. When the issue of reasonable excuse has been established, it will be affordable to justify the actions, which are otherwise unlawful.

In continuing the discussion, it should be pointed out that, in *McCluskey v Her Majesty's Advocate*, the court expanded upon the idea that excuse precedes justification in the overall process of invoking and proving self-defence as a defence in English criminal law.[633] Instead of tolerating a very broad notion of *reasonable excuse* the court articulated that the justification for killing in self-defence would be reached only if the perpetrator could prove that the fatal blow was made in his or her own protection and to ward off danger to him or herself, either danger that was actually threatened or danger that might reasonably be anticipated by him or her. That is, the concept of reasonable excuse as a prerequisite to justification in self-defence may be reduced to a series of reasonable grounds such as: a) protection of self; b) warding off danger to yourself; c) actually threatened danger; and d) danger that might be reasonably anticipated. However, in contrast to the aforementioned decision, the court in *N v Director of Public Prosecutions* is less reluctant to consider the concept of reasonable excuse as a precondition to justification.[634] In analysing section 1(1) of the *Prevention of Crime Act 1953*,[635] the court in *N v Director of Public Prosecution* differentiates between the concepts of reasonable excuse and justification by underscoring that a person may have recourse to force either under lawful authority, namely, under justification, or with reasonable excuse.[636] That is, the *Prevention of Crime Act 1953* does not juxtapose excuse and justification as two reciprocal dimensions of self-defence.

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[633] *McCluskey v Her Majesty's Advocate* [1959] ScotHC HCJ_1 (24 February 1959).
[634] *N v Director of Public Prosecutions* [2011] EWHC 1807 (Admin) (30 June 2011).
[635] Prevention of Crime Act 1953.
[636] See above n 529, 3.

As opposed to the above cases, the court in *Yaman & Anor v R* utilised the concept of *lawful excuse* in lieu of the term *reasonable excuse*.[637] The facts of the case unveil that Yaman was convicted of one count of wounding with intent to do grievous bodily harm and one count of having an offensive weapon. The jury were discharged from bringing in a verdict on count 2, which charged, as an alternative to count 1, an offence of wounding. The appellants were provided with leave to appeal on ground 1, which pertained to the admittedly wrongful admission into evidence of material relating to what can be loosely depicted as the alleged bad character of the Yaman family. As far as the issue of self-defence is concerned, the court stressed that a person's subjective apprehension of an attack or that somebody is a burglar does not automatically entitle that person to act in self-defence.[638] This notwithstanding, the court also pointed out that, although a defendant can invoke the defence of self-defence, it is incumbent on the prosecution to prove that the defendant was not acting in lawful self-defence. In other words, the court in *Yaman*'s case does not place the burden of proof upon the defendant but obligates the prosecution to refute the presumption that self-defence has been utilised as a lawful excuse.

In *Sigismund Palmer v The Queen*, the court made it certain that the distinction between excuse and justification in terms of self-defence plays a crucial role in substantiating the process of reducing murder into manslaughter.[639] A more detailed analysis of how the English common law rule of self-defence enables the reduction of murder into manslaughter is provided in the next section of this chapter.

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[637] *Yaman & Anor v R.* [2012] EWCA Crim 1075 (18 May 2012).
[638] Ibid 24.
[639] *Sigismund Palmer v The Queen* (Jamaica) [1970] UKPC 31 (23 November 1970).

3.2 Advantages of the rule: The reduction of murder into manslaughter

As the foregoing discussion suggests, the key rationale underlying the defence of self-defence under English law is to enable either the acquittal or mitigation of criminal liability of a defendant who acted in self-defence. It has already been established that, irrespective of whether self-defence is considered an excuse or a justification by English courts, English cases focus on the acquittal as the ultimate consequence of having a successful recourse to self-defence. However, murder cases have certain peculiarities that entail a more complicated use of the rule of self-defence. Thus, in *Sigismund Palmer v The Queen*, the court underscored the importance of raising the question, in cases where on a charge of murder there is an issue of self-defence, of whether the accused, while intending to defend him or herself, had applied more force than was necessary.[640] Moreover, the court suggested that the proper answer to the aforesaid question could help establish whether the accused is guilty of murder or manslaughter. Hence, it follows that, under the *Palmer* rule, the reduction of murder to manslaughter is possible only if a series of the following specific conditions have taken place: 1) the accused had the intention of defending him or herself; 2) the accused applied the force; 3) the force was applied with the intention of defending him or herself; 4) the accused applied more force than necessary.

In view of the above-caption conditions under which the *Palmer* rule reduces murder to manslaughter, it should be highlighted that the amount of force constitutes the key condition that helps differentiate between self-defence as a reasonable/lawful excuse and justification (acquittal) and self-defence as a means of reducing murder to manslaughter. Specifically, acquittal is possible only if the applied force was adequate, whereas the reduction of murder to manslaughter occurs when the applied force was excessive or

[640] Ibid.

redundant. In this light, the *Palmer* rule provides that the issue of self-defence in murder cases, if resolved properly, will lead to one of three possible outcomes for the accused: 1) not guilty; 2) guilty of murder; or 3) guilty of manslaughter. However, for the jury to reach one of the three possible conclusions under English law, they need to ascertain all conditions for the exercise of the right of self-defence or, more broadly, the right of private defence. In that vein, the report *Partial Defences to Murder*, which summarizes English case law, suggests that unlawful homicide that would otherwise be murder should instead be qualified as manslaughter if the defendant acted in response to one of the following: a) gross provocation (implying words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged; or b) fear of serious violence towards the defendant or another; or c) a combination of the two aforementioned conditions.[641] The below analysis was conceived to focus on each of the mandatory conditions for the exercise of the right of private defence if viewed through the prism of English law.

3.3 Conditions for the exercise of the right of private defence

3.3.1 Unlawful assault on life, property, or chastity

As a matter of law, self-defence or private defence is not simply an individual right, but more importantly a defence in criminal law. This implies that self-defence may be invoked only when the person is charged with or accused of some unlawful conduct—a violation of law. If the individual is charged with or accused of unlawful conduct, this means that the person has allegedly committed some act that is generally prohibited by law. However, the defence of self-defence helps the accused demonstrate that, although the act committed is generally prohibited under law, it should be excusable or justified because certain

[641] Partial Defences to Murder (Report) [2004] EWLC 290(3) (06 August 2004).

empowering conditions have taken place. The unlawful assault on life, property or chastity constitutes one of the empowering conditions under which self-defence may be found excusable or justified. As a matter of law, unlawful assault on life, property or chastity is the key prerequisite to the practical actualization of the right of self-defence because it makes it reasonable for any individual to protect his or her life, property or chastity. However, the assault must be actual or perceived as actual by a reasonable person to justify the application of force in self-defence. Various issues may arise if the assault is not actual and, for instance, constitutes only a provocation. Here, it should be highlighted that the presence of provocation instead of the actual unlawful assault undermines the legal purity, justifiability and excusive essence of self-defence as a defence under English criminal law because of the following reasons.[642] First, the rationale underlying provocation as a partial defence to criminal liability is elusive and suggests that the defender has suddenly and temporary lost his or her self-control as a result of a provocation that may or may not have caused a reasonable person to do the same. However, it is unclear what requirements of loss of self-control should be taken into consideration to establish the justificatory and excusatory basis of provocation. To this end, the fact of actual assault, rather than provocation, constitutes a more reliable basis for the successful invocation of the defence of self-defence under English law.

3.3.2 Reasonable force

Reasonable force is another condition and issue that, if proved, constitutes both a justificatory and excusatory basis for self-defence as a right and defence under English criminal law. The term *reasonable* means that the force applied in the course of self-defence

[642] Ibid.

must be objectively adequate to stop or prevent the unlawful assault discussed above. If the force is not reasonable, it is either insufficient or excessive. There is no need to elaborate upon insufficient force, as it does not affect the question of the justificatory and excusatory basis of self-defence. As far as the problem of excessive force is concerned, self-defence, under English common law, constitutes a complete defence to any charge of either non-fatal or fatal violence.[643] This means that the problem of excessive force does not actually concern English judges as long as the conduct and state of mind of the accused falls within the parameters of the defence. However, a person whose conduct and/or state of mind does not fall within the defence of self-defence is considered to be acting unlawfully and, therefore, the use of excessive force only aggravates their liability.

Despite this, several English cases still raise the issue of excessive force as an objectively unreasonable application of force. Thus, for example, in *Palmer*, the court reasoned that the use of excessive force reduces murder to manslaughter rather than leads to acquittal.[644] In *Clegg*, the court opined that if a police officer or soldier kills an individual the course of his or her duty by way of firing a shot with the intention of murdering or seriously wounding an individual and the firing is made in self-defence, in defence of another individual, in the prevention of crime, in assisting or effecting the lawful arrest of offenders or suspected offenders or of individuals unlawfully at large, but constitutes force which is excessive and unreasonable in the circumstances, the police officer or soldier is guilty of manslaughter and not murder.[645]

[643] Partial Defences to Murder (Consultation Paper) [2003] EWLC 173(9) (15 October 2003).
[644] *Palmer v R* (1971) A.C. 814, 831-832.
[645] Clegg [1995] 1 AC 482 (HL).

3.3.3 Duty to retreat

As the foregoing discussion suggests, there is no duty to retreat under English law in relation to the actualization of the individual's right of self-defence.[646] Specifically, it is highlighted in English case law that, although certain technical rules concerning the duty to retreat prior to applying force, or at least fatal force, really existed under English law, in the present day, the duty to retreat is considered merely a factor to be taken into consideration in deciding whether it was permissible or necessary to apply force and whether the force was reasonable. Regarding this, English case law suggests that if the only reasonable action is to retreat, then it would appear that to remain and fight must be viewed as applying unreasonable force. However, there is no rule of law that obligates a person who is attacked to run away if he or she can. Notwithstanding this, it is incumbent on the defender to illustrate by his or her actions that he or she wanted to avoid the fight. In other words, the defender must show that he or she is ready to temporize and disengage and possibly to commit some physical withdrawal.[647]

3.4 Mistake in Private Defence Under English Law

The key significance and value of mistake in terms of private defence lies in the fact that the presence of mistake may depreciate the power of private defence as both an individual right and defence against criminal liability by depriving the defender's actions of their justificatory or excusatory essentiality. As far as the issue of mistake in private defence is concerned, English law differentiates between two types of mistake that may be ascribed to the domain of private defence, such as: a) mistake of law; and b) mistake of fact. Broadly speaking, the presence of a mistake of law makes the accused guilty, whereas a mistake of

[646] See above n 522
[647] Ibid.

fact does not make the accused guilty. A mistake of law is often connected with ignorance of law. As noted by the court in *Esop*, if it is possible to prove the appropriate *actus reus* and *mens rea* for the crime, it will be possible to find the accused guilty notwithstanding the fact that the accused might not have knowledge that the *actus reus* was forbidden by the criminal law.[648] In this case, the accused was mistaken over the rules of English law. Hence, it follows that a perpetrator of private defence in an unlawful manner will be found guilty under English, regardless of his knowledge of whether his acts are prohibited by English law, as long as the perpetrator's conduct reflects *actus reus* and *mens rea* for a particular criminal offence. Furthermore, in *Bailey*, the court decided that ignorance of the law can never serve as defence.[649] Similar legal principles can be deduced from other English cases, such as *Carter v McLaren*,[650] *Lightfoot*,[651] *Broad*,[652] *Hipperson v DPP*,[653] etc. Besides, it is extremely interesting to note that, in *Shaw v DPP*, the court held that there is no defence of a mistake of law even where the accused was advised that his activity was not a crime and, thus, the former acted upon the lawyer's advice.[654]

As far as the issue of a mistake of fact is concerned, English law makes it certain that there is a definite disparity between the concepts of mistake of law (guilty conduct) and mistake of fact (usually not guilty conduct). Thus, in *Brutus v Cozens*, the House of Lords pointed out that the construction of an ordinary word in a statute is a matter of fact, not of law, notwithstanding the fact that the rule may seemingly be honoured in the breach more

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[648] *Esop* (1836) 173 ER 203.
[649] *Bailey* (1800) 168 ER 657.
[650] *Carter v McLaren* (1871) LR 2 Sc & D 120.
[651] *Lightfoot* (1993) 97 Cr App R 24.
[652] *Broad* [1997] Crim LR 666 (CA).
[653] *Hipperson v DPP,* unreported (1996) (DC).
[654] *Shaw v DPP* [1962] AC 220 (HL).

than in the observance.[655] In other words, if the accused in a self-defence case is mistaken regarding the construction of an ordinary word in a self-defence statute, English court is likely to find his mistake as a mistake of fact and, thus, the accused will not be guilty under English law. The main reason why a mistake of fact under English law entails innocence of the defender who has caused lawfully prohibited outcomes is that, from a logical point of view, a mistake of fact negates *mens rea*, and, thus, the prosecution fails to prove one of the mandatory elements of a crime. Aside from the above, English law also articulates about so-called "irrelevant mistakes". Taking into consideration that a mistake of fact correlates with *mens rea*, the commitment of a strict criminal offence deprives the accused of the possibility to invoke private defence if the mistake of fact relates not to the strict element of the crime. In *Prince*, the court decided that the accused was guilty because his mistake regarding the age of the victim was an irrelevant one and did not negate the strict elements of the crime.[656]

Apart from the general categorisation of mistakes into the aforementioned two groups – mistake of law and mistake of fact – there is a wide array of cases that specifically deal with the problem of mistake in the course of the invoking the right of private defence. The problem of mistake in English law is closely connected with the underlying principle of private defence that the defender is allowed only to apply the amount of force which is reasonably necessary under the circumstances of the attack.[657] In *Williams*, the court denied the aforesaid principle of private defence by holding that a defender must be judged on the facts as he sincerely believed them to occur, whether his belief was reasonable or not.[658] By this

[655] *Brutus v Cozens* [1973] AC 854.
[656] *Prince* (1875) LR 2 CCR 154.
[657] M Watson, "Self-defence, reasonable force and police" (1997) 147 NLJ 1593.
[658] *Gladstone Williams* [1984] 78 Cr. App. R. 276; [1987] 3 All. ER. 411; [1984] Crim. LR. 163.

decision, the court acknowledged the general principle of English law that a mistake of fact does not make the accused guilty of crime, because it negates his *mens rea*. Similar conclusions were reached by the Privy Council in *Beckford*,[659] and English courts in *R v Scarlett*,[660] *McCann & Others v UK*,[661] *Jordan v UK*,[662] etc.

Hence, it follows that only a mistake of fact, rather than a mistake of law, concerning the reasonableness of the force applied by the defender in private defence makes the act not guilty under English law.

[659] *Beckford v R* [1987] 3 All. ER. 425.
[660] *R v Scarlett* (1994) 98 Cr. App. R. 290.
[661] *McCann and Others v U.K.* (1996) 21 E.H.R.R. 97.
[662] *Hugh Jordan v United Kingdom*, Application No. 24746/94, Judgement 4 May 2001.

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4. The Right of Private Defence under Shari'ah (Published)

4.1 Public and Private Defence

After the nature and peculiarities of self-defence under English law have been brought into light and scrutinised, it is vital to ascertain how the right of private defence is regulated under Islamic law. The law of Shari'ah differentiates between the concepts of private and public defence and to grasp the nature of self-defence under the Shari'ah, it is vital to discern the principal differences between these two types of defence. The first differentiating factor is that the notion of public defence refers to the domain of public affairs and acts as a safeguard for the moral, legal and social values of an Islamic state rather than for individual interests. This is possible to achieve through the promotion of good conduct and the dissuasion of evil acts. The concept of public defence is usually attributed to state authorities, law-enforcement and security agencies and, thus, is aimed at protecting the interests of the whole Islamic society within the state boundaries. By contrast, the idea of private defence stems from the precepts of natural law and, as a matter of fact, is ascribed to every Muslim individual. The concept of private defence usually entails the right of an individual to defend his life, health, property, the chastity of a woman or the similar interests of any other Muslims against any unlawful attack via the application of reasonable force.[663] In this light, the right of private defence can be utilised with the purpose of averting any unlawful assault directed not against the state or society, but against a concrete individual or private property.

[663] See above n 187.

4.2 Private Defence Against Minors and Insane Persons

In elaborating further upon the phenomenon of private defence, it is deemed wise to explore the practical manifestations of this sort of defence in relation to minors and the insane.

Unlike sane adult individuals, minors and insane individuals are incapable of committing crimes as the element of *mens rea* cannot easily be established. As far as Islamic law is concerned, the school of Hanfite lawyers, with the exception of Abu Yousaf, the key requirement for the exercise of self-defence lies in the contention that the attacker must be criminally liable and the attacker's *actus reus* must constitute a criminally punishable offence under the provisions of law.[664] This notwithstanding, in a case when the defender kills a minor or an insane individual in the course of exercising his or her right of self-defence, it is impossible to make the defender liable to *Qisas* because, under the aforementioned circumstances, his or her liability is diminished and he or she can only be required to pay Diya. The key rationale underlying the diminished criminal liability of the defender for killing an assailant in self-defence stems from the fact that the acts of a minor or an insane individual cannot be considered crimes and, therefore, the defender acts under the necessity of defending his rights. However, the necessity under which the defender confronts a minor or an insane individual does not influence the former's civil liability. To that end, the diminished liability of the defender—the obligation to redress damages—serves as a compromise. This situation resembles the case where an individual is assaulted by a dangerous animal and kills the animal to save his life. Similarly, in the case of an attack by a minor or an insane individual, the killing of an animal obligated the defender to compensate the value of the animal.

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[664] See above n 195, 58.

In contrast to the Hanfite lawyers, Abu Yousaf, as well as the majority of Islamic lawyers, contends that it is not necessary that the attacker be criminally liable. Here, the act of a minor or an insane individual may fulfil *actus reus* of a criminally punishable offence, whereas the minor or insane individual may not be criminally liable because the requirement of *mens rea* is absent. At some point, the right of private defence against a minor or insane individual under Islamic law resembles that in the majority of civilised countries. To be more precise, while addressing the right of private defence, the criminal laws of Islamic countries tend to expressly provide that an individual is entitled to exercise his right to self-defence against a minor or insane individual in the same manner as against a legally competent person. This notwithstanding, the actual separation of the right to self-defence against a minor or insane individual proves the existence of specific differences between self-defence against a person who is legally competent person and one who is not. The Hanfite school of jurists provides that the key difference lies in the fact that the death of a minor or an insane individual in the course of exercising the right of private defence obligates the defender to pay *Diya*, whereas the death of a legally competent individual under the same circumstances does not entail any obligation to redress.

The problem of self-defence against a minor or an insane individual is also intertwined with another problem of Islamic criminal law—the problem of evidence. The general rule of evidence states that it is incumbent on the plaintiff to substantiate his claim with evidence and he is entitled to do so by the testimony of witnesses or by the admission of the defendant.[665] As far as the issue of self-defence against a minor or an insane individual is concerned, the court is predisposed not to admit evidence because of a minor's

[665] See above n 188, 12.

inconsistency. In other words, if a minor, who has allegedly attacked the defendant, decides to testify, the court may not admit evidence. Therefore, the burden of proof in a case where the defendant acted in self-defence against a minor or an insane individual is imposed upon the defendant. Hence, it follows that the defendant who has performed his right to self-defence against a minor or an insane individual has more leverage in both proving his innocence and avoiding criminal liability that the defendant who has performed his right of self-defence against a legally competent assailant. However, if the defender exceeds the degree of permissible defence by applying excessive force against a minor or an insane individual, it will be difficult for him to prove that the excessive force was necessary in terms of stopping or preventing criminal conduct against him. This is because an individual who commits an offence carries no burden of responsibility for the harmful outcomes due to the absence of *mens rea* or because *actus reus* cannot be imputed to a minor or an insane offender. As to the problem with *actus reus*, almost any conduct of a minor or an insane individual loses its unlawful character (*actus reus*). Therefore, it is sometimes difficult to justify the application of force in self-defence against a minor or an insane individual when the assailant's act contains all the elements of a criminal offence but cannot be imputed to the person who has committed it.[666]

The absence of *mens rea* also complicates the process of invoking and justifying the defence of self-defence under Islamic criminal law. According to Muslim lawyers, there are three mandatory requirements for the application of legal punishment. First, it is necessary that the offender has the actual power to commit or not to commit the act (*qudra*). Second, it is essential that the offender is conscious that the act he has committed is an offence (*'ilm*).

[666] MC Bassiouni, International Criminal Law, Volume 2 Multilateral and Bilateral Enforcement Mechanisms (Brill, 2008), 132.

Third, it is necessary that the offender has acted with intent to commit the offence (*qasd*). All the above-captioned elements may be synthesised as a framework for a theory of *mens rea* in respect of offences punishable with retaliation and *hadd* offences. However, these elements can also be applied to instances of self-defence against a minor or an insane individual. In this context, minors and insane individuals cannot be held liable for their offences because they are assumed not to be conscious of the unlawful nature of their acts and, furthermore, lack criminal intent. In this regard, the application of self-defence against a minor or an insane individual loses its justificatory or excusatory rationale, taking into account the assailant's lack of awareness and intent to inflict harm. The absence of *mens rea* in minor and insane assailants occurs if the perpetrator of the assault, under Islamic law, has no intellectual capacity to understand fully the implications of his conduct.[667] Minority ends with physical puberty. Insanity can end as a result of healing (treatment). All these circumstances make it possible to conclude that self-defence against a minor or an insane individual is a specific type of private defence, which is subject to the rules and standards of defence against dangerous animals rather than the standards and principles of defence against legally competent individuals.

4.3 The Defence of the Chastity of a Woman in Shari'ah

The defence of the chastity of a woman is another type of private defence under the law of Shari'ah. However, some schools of Muslim jurists do not discern between types of private defence such as the defence of the body, the chastity of a woman and the defence of property, but place emphasis upon the assailant's intent to cause death or serious bodily injury irrespective of other factors.[668] This notwithstanding, the defence of the chastity of a

[667] See above n 391, 56.
[668] JN Anderson, *Islamic law in the modern world* (World Assembly of Muslim Youth, 2000), 108.

woman still constitutes a specific type of private defence that can be discerned and analysed separately from other types of private defence. Moreover, some Muslim jurists are prone to believe that the defence of the chastity of a woman is not simply a right but a duty under the law of Shari'ah.[669] Specifically speaking, many Muslim jurists opine that every Muslim has an obligation to defend the chastity of his family or the family of any other Muslim. This obligation is, to a considerable extent, dictated by the prohibition of adultery, fornication or other indecent sexual acts. If the aforesaid indecent conduct happens, the person concerned ought to invoke private defence without causing the death of the assailant, if possible. Such defence will be viewed as a justificatory or excusatory act because Islam and Shari'ah dictate the duty to defend chastity.

In elaborating upon the defence of the chastity of a woman further, it needs to be pointed out that in case a Muslim man finds his wife in a compromising situation with a stranger, it is incumbent on him to apply minimum possible force to cease or prevent the infringement.[670] However, if the offender does not cease or is not prevented from committing the infringement, the defender is permitted to kill the offender without any criminally liable repercussions. The majority of Muslim lawyers do not justify the infliction of death simply by virtue of the fact that the deceased was in seclusion with a woman unless the fact of the commission of unlawful sexual intercourse has been established. Hence, it is possible to infer that the defence of the chastity of a woman differs from other types of private defence under the law of Shari'ah in that it requires the application of the lowest possible degree of force, avoiding the infliction of death upon the assailant, unless the fact of sexual intercourse is proved.[671]

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[669] See above n 398.
[670] M S El-Awa, *Punishment in Islamic Law* (American Trust Pub., 1981), 87.
[671] N Culson, *A history Islamic law* (Aldine Transaction, 2011), 26.

In analysing the defence of the chastity of a woman through the prism of different schools of Muslim lawyers, it needs to be stated that the Shafite school claims that a man has an obligation to defend the chastity of a woman even if he is not under the apprehension of grievous bodily harm or death at the hands of the assailant. Moreover, there is consensus among Muslim scholars that it is incumbent upon a Muslim woman to defend herself and is allowed to kill the assailant in the course of defence without any criminal liability.[672] *Hanblite* jurists distinguish two conditions of unlawful sexual intercourse to establish whether the consent to sexual intercourse was given or whether the sexual intercourse took place without the woman's consent.[673] If the woman was engaged in a non-consensual act and the assailant was killed, the defender will not be liable for any punishment. However, in the case where a woman was a consenting party to the unlawful sexual intercourse and the assailant was killed, the defender shall be liable for *Qisas.*

4.4 The Conditions for the Exercise of the Right of Private Defence

This section discusses four conditions: the aggression must be unlawful; the aggression must be real or about to happen; the contravened should ward off any aggression with reasonable force; the aggression must be in progress

Here, it is proper to discuss the idea of legal maxims (*Al-gawa'id al-fighiyya*) in Islamic jurisprudence. Muslim jurists built up certain uniform rules of universal application. These rules known as *Al-gawa'id al-fighiyya* are in view of either a verse from either the *Quran* or the Hadith and are compatible with the maxims of equity in English law. These maxims also have been presented in the book of Al-Ishbah Wa Al-Nazair in the Hanfite and Shafite schools of thought. The maxims manage the essential inquiries of intention, proof, flexibility,

[672] See above n 535, 157.
[673] See above n 358,16.

necessity, custom, mischief, and numerous others, and they give premise to deducting legal rules.

For instance, "all matters shall be determined according to the intention. ". This is a maxim related to the intention and based upon the well-known saying of the Holy Prophet Mohammad that deeds are to be declared by the intention. Another example is "certainty cannot be displaced by doubt. " This maxim related to the proof enunciates.

Freedom from any civil obligation or criminal liability falls under this maxim except if opposite demonstrated on the grounds that each one is originally presumed to be innocent. The maxim depends on the saying of the Holy Prophet that expresses that the burden of proof is on the proponent, a vow is occupant on him who denies. Likewise, the maxim that need renders prohibited things passable discovers its underlying foundation in a verse of the Holy *Quran*.[674]

4.4.1 The aggression should be unlawful

The contravened shall be in a state of self-defence only when the aggression is unlawful as such unlawful aggression legitimates the right of self-defence to the contravened. [675] Almighty Allah says, “Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you”.[676]

The lawful action should not be warded off. This includes actions to retrieve a right, perform a duty and perform chastisement by the owner of this right such as a guardian, judge, enjoiner of good, teacher, parent, husband or any person who has the right of chastisement. However, if their actions exceed the legal limit, it shall be deemed a

[674] See above n 57.
[675] Abdul Qadir Odeh, *Islamic criminal legislation compared to positive law* (DAR Al-Kitab) (Arabic) (Author’s Translation) Ch. 1 478-480.
[676] Surat al-Baqarah, V: 194.

transgression and should be reconciled either by retaliation, compensation or value. In such cases, the person shall have the right to ward off such excess as it is regarded to be aggression.[677]

4.4.2 The aggression must be real or be about to happen

The case of self-defence shall not be established unless: 1) The aggression actually happened—the aggressor initiated beating the contravened, took his property or destroyed such, or tried to attack his wife, etc. 2) The aggression was likely to happen and was not initiated—for example, the aggressor headed towards the contravened taking up a weapon or aiming a gun or any other weapon at the contravened and the contravened was certain that the aggressor was serious and would attack him if he does not ward him off. In both cases the contravened shall be acting in self-defence and has the right to ward off the aggressor by reasonable means. In a case where the aggression is not established or is not likely to happen—for example, it was merely a threat or menace—the contravened shall not be deemed to be in a self-defence case as the delayed aggression does not need warding off due to the lack of danger. In this case, the aggression should be warded off by a suitable means such as resorting it to the general authorities, public or taking precautions to prevent such aggression.[678]

All actions committed by the abovementioned shall not considered an act of aggression if they do not transgress lawful rights. Anyone performing his right shall not be regarded as an aggressor nor shall his actions be regarded as aggression.

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[677] Muwaffaq Al-Din Abd Allah Ibn Ahmed Ibn Qudamah, *Al-Mughni* (Dar Alam Alkutob Publishing, 1997) (Arabic) (Author's Translation) ch 12 526-528.
[678] See above n 288, ch 4 357.

4.4.3 The contravened should ward off any aggression with reasonable force

Jurist consensus is that the contravened is entitled to ward off aggression by the lightest and least harmful means and should not resort to the strongest force when such means are available.[679] In the case where he could ward off the aggressor verbally, remind the aggressor with Allah or seek help from the public or authorities, he should not beat the aggressor. The basic principle in Shari'ah is to protect the aggressor if the contravened is able to ward the aggressor off using his hand, he should not resort to a lash; if he is able to ward him off using a lash, he should not use a singlestick; if he is able to do such with a singlestick, he should not use a weapon; and if he is able to ward him off by the amputation of a limb, he should not kill the aggressor. It legitimates retaliation with a suitable punishment to ward off such aggression. There is no necessity to ward it off using the strongest means if it can be warded off by the lightest and it is thus prohibited to ward off aggression by using the strongest means at first.[680] The contravened shall be liable for any damage in body or any minor damage and either retaliation or blood money shall apply if he warded off aggression using the strongest means instead of the lightest. In the case of unlawful self-defence, the contravened shall be accountable.[681] In the case where the contravened could find no other way to defend but the most forceful, he has the right to ward off using the strongest means; for example, if he feels that he will be killed by the aggressor, he is entitled to kill or amputate a limb and shall not pay compensation because he did so to ward off the aggressor.[682]

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[679] See above n 677, ch 12 531-533.
[680] Mohammad Ibn Ameen Ibn Omar Ibn Abdeen, *Hashyat Ibn Abdeen* (Dar Alam Alkutob Publishing, Riyadh 2033) (Arabic) (Author's Translation) ch 6 546.
[681] Fakhr Al-Din Uthman Ibn Ali Al-Zayla'i, *Tabyyn Alhquq* (Prince Publcation Press1th Cairo 1898) (Arabic) (Author's Translation) ch 6 111.
[682] Ala Al-Din Ibn Abu Bakr Ibn Musod Al Kasany, *Buda Al Suna* (Dar Al-Kotob Al-ilmiyah second published Beirut, 2003) (Arabic) (Author's Translation) ch 7 93.

In the case where the defender could not judge how much force was required in self-defence or found it difficult to do self-defence because of the fighting began, then the grading shall not be considered as if he did so, it shall result in his murdered.[683] The same shall apply in a case where the aggressor had a singlestick and the contravened only had a weapon; he is entitled to use the weapon and shall not be asked the reason for not using a singlestick.[684]

With regards to warding off aggression using reasonable force—either by words, beating, cutting or amputating or killing—the legal measure of force cannot be adequately estimated as the circumstances and facts surrounding may differ between times, places, persons and the means used in aggression; thus, the defence should be equal to the aggression if possible. However, where such an estimation is required, it is grounded in logic, reason and proof.[685] In Bazazi *Fatwas*: "… if he headed towards him taking up his sword at night or aiming his arrow and the defender be sure he wants to kill him, it is lawful for the defender to initiate fighting against him but, if the defender felt otherwise, it is forbidden to kill the aggressor, so here the defender's conduct depends more on the doubt" .[686]

4.4.4 The aggression must be in progress

The state of self-defence shall not be established unless the aggression is in progress. Lawful self-defence is deemed to start and end with the aggression and no defence shall be considered prior to or after the aggression. No legal self-defence shall be

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[683] Mohammed Ibn Ahmed Ibn Humza Ibn Shihab Al-Din Al Ramly Al Munofy, *Nihyt Al mohtaj* (Dar Al-Kotob Al-ilmiyah second published Beirut, 2003) (Arabic) (Author's Translation) ch 8 27.
[684] Ibid.
[685] See above n 535, Ch1 486.
[686] Hafyz Al-Din Mohammad Ibn Shihab Al Bazaz Al Kardary, *Fatawa Al Al Bazaz* (Prince Publcation second published Cairo 1893) (Arabic) (Author's Translation) ch 6 433.

established, for example, in cases where the aggressor ceased beating, dropped their weapon or ran away, abandoned the stolen property or was warded off for another reason, for example, he fell into water or fire, his leg was broken, or a wall or large hole came between them. If the contravened performs any action, it shall not be lawful, and he shall be liable to retaliation or blood money for such action.

Where self-defence has been successfully used to prevent aggression and ward off damages, further self-defence shall be considered an act of aggression and a form of revenge. Any penalties shall be carried out by the ruler, not by the individual,[687] as individuals have no authority to retrieve their rights by themselves. Where aggression has occurred, the contravened should raise it with the ruler to regain his right. The aggressor has been protected in Shari'ah law like anyone, but self-defence law justified using force against him is temporary and proportionately.[688]

4.5 The Effects of Private Self-Défense Law

By performing self-defence against any aggression towards oneself, one's property or honour, the contravened will either maintain the lawful measures or exceed his lawful right. This will, thus, be discussed in two sections; the first considers the effects of keeping the lawful measures by the contravened, and the second considers the effects of violating the right of self-defence by the contravened.

4.5.1 The Effects of Keeping the Lawful Measures of Self-defence by the Contravened

[687] Ali Ibn Mohammed Ibn Habib Al Mawardy, *Al Ahkam Al Sultania* (Dar Ibn Qutibah first published Kuwait 1989) (Arabic) (Author's Translation) 51.
[688] Mansoor Ibn Yousaf Al-Bahooti, *Kashaf Al Quna* (Alam al-Kutub, Beirut 1983) (Arabic) (Author's Translation) ch 6 154.

Jurist consensus is that the actions taken against the aggressor by the contravened are lawful if the contravened keeps the lawful measures without excessive.[689] They also agree that the defender has right used force against the aggression regardless of whether the threat comes from a person who is legally competent person and one who is not.[690] This can be found in the Holy *Quran* and *Sunna* of the Prophet (peace be upon him). The *Quran* says in verse 2:194 “Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you".[691]

This verse refers to the legitimacy of warding off aggression in the same way as Almighty Allah ordered by saying, “then assault him in the same way that he has assaulted you”. Anyone who performs a lawful action shall not be a wrongdoer, nor his action shall result in retaliation or blood money. In addition, he is not liable for expiation, as he has performed a permissible action without aggression or excess.[692]

4.5.1.1 The evidence from the Holy Quran

1) “Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you." [693]

2) “If you were to retaliate, retaliate to the same degree as the injury done to you. But if you resort to patience—it is better for the patient.”[694]

3) “The repayment of a bad action is one equivalent to it.”[695]

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[689] See above n 264, 203-204.
[690] Ibid.
[691] Surat Al-Baqarah, V: 194.
[692] Ali Ibn Mohammed Ibn Habib Al Mawardy, *Al Hawe Al Kabeer* (Dar Al-Kotob Al-ilmiyah first published Beirut, 1994) (Arabic) (Author’s Translation) ch 13 451.
[693] Surat Al-Baqarah, V: 194.
[694] Surat An-Nahl V :126
[695] Surat Ash-Shura V: 40

These verses state that it one should ward off aggression through the same means as the aggressor, whether accountable or not, an animal or a human being, a sane or an insane individual, minor or a senior citizen. Someone who performs a legitimate act is not subject to any liability as he is ordained to do so. There is a contradiction between the order to defend and the liability as both cannot hold simultaneously.[696]

4)The Quran says, "In no way can the righteous be blamed. Allah is Forgiving and Merciful."[697]

This verse refers to that the contravened, stating that they shall not be liable for any damage due to their defence as he is, in this case, a doer of good so and thus has no any liability.[698] (105) Due to the generality of the verse, this applies whether the aggressor is accountable or not.

5)The Quran says, "As for those who retaliate after being wronged, there is no blame on them."[699]

This verse states that the contravened shall not be liable for damages while warding off aggression as he avenges after he has been wronged. He has no liability, whether the aggressor is accountable or not, due to the generality of the verse. This view is argued as follows.

First, no wrong shall be attributed to the unaccountable, so he is not subject to the verse. The definition of injustice is to place something in the wrong place and to transgress over selves, properties or honours falls. The contravened falls under such a category.[700]

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696 Shums Al-Din Mohammed Ibn Mohammed Al Kateeb Al Sherbini*, Moqni Al Mohtaj* (Dar Al-Kotob Al-ilmiyah second published Beirut, 2000) (Arabic) (Author's Translation), ch 4 195.
697 Surat At-*Tawbah* V: 91
698 See above n 694, ch 13 452.
699 Surat Ash-Shura V : 39
700 See above n 694, ch 13 452.

Second, from the *Sunna*, 1-Said ibn Zaid said, “I heard the Messenger of Allah (pbuh) saying, ‘He who dies while defending his property is a martyr; he who dies in defence of his own life is a martyr; and he who dies on defence of his faith is a martyr, he who dies in defence of his family is a martyr’" (Narrated by Al Termethy) .[701]

This Hadith refers to the legitimacy of protecting oneself, one’s faith, property and family against any aggression. The Prophet (peace be upon him) made one who is killed in such a manner into a martyr. Martyrdom can only be gained by a lawful action. The doer of a lawful action shall not be liable to any damages, and there is a contradiction between the order to defend and the liability as they both can be simultaneously met. This hadith made no difference between the accountable and the unaccountable concerning the absence of liability due to the generality of the word.

6) Ibn Az-Zubair said, “The Messenger of Allah [pbuh] said, ‘Whoever unsheathes his sword and starts to strike the people with it, it is permissible to shed his blood’” (Narrated by an-Nasa'i).[702]

This hadith states that it is permissible to shed the blood of anyone who unsheathes his sword against Muslims, whether accountable or not, as he falls under the category mentioned in the Hadith. If the human is not indemnified, neither is an animal.

7) Imran ibn Husain said, “A man bit another man's hand and the latter pulled his hand out of his mouth by force, causing two of his incisors (teeth) to fall out. They submitted their case to the Prophet, who said, ‘One of you bit his brother as a male camel bites, there is no blood money for him’” (Narrated by Al-Bukhari).[703]

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[701] Mohamed Ibn Esa Al Termethy, Al-Jama Al- Kabeer, (Dar Al Garb Al Islami first published Beirut, 1996) (Arabic) (Author Translation) Hadith 1421.
[702] Abd Al-Rahman Ahmed Ibn Shoaib Al Nasa'I, *Al-Sunn Al-Koubra* (Resalah publisher, Beirut, 2001) (Arabic) (Author’s Translation) Hadith 3546.
[703] See above n 184, Hadith 6892.

8) It was narrated from Safwan ibn Ya'la, from his father, that: "a man bit the hand of another man and his front tooth fell out. He came to the Prophet but he considered it in vain" (Narrated by Al-Bukhari).[704]

These two traditions state that the self-contravened shall not be liable for damages while warding off aggression because the Prophet (pbuh) nullifies the blood money of the biter. If the accountable aggressor is not identified, any unaccountable or vicious animal shall not be indemnified.

9) Abu Huraira reported Allah's Messenger (pbuh) as saying, "If a person were to cast a glance in your (house) without permission, and you had in your hand a staff and you would have thrust that in his eyes, there is no harm for you" (Narrated by Al-Bukhari).[705]

This Hadith states that the accountable aggressor shall not be indemnified as the Prophet (pbuh) nullifies liability on the side of the self-defender. If the accountable are not indemnified, neither are the unaccountable and the vicious animal. These views are argued as follows. First, aggression by minors and vicious animals is not regarded as tyranny—they have no intention and thus are protected and should be indemnified.[706] Minors, insane individuals and vicious animals must be indemnified. However, warding off the aggression of a minor or an insane individual is legitimate and any doer of such shall not be liable for any damages.

Second, there is a difference between the accountable and the unaccountable as the accountable shall be liable for his accountability but the minor and the insane individual shall not. This argues that the indemnification shall be against aggression. The same rule shall apply to both the accountable and the unaccountable.

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[704] Ibid Hadith 6893.
[705] Ibid Hadith 6902.
[706] See above n 682, ch 6 110.

4.5.1.2 The evidence from the Sunna

Firstly, a man came to the Messenger of Allah and asked, “O Messenger of Allah! What shall I do if someone comes to me with the intention of taking away my property?” He replied, “Do not hand over it to him”. The man asked, “What shall I do if he fights me?” The Messenger of Allah said, “Then fight him”. The man then asked, “What will be my position in the Hereafter if he has killed me?” The Messenger of Allah (pbuh) replied, “In that case, you are a martyr”. The man asked, “What if I killed him?”. The Messenger of Allah (pbuh) replied, “He will be in the Hell-fire.” (narrated by Muslim through his chain of transmitters).[707]

Secondly, the Prophet (pbuh) said: “He who is killed while protecting his property is a martyr, and he who is killed while defending his family, or his blood, or his religion is a martyr”.[708]

The two traditions above state that the actions performed by the contravened against the aggressor are lawful and he shall not be liable for retaliation and shall not be punished unless he exceeds the limits to gain his right; the Prophet (peace be upon him) made anyone killed while defending themselves, their family, honour or religion into a martyr. The state of being a martyr can be gained only by performing a lawful action. Any individual who performs a lawful action shall not be liable to retaliation nor shall he be punished.[709] Jurists had three different opinions concerning the liability of the unaccountable aggressor as is the case with minors and insane individuals.

- The first opinion

[707] See above n 170, [Hadith n 0259].
[708] See above n 305.
[709] See above n 694, ch 13 450-451.

In a case where the unaccountable aggressor was killed or wounded by the defender to ward off his evil, he shall be liable for minor or insane blood money or the value of the animal. This opinion is adopted by Hanafi school.[710]

- The second opinion

In a case where the unaccountable aggressor was killed or wounded by the contravened to ward off his evil, he shall not be liable for retaliation, blood money, expiation or value as his blood is permissible. This opinion is adopted by the majority of Maliki [711], Shafi [712] , Hanbali[713] and Zahri schools.[714]

- The third opinion

In a case where the aggressor is a minor or an insane individual and is killed or wounded by the contravened to ward off his evil, no liability shall be on the contravened but there shall be a value for the vicious animal or liability for what it damaged. This is adopted by Abu-Yousef from the Hanfi school.[715] The proofs that support the above opinions are as follows:

1) *Abi Humaid Al-Saedi (may Allah be pleased with him) said that the Prophet (peace be upon him) said, "it is not permissible to take the money of a Muslim except if he is fully content".*[716]

This is evidence that it is obligatory to pay the value of the vicious animal if it was warded off by the offender because it was killed without its owner's consent; therefore, the

[710] See above n 682, ch 6 545-546.
[711] See above n 288, ch 4 357.
[712] See above n 692, ch 13 450-451.
[713] See above n 690, ch 6 154.ch 6 155.
[714] Ali Ibn Ahmed Ibn Saeed Ibn Hazm Al Zahri, *Al Mhulaa Bilathar* (Dar Al-Kotob Al-ilmiyah second published Beirut, 2003) (Author's Translation) ch 11 98-102.
[715] See above n 682, ch 6 110.
[716] Ahmed Ibn Al-Hussein Ibn Ali Al-Bayhaqi, *Al-Sunn Al-Koubra* (DAR Al-Kutob Al-elmiah third published, 2003) (Arabic) (Author's Translation) ch ١1٠0.

killer shall be reliable for compensation.[717] This opinion has been argued as follows: In fact, the animal's killer has damaged the property through a permissible action, hence no liability shall apply as the same as in killing the sane adult.[718]

2) *Abu Huraira said that the Prophet (peace be upon him) said, "There is no retaliation for persons killed by animals" (Narrated by Albukari).* [719]

This tradition is evidence that the killer of the vicious animal is liable for its value as there is no compensation for the property damaged by such an animal in the absence of its owner. That is because such an animal has no will and, therefore, its damages shall not be covered. The contravened in this case shall be considered a killer without a permissible action, so he shall be liable for the value.[720]

This view is urged from two perspectives. First, first that it is permissible to kill a vicious animal for its attack and it is prohibited to kill it if it does not attack. This is evidence for the lapse of the right due to the attack and vice versa.[721] Second, we cannot ultimately acknowledge that animals do not have a will and Shari'ah considers animals to have a will. It is permissible to consume game caught by a dog released by a person, but it is prohibited to eat the prey if it goes forward by itself.[722]

3) *Self-defence that leads to the killing of the aggressor bears the meaning of retaliation. There are conditions to establish retaliation; namely, the aggressor must be an accountable person. This condition cannot be met in the case of minors and insane individuals because they are not accountable. They are not liable for retaliation*

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[717] See above n 694, ch 13 452.
[718] Ibid.
[719] See above n 184, ch 4 Hadith 276.
[720] See above n 694, ch 13 453.
[721] Ibid.
[722] Ahmed Ibn Edris Al Sanhaji Al- Qrafi, *Anwar Al-Broq in Anwa Al-Frowq* (Dar Al-Kotob Al-ilmiyah first published Beirut, 1998) (Arabic) (Author Translation) ch 4 185.

because their blood is consequently protected; if they are killed, the killer shall be liable for retaliation.[723]

Thus, killing an aggressor in self-defence is considered a *Qisas* offence in according to Islamic criminal legal system.[724] It is an act of warding off the aggression by the same means. It is ordained to ward off as Almighty Allah says, “Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you”.[725] The contravened is obliged to kill the aggressor if he could not find a lighter means of warding him off and he forced to kill the aggressor, so he shall not be liable for the damaged.[726]

4) *The actions of a minor or an insane individual cannot be regarded as haram and if so, this is not mean their blood permissible. In such a case, the contravened killed a protected self and is therefore liable to retaliation or blood money. However, retaliation is not obligatory in this case because there is a reason behind the action, i.e. warding off his evil. In this case blood money is obligatory.*[727]

This view is urged from two perspectives. First, if we acknowledged that their actions are neither haram nor a crime then the contravened killed them in warding off their evil, which cannot be stopped without killing; therefore, anyone caused damage while defending oneself shall not be liable.[728] Second, the blood of minors and insane individuals is permissible for their aggression and anyone with permissible blood does not have the right to be indemnified.[729]

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[723] See above n 684, ch 7 234.
[724] See Chapter One Part two.
[725] Surat Al-Baqarah, V: 194.
[726] See above n 679, ch 12 530.
[727] See above n 688, ch 6 433.
[728] Abd Al-Rahman Ibn Ahmed Ibn Rajab Al Hanbli, *Al Qwad* (DAR Al-Fikr) (Arabic) (Author’s Translation) 36.
[729] See above n 679, ch 12 530-531.

5) *The contravened who kills an aggressor (minor or insane) is obliged to defend himself. In Shari'ah, he shall be treated as one who is obliged to consume the food or drink of another, but he shall pay the value. This shall apply to the killer of a minor or an insane individual, who shall, thus, pay blood money.*[730]

This view is argued as follows: This can be regarded as analogical deduction, and it isn't analogical deduction because the aggressor obliged the contravened to kill him to ward off his aggression. Therefore, the aggressor shall be as if he killed himself, in which case no liability shall apply. With regard to consuming food, it does not legitimate spilling his blood and he makes no damage. The food can be indemnified, and the property shall remain protected. This is similar to the case of the *Mohrem* if he killed the game while defending himself.[731]

6) *The blood of a minor or the sane individual cannot be shed by their consent, and if they cannot permit their blood to be permissible then they are not considered to make their blood permissible.*[732]

This view is argued as follows: Blood is not permissible by consent as the accountable has no right to make his blood permissible. Therefore, both the minor and the accountable have the same provision. If they both permitted their blood, it will not be valid.[733]

7) *Defence that was performed to ward off the aggression of a minor, insane individual or an animal is not regarded as a crime. The aggressor in such cases shall not be in a self-defence case. However, in such a case he has the right to ward off the aggression in a suitable manner because he is in a case of necessity. The necessity*

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[730] Ibid.
[731] See above n 694, ch 13 453.
[732] See above n 684, ch 7 234.
[733] See above n 679, ch 12 530-531.

exempts him from punishment but not value because blood and property are protected. Legitimate excuses do not contravene such protections and, therefore, the contravened shall be liable for blood money for minors and insane individuals or, in the case of an animal, its value.[734]

This view is argued in two ways. First, the aggression of the minor or the insane individual made their killing permissible; consequently, their blood became unprotected. There is no liability in the case of the unprotected.[735] Second, the minor or the insane individual obliged the contravened to kill them; in this case, the aggressor shall be considered the killer. This, the killer of oneself and is not entitled to retaliation.[736]

8) *The protection of property is the right of the owner; when an animal kills or injures a person through self-defence, verily it damaged a protected property without the consent of the owner and consequently, liability for the damages shall apply.*[737]

This view is argued in three ways. First, any aggression made by an animal shall nullify its protection and there is no liability for such.[738] Second, there is no liability on the accountable Muslim if he or she made an aggression, and less such an animal. Because the blood of the human is more valuable than the blood of any animal. The human shall be liable for retaliation and blood money, but the animal shall be indemnified by value.[739] Third, the absence of the owner's consent in damaging the animal is not the reason behind indemnification; the action is not permissible. Anyone who damages a property without legal permission shall be liable for compensation because he is an aggressor. Anyone who

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[734] Zin Al-Din Ibn Ebrahim Ibn Mohammed Ibn Al Najim, *AL Bahr Al Reaq* (Dar Al-Kotob Al-ilmiyah second published Beirut, 1997) (Arabic) (Author's Translation) ch 8 344.
[735] Ibid.
[736] Ibid.
[737] See above n 715 , ch 4 183-185.
[738] Ibid.
[739] See above n 694, ch 13 453.

damages a property with legal permission shall not be liable for any compensation because liability in such a case would be a punishment. Shari'ah never makes something lawful whilst making a punishment for such lawfulness. This is similar to the case of the Mohrem who killed the game while warding it off—it is permissible for him or her to do so.[740]

The argument supporting the second opinion depends on evidence from the Holy *Quran*, the *Sunna* and logical deduction.

4.5.1.3 The evidence from logic

1) Minors and insane individuals are not protected in relation to their aggression, and the unprotected shall not be entitled to retaliation or blood money.[741]

If the accountable Muslim is killed by the contravened, no retaliation, blood money or expiation shall apply. This is because his blood is shed due to his aggression. The same shall apply to the minor and the insane individual if killed while warding their evil off. The killer shall not be liable as he is regarded as being in a case of legal self-defence. This is argued as follows. We cannot regard the unaccountable (minor, insane individuals and vicious animals) as the accountable. This is because the accountable has intention and free will, whereas the unaccountable does not. In this case, there shall be indemnification for the unaccountable, but not for the accountable.[742] First, the shedding of blood and the absence of liability are against aggression; both accountable and unaccountable aggression are the same so there shall no liability for killing such an aggressor. Second, the evidence that legitimizes the blood of the aggressor does not make a distinction between the accountable

[740] Ahmed Ibn Edris Al Sanhaji Al- Qrafi, *Al Dakearh* (Dar Al Garb Al Islami first published Beirut, 1994) (Arabic) (Author Translation) ch 12 267.
[741] See above n 288, ch 4 357.
[742] Ibid.

and the unaccountable, and it is obligatory to comply with the generality of the text until we find specific evidence for such a case.[743]

2) The contravened is ordered to defend himself, his property and family even if he kills the aggressor. There is a counteraction between the order to fight and the liability. They cannot meet.[744]

3) The damage was a result of a legitimate action so no liability shall apply. Warding off the aggressor is permissible. Therefore, no indemnification shall be entitled to the minor, insane individual or vicious animal in return for warding off their evil.[745]

4) It is established that vicious animals known by aggressive behaviour shall be killed against no liability[746] *and this shall apply to the minor and the insane if killed for their aggression as they are killed to ward off their evil.*[747]

This is argued as follows: This *Qiyas* cannot be applied because the human is more sacred than the animal. The human is indemnified either by retaliation or expiation, but the animal is only indemnified paying the value so they cannot be identical.[748]

5) Anyone who damages something while warding off its evil shall not be liable. In such a case, the contravened who causes damage to a minor, insane individual or vicious animal therefore has no liability.[749]

6) The aggressor is shed blood and is not entitled to indemnification in terms of retaliation, blood money or value.[750]

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[743] Suleiman Ibn Abd Al Qawee Ibn Abd Al Kareem Ibn Najem Al-Din Al Tofee, *Sharh Muktasr Al Rodat* (Resalah publisher, 1998) (Author's Translation) ch 2 542.
[744] Ahmed Ibn Hajar Al-Askalni, *Fatho Al-Bari in Sharh Saheh Al-Bukhari,* (DAR Al-Kitab Al Salfih,) (Arabic) (Author's Translation) ch 12 219.
[745] See above n 721, 37.
[746] See above n 719, ch 12 267.
[747] Ibid.
[748] See above n 694, ch 13 453.
[749] See above n 730, 36.
[750] See above n 690, ch 6 154.ch 6 155.

7) If the aggressor is killed while the contravened is warding off his evil, which cannot be warded off without killing, he is regarded one who commits suicide and such a person is not indemnified.[751]

4.5.1.4 The evidence of the third view concerning the liability of the unaccountable aggressor as is the case with minors and insane individuals

Jurists from Hanfi school who adopt the third opinion concerning the liability of the unaccountable aggressor as is the case with minors and insane individuals make a distinction between the unaccountable and the vicious animal and consider that the unaccountable is not entitled to indemnification, unlike the animal.

1) Abu Huraira said, "Allah's Messenger (pbuh) said, 'There is no Diya for persons killed by animals".[752]

2) The aggression of minors and insane individuals is regarded as a crime, but the punishment has been nullified by the absence of free will. The aggression of an animal is not a crime. In such cases, the contravened is in a legal self-defence case if he was attacked by a minor or an insane individual and shall not be liable for any retaliation or blood money.

In the case of necessity, if he is attacked by an animal, he shall pay the value with no punishment.[753] (127) This view is argued as follows: It is permissible for the contravened to defend oneself in a fair way, but if he was obliged to kill, it is legitimate to do so.[754]

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[751] See above n 225, 39.
[752] See above n 679, ch 12 530.
[753] See above n 736, ch 8 308.
[754] See above n 535, Ch. 1 477.

3) If a vicious animal attacked a human and he killed that animal, he then damaged a protected property without its owners' consent because of the protection of property owned by him; thus, the owner is entitled to be indemnified.[755]

This is argued as follows: The contravened damaged such property by a legitimate action and thus no liability shall apply as in the case of the killing of a sane adult.[756]

4.5.1.5 The preponderant opinion

Having reviewed the various points of views on the subject, it is clear that the second opinion—which is the view of the majority of jurists—is the preponderant opinion. This is due to the following:

- The evidences of the second opinion provide a weighty argument.
- The evidences of the other two opinions are less weighty.
- The generality of the texts here states that the aggressor is not entitled to any indemnification whether he is accountable or not. Shari'ah law evidence usually relies on either the generality such as these texts here or specificity concerning the rules unless found contradiction between evidence which is not found here.
- The Prophet (pbuh) gave the contravened the right to defend himself even if he is obliged to kill the aggressor.
- The contravened is ordered to ward off any aggression and he shall be rewarded for doing so. He shall not be liable for any damages.
- Damage may be caused by an accountable or un accountable person and we should not distinguish between them.
- The sacredness of the human is greater than that of the animal.
- The original rule is that no liability shall be established unless there is evidence.

4.5.2 The Effects of Violating the Right of Self-defence by the Contravened

[755] See above n 684, ch 7 238.
[756] See above n 715, ch 4 185.

The basic rule is that blood and property are scared, and it is not permissible to attack them without a legal action—one of which is legal self-defence. The contravened should ward him off using the slightest means, but if the assailant cannot be warded off except by killing then it is permissible for the contravened to kill the assailant, and he will not be subject to retaliation (*Qisas*) and he does not have to pay blood money (*Diya*) or offer any expiation (*Kafaarah*).

He should also ward off such aggression at the time and not before or after. If he warded off the aggression after it had occurred or by a stronger means while a slighter one would suffice, he shall be regarded as a transgressor and shall be liable as per the agreement of all jurists.[757] The person who is attacked should not hasten to kill the assailant until after he has exhausted other means of warding him off such as reminding him of Allah, scaring him and threatening him, seeking help from other people or seeking the help of the police. But he may hasten to kill him if he fears that the aggressor is about to kill him.

Zailai said, “if someone unsheathed his sword against another and attacked him and after that stopped fighting, if the contravened killed him after the cease of fighting, the contravened shall be liable for retaliation because the aggressor became protected after ceasing to fight. If the contravened was sure that the aggressor shall be warded off through seeking help and killed him, he shall be liable for retaliation”.[758]

It is written in the Muhazab: “if someone was able to ward off the aggressor by using a singlestick, but he amputates a limb, or could ward him off by amputation but he killed him, he shall be liable for retaliation as he transgresses the limits of self-defence”.[759]

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[757] Ebrahim Ibn Ali Ibn Yussef Al Shirazy, *Al Mohazab in Fiqh Al Shafi* (Al Dar Al Shamih publisher, Beirut, 1996) (Arabic) (Author Translation) ch 2 288.
[758] See above n 188, 7.
[759] See above n 95.

4.6 Mistakes Made in Private Defence

The purpose of this thesis is to explore and explain the legal concept and phenomenon of *mistake* in private defence under Islamic law. To that end, it is directed at the definition and interpretation of the meaning of mistake in terms of private defence under the provisions of the law of Shari'ah. The next step of the research is the critical evaluation of the legal consequences under Islamic law of committing mistake when having recourse to private defence.

4.6.1 The legal definition and nature of mistake in private defence under Shari'ah

The first and foremost question is how the concept of mistake is defined and applied by Islamic lawmakers, jurists, judges and other lawyers. The concept of mistake does exist in Islamic law and can be covered by the term *shubha*.[760] The term is derived from the classic doctrine of private defence under Islamic law and denotes a specific defence to criminal liability. However, the concept of mistake may be used in different contexts and, thus, it is incumbent on Muslim jurists and judges to ascertain the correct context in which the term *shubha* should be used. For example, the notion of mistake is given consideration when the defendant makes a specific plea in regard to assumed uncertainty, when the facts upon which this uncertainty is based must be proven. However, Islamic law does not require proof of the mistaken belief. When the mistaken belief is grounded upon a sacred text from the *Quran* or *hadith*, which has been abrogated by another text or is construed differently by the majority of empowered Islamic lawyers, or, alternatively, when the mistaken belief rests on a minority opinion, there is no requirement for the defendant to prove the mistake in such belief.[761]

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[760] Mohammad Hashim Kamali, Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia (Arab Law Quarterly, 1998) 231.
[761] See above n 195, 84.

As far as private defence is concerned, Islamic law, and *Quran in verse* 4:92 in particular, makes it clear that mistake can serve as a defence to criminal liability for murder, Allah says, “Never should a believer kill another believer, unless by error. Anyone who kills a believer by error must set free a believing slave, and pay compensation to the victim’s family, unless they remit it as charity. If the victim belonged to a people who are hostile to you, but is a believer, then the compensation is to free a believing slave. If he belonged to a people with whom you have a treaty, then compensation should be handed over to his family, and a believing slave set free. Anyone who lacks the means must fast for two consecutive months, by way of repentance to Allah. Allah is All-Knowing, Most Wise“.[762]

According to *Quran* 4:92, a Muslim is prohibited from murdering another Muslim unless the act of killing has been committed by way of mistake. Also, the same Quranic passage provides that, in a case where murder was committed by mistake, the killer must release a believing slave and secure payment of blood-money to the victim’s family, unless there is a remission as a charity. Another important principle that can be deduced from Islamic law is that killing by mistake disallows the application of capital punishment, even when the murderer had a planned intention to kill somebody but murdered a different person by mistake. This also relates to killing in self-defence, when the defender accidently killed a non-assailing person. The key rationale under Islamic law for not applying capital punishment with respect to such a killer is that a person who intends to kill one individual and accidentally kills another lacks the required intent to kill the victim.

The legal nature of mistake as a defence to criminal liability, even in terms of private defence, can also be viewed in the light of another principle of Islamic law—*al-umur bi*

[762] Surat An-Nisa, V: 92.

maqasidiha.[763] This principle of the Shari'ah actually implies that any act, whether verbal or physical, should be deemed and judged in conformity with the intention of the doer. The first component of the principle, *umur*, may be translated as an issue, matter, physical or verbal act. The second constituent of the maxim, *al-maqasid*, means will or determination to deliberately do something in order to achieve some purpose. To all intents and purposes, the aforesaid principle of Islamic law provides that an act will be punishable only if the intention of the perpetrator has been established. Both the *Quran* and *Sunna* should be considered the primary sources of this principle. Thus, *Quran* in verse 33:5 articulates that there is no blame on a man if he committed a mistake because only intention counts, Allah says, "There is no blame on you if you err therein, barring what your hearts pre-meditates. Allah is Forgiving and Merciful ".[764]

In a similar manner, the *Sunna* provides that actions of every person need to be judged by the actual intention underlying the actions, and every individual must receive what he actually intends.[765] Furthermore, the *Sunna* provides that unintentional mistakes and forgetfulness of the Muslim community are overlooked by Allah.[766]

With regard to this, the Shari'ah prescribes the general rule that an individual cannot be found liable for a simple thought that has not materialised into a harmful action. Under Islamic law, a good thought is considered an act of piety, whereas a bad thought is not considered for the purpose of prosecution at all. According to prominent Muslim scholars such as Abou Zahara, criminal intent is the intent to commit a wilful, deliberate and

[763] M Badar, 'Islamic law (Shari'ah) and the jurisdiction of the Intentional Criminal Court' (2011) 24 (2) *Leiden Journal of International Law*, 426.
[764] Surat Al-Ahzab V:٥ .
[765] See above n 184, Hadith n 1, page n 13.
[766] Y Y Bambale, *Crimes and Punishment in Islamic Law* (Malthouse Press 2003) 7.

premeditated act with complete consent regarding the intended results.[767] Thus, it can be inferred that a mistake negates the possibility of a wilful, premeditated and deliberate act because it deprives the perpetrator of consent regarding the intended results of the act. As a matter of Islamic law, intentional crimes are committed under three necessary conditions. First, there must be premeditation. Second, there must be a free will to select a specific course of conduct. Third, there must be knowledge of the unlawfulness of the act.[768] In practice, Islamic judges are prone to differentiate between different degrees of mental states other than the one of actual intent. For example, representatives of the Malik school of thought are disposed to think that, in murder cases, it is not a condition *sine qua non* to prove the intent of murder on the part of the criminal defendant. In other words, it is enough to prove that the act was committed with the purpose of assault and not with the purpose of discipline or amusement. A practical example of how Malik's jurisprudence is applied may be the following: in a case where two individuals were involved in an intentional fight and one of them was murdered, retaliation (*Qisas*) should be imposed as the punishment for the person who survived the fight.[769]

4.6.2 The legal means to establish mistake in private defence under Shari'ah

After the meaning and legal nature of mistake have been discussed, it is essential to focus more on the legal consequences of mistake in terms of private defence. Here, it is possible to discern several types of mistakes with different legal consequences for the defender. Broadly speaking, Islamic law prescribes that an individual who has made a mistake in believing that an attacker is going to assault him is considered to have made a mistake of fact. However, a defender can also make a mistake related to the question of the

[767] Abdullah O Naseef, *Encyclopedia of Seerah* (The Muslim Schools Trust, 1982), 741.
[768] See above n 765, 427.
[769] Supreme Federal Court of the UAE, Appeal 52, Judicial year 14, hearing 30 January 1993.

existence of the conditions of necessity. This is also a mistake of fact. Contrariwise, a mistaken belief in the amount of force necessary to defend life, or honour relates to a mistake of law.[770] In view of the above, it needs to be asserted that a mistake of fact entails an objective approach to the ascertainment of the existence of the circumstances of defence, whereas the reasonableness and necessity of the force can be established by way of a subjective approach. However, the two approaches to the determination of the legal consequences of a mistake in private defence are not flawless, taking into consideration that they originate from English common law and have been somehow received by Islamic countries.

It is not easy to determine reasonableness of force under Islamic law because the force applied in private defence rests entirely upon the beliefs of the defender, whereas, as the foregoing discussion must suggest, the *Quran* and other sources of Islamic law do not punish individuals for a mistake in belief. However, it also needs to be pointed out that any attempt to avoid punishing a defender for his belief would be considered a deprivation of the attacker's fundamental human rights.

In analysing cases of private defence under Islamic law, it is possible to distinguish a tendency that, like English law, the law of Shari'ah exemplifies the reciprocity of the two aforesaid problems. Muslim jurists and judges make strenuous efforts to determine the intention of the defender, especially in murder cases, because it is actually impossible to establish the fact of mistake unless the defender's intention is brought to light. However, because the genuine intention of a defender is difficult to establish, Muslim lawyers do not deem it wise to explore the psyche of the defender or to make any extensive examination of

[770] See above n 185, 218.

behavioural patterns or the development of the relationship between the defender and the victim.[771] In contrast to English jurists, Islamic lawyers take into consideration the objects used by the defender depicted by the relative *hadiths* as external standards that are expected to shed light on the inner working of the defender's mind and thus discern between '*amd* (intentional) and *shibh al-'amd* (quasi-intentional).

In making parallels between the law of mistake in private defence and pertinent *hadiths*, most Muslim scholars arrive at the conclusion that the *mens rea* (guilty mind) of the defender who kills in private defence is enrooted in the attacker's application of an instrument that is most likely to inflict death or is adjusted for killing, such as cold steel.[772] With regard to this, Abu Hanifa excluded all blunt tools, such as a wooden club, from the list of lethal weapons and contended they evince quasi-intention, irrespective of the size of the instrument or the force applied.[773] Nevertheless, Abu Hanifa does not exclude an iron rod, based on the words of the *Quran* in verse 57: 25, Allah says "We sent down iron, in which is violent force, and benefits for humanity " .[774] This notwithstanding, Imam Abu Yusuf and Imam Muhammad al-Shaybani, Hanifa's disciples refute Abu Hanifa's arguments by claiming that the stone and stick articulated in the *hadith* make reference to not just any sort of stone or stick, but a stone and stick that in the ordinary course of use do not inflict death. The aforesaid statement constitutes the opinion of the majority Muslim jurists.[775] The general balance between objective and subjective criteria in establishing intent therefore tips convincingly in favour of a reliance on objective evidence, which itself constitutes a

[771] P R Powers, 'Offending Heaven and Earth: Sin and Expiation in Islamic Homicide Law' (2007) 14 *Islamic Law and Society*, 42.
[772] S S S Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (AS Noordeen 2000), 36.
[773] I A K Nyazee, General Principles of Criminal Law: Islamic and Western (Lulu.com, 2010), 28.
[774] Surat al-Hadid V:25.
[775] See above n 391, 56.

necessary element of the offence. With regard to this, Hanafi defines intentional killing as “deliberately striking with that which splits into parts, such as a sword, a spear, a flint, and fire”;[776] Hanbali considers intentional any murder committed with an instrument “though likely to cause death when used in its usual manner”.[777] In this light, mistake in private defence cannot be considered murder, because it lacks the required intent to commit deliberate striking, whereas the presence of a deadly weapon in the defender’s arms can make it difficult to prove a lack of intent to kill.

Hence, it follows that Muslim jurists demonstrate a predisposition to establishing a mistake in private defence by proving the lack of the necessary intention to commit crime.

4.6.3 The case of mistake in private defence

To better understand the nature and peculiarities of mistake in private defence under Islamic law, it is necessary to review the case below (**Exhibit**).[778] The individual in the case is accused of possessing a psychotropic substance for addiction or trading. He has previous convictions, including the possession and usage of drugs. According to the arrest report prepared by the counter-narcotics officers, the accused was suspected of carrying Captagon tablets. He was reported to have resisted arrest and tried to escape. He also pulled a knife from his pocket and stabbed one of the officers. According to the facts of the case, the incident happened when the accused was in full capacity. The incident is considered a forbidden act under Saudi criminal law act (113, 114). To prove the accusation and sentence the accused in accordance with the counter-narcotics and psychotropic substance act, it is essential to decide on the appropriate sanctions available from the following: 1) charge with the murder of the offender; 2) prison punishment; 3) travel ban punishment; 4) rebuke

[776] See above n 773, 48.
[777] Ibid. 49.
[778] The case number (3128) Date 21/12/1437 AH, Madinah, Kingdom of Saudi Arabia.

because of his disguise; 5) rebuke because he has acquired banned tablets, which were prohibited under the degree of the general authority. As evidence of mistake in private defence, the court is likely to take into consideration the sayings statement provided by the accused in the police report, his statements in the arrest and inspection report, as well as the statements of the accused in the attached legitimate chemical report.

4.7 Insight into the right of self-defence in Shari'ah

A number of the important points are extracted from the right of self-defence in Shari'ah. Firstly, all jurists agree that defending oneself, one's property and one's honour is legitimate. Secondly, legal self-defence and defending property has certain requirements that must be established in order to be regarded as a legal self-defence without being subject to liability. They are that: the aggression must be unlawful; it must be real or likely to happen; it should be warded off with reasonable force; and it must be in progress. Thirdly, the jurists are in consensus that all the reactions of the contravened against the aggressor are permissible. Fourthly, the blood of the accountable aggressor is shed and he is not entitled to retaliation, blood money or expiation. Fifthly, the jurists have not reached an agreement concerning liability for the blood of the unaccountable or the vicious animal as they have three different views. The preponderant opinion is that there shall no retaliation, blood money, expiation or value. Sixthly, the basic rule that all blood, property and honour are protected is only be permissible by a legal entitlement. Seventhly, the protection of the aggressor shall be temporally nullified and shall be regained on the cessation of aggression. Finally, it is permissible for the contravened to ward off the aggression by reasonable force without excessive.

5. Summary

It is necessary to generalise that the right of private defence under English law statutes under similar principles and conditions as the right of private defence under the Islamic law. The major difference is that in English law, private defence is an entitlement, whereas under the Islamic law it can often be viewed as a duty. Hence, the thesis statement was followed and verified as true. The conducted study helped reveal that though under English law and the Shari’ah private defence frequently rests upon various theoretical justifications and philosophical principles, its practical application is equally motivated regardless of the society where it is utilised.

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CHAPTER 6

CRIMINAL RESPONSIBILITY IN SHARI'AH

1. Introduction

Criminal liability in Shari'ah basically depends on the status of the offender who breaches a certain legal provision under specific circumstances. Consequently, in Shari'ah, the first step following commission of a crime is to ascertain the status of the offender with a view to verify whether the offender comes with the conditions reduced or dropped because the offender is not be completely responsible for the crime. It has been shown that the criminal law basically deals with four major questions: is the accused the only one responsible for the crime? How should the gravity of an offence be assessed? What are the criteria to select an appropriate punishment for the offence? What are the conditions and justifications for dropping or reducing a punishment? This chapter examines the impact of different justifications on criminal responsibility in Shari'ah with a focus on the circumstances underpinning criminal responsibility. This Chapter also serves as a primer to the most important limitations on criminal liability. It begins with an overview of the nature of criminal responsibility in Shari'ah. Then, it addresses justifications to be free from criminal responsibility such as nescience, age, necessity, coercion, intent and self-defence. Each section includes evidence from primary and secondary sources supporting the Shari'ah view of criminal liability and justification. Finally, the chapter clearly explains the Shari'ah position on self-defence elements and justifications which play main roles in dropping or reducing criminal liability.

2. Concept of Criminal Liability in Shari'ah

The application of justice by laws in criminal cases requires a deep study and understanding of the concept of criminal liability, because it plays a role to drop criminal responsibility of the accused. The concept of criminal liability in criminal law is a very important subject and it needs more clarifying, because most defence lawyers exploit it as a legal gap such as case of Anders Behring Breivik in Norway 2011. Consequently, lawyers are usually trying to have the criminal charges such as homicide by dropping criminal liability for the clients. Criminal liability in *Fiqh* has been identified that a person who has complete eligibility which means the person is able to take responsibility for his actions and decisions.[779] In *Fiqh*, criminal liability means that the person is responsible for his illegal acts, that comes by his freedom to choose and his will.[780]

In Shari'ah, the general theory of criminal liability requires that the person convicted be totally responsible, in terms of his reason, his will, inclinations and choice.[781] In Shari'ah no one can be punished for a crime committed by another person. Nor is there a penalty for a child, a person who is mentally sick, or a person[782] forced to commit an offence. Perhaps in such cases a *Diya* could be applied.[783] Thus, the Shari'ah is comprehensive for concept of criminal liability with more details that are based on individual situations and conditions for each crime. The *Quran* deals with the issue of punishment of the offender and forgiveness for person who commits a crime by mistake. Almighty Allah says in verse 33 :5

[779] See above n 540, 18 [3].
[780] Ibid.
[781] Joseph Schacht, *An introduction to Islamic law* (Clarendon Press, 1964) 124.
[782] There is disagreement among jurists about persons forced to commit a crimes such as murder.
[783] Abd Allah Ibn Qudaamah Al-Maqdisi, Rodat Alnader and Junt Almunder Fi Asoul Al Fiqh (1146-1223) 119-125 [Principles of Fiqh in Hanafi School] (Author's Translation) 26-27.

"There is no blame on you if you err therein, barring what your hearts pre-meditates. Allah is Forgiving and Merciful".[784]

The *Quran* mentions (hi) story of Ammar Bin Yasir to illustrate forgiveness when something wrong is done without intent. The *Quran* compares Amar who was forced to abandon the religion of Islam , the biggest crime in the Islam, without his intent[785] on the one hand and punishment for a person who abandon the religion of Islam by his/her choice on the other.[786]

The *Sunna* has mentioned to the issue of personal liability. For example the Prophet Mohammed (pbuh) told us that God has forgiven His Ummah (the nation of Muslims) for mistakes, forgetfulness and coercion.[787] Additionally, Prophet Mohammed taught us that there is no responsibility for three people from His Ummah: , the sleeper, under age and the mentally ill person.[788] Thus, the system of penalty in Shari'ah differentiates between persons who are well aware of their deeds and those who are unaware of their deeds.[789]

Jurists of *Usul* have defined the eligibility for dropping criminal liability of a person depending on rights (life, security, education...etc.) or duties (his/her words and his/her deeds). These two categories could assist in identifying the motivation behind the commission of crimes. However, this is not the only point that Shari'ah looks at before applying the penalty. In addition, Shari'ah determines the extent of the criminal dangerousness and how to apply the best penalty in order to protect the Muslim communities from those criminals. In recent criminological studies, criminals have been

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[784] Surat al-Ahzab V:5.
[785] Surat an-Nahl V:106
[786] Ibid.
[787] See above n 263, Chapter n 2, Hadith n 1675, 178 [2].
[788] Ibid Hadith n, 1673, 177.
[789] See above n 168, 157-160.

divided, in terms of their dangerousness, into the following five categories.[790] Firstly, criminals who are unable to stop committing the crimes and who need to be in a high-security prison or death.[791] Secondly, criminals who suffer from psychological problems or mental issues who need to be transferred to a mental care centre instead of punishment.[792] Thirdly, criminals who used to commit crimes and who need punishment and treatment to be suitable for return to the community.[793] Fourthly, criminals who have committed a crime, which should be punished by *Ta'azir* penalty, thus for them psychic treatment and do *Tawbah* is better than punishment.[794] Finally, first time offenders who need a treatment without being mixed with other criminals, in order to prevent them from returning to crime.[795] Shari'ah considers the criminal liability as essential reason behind the crimes and examines the differences in personal circumstances before give legal decision for an offense for a better understanding of the concept of criminal liability in Shari'ah lead to more justice in the application of the penal system, it is important to understand the substantive reasons for dropping criminal liability.

3. Reasons for The Absence of Criminal Liability

Under Shari'ah law many factors impact on criminal liability and the application of the penal system. It is important to discuss these factors and the reasons for the absence of the criminal liability in order to achieving justice by considering some examples of these factors. The factor such, persons who are ignorant of the law or Islamic provisions such as recent immigrants Muslims are exempted from criminal punishment. Moreover, the ignorance, the

[790] See above n 264, 24-25.
[791] Ibid.
[792] Ibid.
[793] Ibid.
[794] Ibid.
[795] Ibid.

intent to commit crime, the necessity, age, coercion and mental illness. The most significant factor is the right of self-defence.[796] These factors will be explained in turn.

3.1 Ignorance and Mistake

In Shari'ah, the nescience literally means against the knowledge and it refers to a person who educated something different from the truth or doing something different than the right thing by mistake.[797] For instance, the *Quran* has mentioned to the ignorance by story of Bny Al-Mustalq, which is command for Muslims to be careful of taking the news at their face value to avoid falling into the ignorance and mistake.[798]

In Shari'ah punishing a person who did not know that he/ she had breached the law is seen as unjust. Shari'ah does not impose criminal responsibility on a person who proves that he did not know the laws or the provisions of Shari'ah which he violated.[799]

There is a disagreement among jurists of *Usul* about the meaning of the nescience. For instance, the jurists of Shafi considered nescience as a justification for provisions of Ibadat (issues relating to Allah such as Pray, Fasting….etc.) but not provisions of Muamalat (issues pertaining to people such as Sales, Purchasing, Work …. etc.).[800] On the other hand, the jurists of the Maliki School considered nescience a justification, if a person had a wrong belief, such as a person who drinks a wine believing is grape juice.[801] Thus, the nescience should be based on the evidences to prove extent of impact the nescience on the crime either it drops the criminal liability or not.

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[796] Leila Nadya Sadat and Michael P. Scharf, The theory and practice of international criminal law : essays in honor of M. Cherif Bassiouni (Leiden: Martinus Nijhoff Publishers 2008) 157.
[797] See above n 540, 30.
[798] Surat al-Hujurat V:6.
[799] See above n 540.
[800] Jall Al-Din Abd Al-Rahman Al-Sutee, *Al-Ashbuh Wanudar in qwad and furo Fiqh of Shafi* (Library of Nizar Moustaf second published, 1997) (Arabic) (Author's Translation) 288-302.
[801] Yacoub Abdul Wahab Al Bhussien, *Rafo Al Haraj in Shariah* (Muktabh Al Roshd fourth published Riyadh, 2001) (Arabic) (Author Translation) 217-218.

In order to get a deep understanding about the impact of nescience on criminal liability a person should know the differences between nescience and other elements such as a doubt and fault, which could confuse the decision for dropping the criminal liability or not.

Firstly, jurists of *Usul* have stated that there is a difference between nescience and doubt, whereas others are considered as a kind of nescience, thus the nescience is without hesitation or negligence by accused.[802] Furthermore, there is a responsibility on a person who broke a law because of uncertainty. That person should have checked the lawfulness of his act. Secondly, the jurists of *Usul* have two different views about fault. According to the first view nescience and fault are similar; both of them could be considered justifications against criminal liability.[803] However, others argue that they are completely different. For example, a person who has committed murder by mistake will face a penalty *Diya* or *Kafarh* such as car crash, but if the person committed that crime by ignorance of law or person under age, such as a boy the *Qisas* penalty will be dropped.[804] Lastly, the jurists of *Usul* considered idiocy to be similar to sickness in terms of the application of *Qiyas* penalty, which is absolutely a justification for the criminal liability, but it is different than the nescience that perhaps negated by knowledge.[805] Thus, the criminal system in Shari'ah considers the criminal's personality and his/her history for making a decision on criminal liability.

In fact, the nescience has been divided generally into three parts: the criminal responsibility, eligibility of a person, and impact of nescience.[806] The most important of these

[802] See above n 540, 41.
[803] Ibid 36.
[804] Ibid.
[805] Ibid 59-60.
[806] Ibid 78.

parts, which is related to the scope of this study, is ignorance in relation to criminal responsibility.

The scholars of *Usul* have agreed on the following two main types of ignorance in terms of its effect in criminal responsibility. The first type of ignorance does not exempt a person from criminal responsibility. This type of ignorance refers to a case where a person interpreted the texts of the *Quran* and *Sunna* differently from their actual meaning. This type of ignorance is not considered as a justification.[807] For instance, a person who drinks alcohol cannot justify his act based on the *Quran* text where Allah said that all foods and drinks are Halal.[808] There are many texts in the *Quran* and *Sunna* which explain Halal foods and drinks for people. Where other texts in *Quran* and *Sunna* explain that there are several kinds of prohibited food and drink ,such as alcohol, drinking alcohol cannot be justified by what Allah has said. .

The second type of ignorance relieves a person from criminal responsibility. This kind is considered as justification. Indeed, scholars of *Usul* have studied this type in two points: the nescience in field of Ijtihad, and the nescience of the reason such as a person who drinks wine thinking that it is grape juice.[809]Thus, in Shari'ah, only several forms of ignorance serve as justification to exempt an accused from criminal responsibility.

3.2 Criminal Intent and Justification

Intention behind the crime and circumstances surrounding the crime are significant in Islamic penal system and effect for dropping criminal liability. Criminal intention means malice, aforethought or the intention of intimidation and revenge against someone.

[807] Ibid 86.
[808] Ibid 88.
[809] Ibid.

Therefore, there is intention behind all crimes that should look at it whether it is a good or bad depending on the person. Therefore, the *Quran* teaches people to follow the path of good and to avoid bad ones, Allah says in verse 90:10 “And We showed him the two ways? ”.[810] It is worth noting that there is a relationship between the offender and the victim and understanding the offender’s personality assists to identify the intent or the motive for the commission of a crime and surrounding circumstances such as murder by intent of theft or defence.

Indeed, there is a big difference between the intention and desire of the person to do something. Scholars of *Usul* understand the intent in *Fiqh* as a motive behind acts of person.[811] The intention or motive is divided into two general categories: innate motives and acquired motives. [812] Innate motives refer to motives such as the need for eating or drinking that do not come from the surrounding environment and previous learning.[813] Acquired motives refer to aggressive behaviour and competition that result from the surrounding environment by learning and daily experience.[814]

The motive is divided in to two based on its impacts and its application of penalties.[815] Firstly, the reaction of accused is commensurate with motivation and the penalty usually is applied based on the motives such as crime of murder happened for acceptable reason such as the case of self-defence.[816] Secondly, the reaction is not commensurate with

[810] Surat al-Balad V:10.
[811] See above n 264, 71.
[812] See above n 289, 25.
[813] Ibid 26.
[814] Ibid 27-28.
[815] Ibid 38.
[816] Ibid.

motivation and therefore the penalty will be strict such as crime of murder happened for very trivial reasons such parking car on the wrong side of the road.[817]

In Shari'ah, the criminal motive behind a crime can assist in determining the type of penalty to be imposed. For example, *Ta'azir* for manslaughter and *Qisas* for intentional murder.[818] Imam Malik has mentioned that there is no mercy or negotiation for *Diya* murder of *Khid'a* (It means killing someone by a trick, in order to steal his money). Because these cases are considered as serious, they should be dealt by the Caliph (governor of Muslims).

From a Shari'ah point of view, there is no penalty for a crime without look at two main factors that are motive behind the crime and the crime which is breach the law. In other words, there is no responsibility for a crime without criminal intent; there is also no crime without criminal intent or motives. For instance, the *Sunna* has mentioned about people's acts that Prophet Muhammad (pbuh) said 'Acts of people are dependent on their intentions either good or bad and each person will be asked about his/her intention either now or in judgment day'.[819] In summary, Shari'ah considers criminal intent as a main factor that determines criminal responsibility and penalty.

3.3 Necessity

According to *Fiqh* scholarship, all objects in the earth are Halal (not forbidden) for people unless prohibited in the *Quran* and the *Sunna* or something is proved to be However, Muslims perhaps do something illegal or prohibited in Shari'ah without criminal intention but they may commit it when they are under state of necessity, i.e., in order to save

[817] Ibid.
[818] Ibid.
[819] See above n 184, ch 1 Hadith n 1, page n 13.
[820] See above 255, 32 and Surat al-Balad V:10.

his/her life or property., Shari'ah considers state of necessity as a justification against criminal responsibility in several cases.

Necessity in Arabic relates to fear from death, grievous injury on human body, or loss of money and property.[821] The significance of this justification is that the individual may do something illegal or forbidden under serious threat in order to preserve his/her life from death, bloody injury, or loss of money and property.[822] For example a Muslim, who could not find food or drink to survive, will be justified by a state of necessity if he eats a dead animal or drinks alcohol, both of which are normally prohibited in Islamic law. However, there are strict conditions which should be fulfilled for this justification to be used as a reason to exempt one from criminal responsibility.[823]

The justification of necessity, in Shari'ah sources, was developed through many texts. The *Quran* has mentioned eating dead animal as an example for justification of necessity to do things prohibited in Shari'ah, Allah says in verse 6:119 "And why should you not eat of that over which the Name of Allah is pronounced, when He has detailed for you what is prohibited for you, unless you are compelled by necessity?".[824] This verse highlights an exception from the punishment under necessity in order to preserve human life. The *Sunna* and Islamic history indicate that, the Prophet Muhammad (pbuh) did not punish Abad Bin Sharhabeel, during the year of drought in *Medina*, when he stole date from a farm to save himself from starvation.[825] Therefore, a person can eat or drink something, which is not his/her own, to save his life. Indeed, there are different points of view regarding this matter,

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[821] Ibid 66-[1].
[822] Bader Al salyh, The intention and the impact of criminal liability in crime of murder in Islamic criminal law with the application in the High Court in Riyadh (PhD college of Prince Naif for Security Sciences, 2002) 67-[4] (Arabic)(Author's Translation).
[823] Khalid Owaydhah, 'Justifications and Concept of Criminal Liability in Shari'ah' (2014) 3 (2) *Humanities and Social Sciences Review* 56.
[824] Surat al-An'am V:119.
[825] See above n 262, 246 Hudeth 1875.

all scholars of Maliki school agree that a person who wants to save himself from starvation can eat or drink but without causing a harm to the food owner. [826] On the other hand, the scholars Jurisprudence have envisaged two instances a person travelling or a person who is a resident in a country.[827] The majority of Shafi jurists agree with Maliki's view unless a person is resident in a country.[828] A traveling person, after eating and drinking, can take some food or drink with him to avoid death.[829] Similarly, there is no penalty for a person who commits adultery crime with necessity. For instance, Caliph Omar Ibn al-Khattab did not punish the woman who committed adultery with a person who was tending sheep, in order to get a few dates and water as she was fearful of death in the desert.[830] In sum, Shari'ah considers necessity as a justification for exemption from criminal responsibility for any criminal case for there is no choice for the person who is under threat of death.

3.4 Age

The age factor is relevant in criminal cases under Shari'ah law. It is a justification for dropping penalties. Hadth in *Fiqh* refers to a case where a person, who is under legal age, commits a crime. Literally, the Hadth, in Arabic, means that anything small in size and opposite to any great or big thing.[831] Ibn Abdeen has defined Hadth in Shari'ah as the age of the child from birth to age of puberty.[832] The *Quran*, addressing to non-believers of Quraysh (Tribe of the Prophet Muhammad), discusses the effect of age That is weaknesses as an attribute of childhood and old age and powerfulness/strength as quality of youth, Allah

[826] See above n 264, 63.
[827] Ibid 264.
[828] Ibid.
[829] Ibid.
[830] Ibid 65.
[831] Majd Al-Din Mohammed Bib Jacob Shirazi, *Al-Kamouse Al-Moheet* (Egyptian General Authority for Books 3th ed, 1998) (Arabic)(Author's Translation) Ch 1-545.
[832] See above n 682, ch 5-336.

says in verse 30:45 “Allah is He Who created you weak, then after weakness gave you strength, then after strength gave you weakness and grey hair. He creates whatever He wills. He is the Omniscient, the Omnipotent”.[833]

The impact of puberty is divided into two in term of Ibadat and impacts in term of provisions of Shari’ah that involve the penalties system. Following the Prophet Mohammed’s commands (pbuh), all Muslim scholars of *Fiqh* agreed that age be a justification for criminal responsibility and reason for dropping penalties for an offense.[834] The majority of Muslim jurists agree that the child is an incomplete eligibility from the birth age until age of puberty like a person who has mental illness. However, there is no agreement about the age of puberty.[835] For instance, the disagreements on the age of puberty based on marks such as the armpit hair or pubic for boys and menstruation for girls. The scholars of Hanafi School indicate that the age of puberty is eighteen years for boys and seventeen for girls unless there are marks for the puberty.[836] On the other hand, majority Shafi, Hanbali and the Maliki scholars indicate the age being fifteen years both for boys and girls.[837] Therefore, there is no criminal responsibility or penalties for children in Hadth age, but *Ta’azir* penalties could be applied for a child who commits a crime in age of thirteen or fourteen.[838]

In order to get more clarify about the impact of age on criminal responsibility, let us consider different instances. In case of a child who has stolen something, the penalty will not be amputation of hand, but following the Shafi view, a suitable fine should be paid by

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[833] Surat ar-Rum V:54.
[834] See above n 264, 271 [1].
[835] Ibid 272.
[836] Osam Abdul Alim Al-Shaik, *Puberty and Impact on Fiqh* (Om Al-Qura press) (Arabic) (Author’s Translation) 14-21.
[837] Ibid 14-21-22.
[838] See above n 264, 273.

his/her family for the stolen property.[839] Where a boy has committed a murder by his/her choice or even through instigation or exploitation by another person[840] the penalty will be half of *Diya* that should be paid by his/her family, according to Maliki scholar view.[841] Where an underage has collaborated to commit murder, without incitement or exploitation, the penalty will be half of *Diya* for each one for the boy might be the cause of the death.[842] Because the age factor could completely exempt the doer of the criminal act from his criminal responsibility, it is important to look at it before applying the penalties in Shari'ah.

3.5 Coercion

Coercion affects criminal responsibility in Shari'ah. It is considered as a justification for reducing the criminal responsibility or penalties. According to vocabulary of Arabic, the coercion of person to do something by threat and fear means that person is in situation of unsatisfaction to do something.[843] Al-Zayla'i (1820-1882) has defined the coercion situation in Shari'ah as an act with forcing using the threats on a person to do something, which is unwanted, and without leaving a choice for him/her.[844]

The majority of scholars of *Fiqh* agree on the appropriateness of dropping of responsibility on a person who has been forced to commit a crime even the greatest sin such as leaving the Islam.[845] The scholars of *Usul* have divided the coercion situations into two main categories: complete and incomplete situation of coercion.[846] The first situation of

[839] Ibid 274.
[840] Ibid 278.
[841] Ibid.
[842] Ibid.
[843] See above n 98, 3865.
[844] Fakhr Al-Din Osman Ibn Ali Al-Zayla'i, *Tabyyn Alhquq* (DAR Al-Koutb Al-Islami, 1895) (Arabic) (Author Transition) ch 5-181.
[845] Katarzyna Sidło, 'Coming Out" or "Staying in the Closet"– Deconversion Narratives of Muslim Apostates in Jordan' (2016) 18 (1) Marburg Journal of Religion 1.
[846] See above n 264, 245.

coercion is extremely strong and there is no choice for the person to do anything or even thinking, in other words the person will loss his/her life or even a part of the body if he tries to reject the demand of the coercer.[847] The second situation of coercion is less than the first case in terms of the strength of the threat, such as threats of imprisonment and beatings which depend on the steadfastness of the person.[848] For example, majority of *Fiqh* scholars state forty beatings with a whip considers justification for dropping the criminal responsibility according to Al-Zayla'i.

The Muslim jurists have divided coercion into five categories: the coercion to assault a human life, the coercion to commit adultery, the coercion to obtain a confession about the commission of a crime, the coercion to leave the Islamic religion, and the coercion to drink alcohol.

Firstly, majority of *Fiqh* jurists agree that there is no right for one person to coerce another to assault on someone else's life. [849] Commission of murder in Shari'ah is a serious crime. As has been mentioned in sources of Shari'ah clearly, the *Quran* states that Allah has prohibited it except with justification.[850] However, there are disagreements among scholars of *Fiqh* on the penalty appropriate where the crime is the result of this type of coercion. Hanbali School argues that no *Qisas* but *Ta'azir* penalty should be implemented because the killer, in such cases, is used as a tool to kill.[851] They have supported their view by Hadith[852] from the *Sunna*, which mentions such cases of coercion and provide for no

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[847] Ibid.
[848] Ibid.
[849] Ibid.
[850] Surat al-Isra V:33.
[851] Mustafa Ibn Saad Al Suyuti Al Rahibani, "Matalib Olei Al Noha" (Al Muktab Al Islami second published, 1994) (Arabic) (Author Translation) ch 6 21-24.
[852] See above n 263, ch 2, Hadith n 1675, 178 [2].
[852] Ibid Hadith n, 1673, 177.

criminal responsibility.[853] Hanafi School states that the penalty on the killer should be *Diya* because he was under coercion; on the other hand the *Qisas* penalty will be applicable for the person who coerces the killer to kill.[854] According to Maliki and Shafi views, the *Qisas* penalties should be applied for the person who coerces the killer to kill because of the loss of life which considers serious offense in Shari'ah law.[855] Other scholars disagree. Though the normal punishment for leaving the Islamic religion is death, all scholars of *Fiqh* agree that there should be neither criminal responsibility nor penalty, if the person returns back to the Islam.[856] All scholars of *Fiqh* agree that there is no criminal responsibility or penalty where a person drinks alcohol under coercion.[857] There are different views on the appropriateness of using coercion (such as during police investigation) to make one confess that he has committed a crime. Coercion may compel an innocent accused to confess for a crime that he did not commit. For *Fiqh* Scholars coercion to elicit confession is divided into two.[858] First, there is no penalty for a person who is coerced to admit his involvement in the commission of a crime should not be punished for the said crime as the confession was the result of fear.[859] This view has been supported by words of Caliph Omar Ibn al-Khattab (May Allah be pleased with him) that describing a person in the case of coercion '' a man is not honest, if he was imprisoned and restricted or even if he was hungry at least".[860] Others argue that there is nothing wrong with forcing an accused who has a long history of crimes of theft, murder and highway robbery to confess.[861] This view is supported

[853] See above n 825, 64.
[854] See above n 113, 2163-2164.
[855] Ibid.
[856] See above n 264, 255.
[857] Ibid.
[858] Ibid 258.
[859] Ibid
[860] Ibid.
[861] Ibid.

by Hadith Ibn Omar as can be learnt from the story of Zubair bin Awam where force was used with uncle of Hoyy Bin Aktab in Battle of to know where the money of Hoyy.[862] Furthermore, there are different schools of thought regarding who allowed using force into two views as follow. According to several Maliki and Hanbali scholars, only two people are allowed to use force: The Caliph or someone with his permission and the For others it is only the Caliph who can use force with the accused that has long history of crimes according to several of Shafi scholars.[864]

Fiqh scholars have accepted coercion as a justification to reduce criminal responsibility under three conditions: when the person refused to commit the crime;[865] when the threat is real and serious[866]; and when a threat is on life or loss of body parts.[867]

In conclusion, understanding the circumstances surrounding the crime and the factors influencing lead to know those who are actual involved in crime. Although, the disagreement on the penalty among scholars gives flexibility to apply a penalty, after studying the specific conditions in each case.

3.6 Justification of The Loss of Mind

According to scholars of *Fiqh*, the concept of mind is as a gift from Allah and a quality which is distinguishes humans from other creatures such as animals. In fact, a healthy mind is an essential element in order to understand the provisions of Shari'ah and legal rulings even dropping of criminal responsibility in terms of committing crimes according to Prophet's Hadith.[868] According to the *Fiqh* scholars the loss of a person's mind is a disease causing

[862] Ibid 259.
[863] Ibid.
[864] Ibid.
[865] Ibid 243.
[866] Ibid.
[867] Ibid.
[868] See above n 263, Chapter n 2, Hadith n 1675, 178 [2].

the loss of cognition, thus the person cannot differentiate between bad and good things.[869] Loss of mind has two levels: complete and incomplete damage. [870] The complete damage in mind is damage in a constant state since birth or after birth of a person. A person suffering from a complete damage does not have a criminal responsibility.[871] An incomplete damage in mind is similar to the previous situation but the effect is intermittent. Sometimes, the person knows what he is doing.[872] There is a criminal responsibility where he commits a crime at the time when he understands what he is doing but no criminal responsibility in other cases.[873]

As a result, all scholars of *Fiqh* have classified other mental illnesses according to their impact in the criminal responsibility either effect of mind or completely loss of cognition in terms of applying the penalties system.

4. Self-Defence

The scholars of *Fiqh* recognizing one's right to defend his life, family and property they consider self-defence as a justification for dropping criminal responsibility. Self-defence has been defined as a human duty to protect himself, his/her family, his/her property, or the money of his/her family from all illegal aggression by using the necessary force.[874] The other meaning of self-defence is legitimate defence against anyone who wants to harm an adolescent, a non-rational person or even part of a person, a Muslim, a Dhimmi,[875] a Slave,

[868] Ibid Hadith n, 1673, 177.
[869] See above n 288, ch 5 , 112.
[870] See above n 264, 215-216.
[871] Ibid.
[872] Ibid.
[873] Ibid.
[874] See above n 535, Ch. 1 473 [1].
[875] Non-Muslim people who are Christians or Jews.

or an animal.[876] In the basic primary Islamic sources, such as in the *Quran* and *Sunna*, self-defence is known as *Dafo Al Sael*. This notion of self-defence has not been discussed adequately in academic research. The following sections provide evidences from the Islamic point of view in the main Islamic primary and secondary sources.

In the *Quran*, the Islamic view on private self-defence is clearly outlined in the (hi) story of battle of Mecca. When Prophet Mohammed was travelling to Mecca for Hajj Quraysh stopped him. Though he was not allowed to open fighting with Quraysh for the time was month of Dhu al-Hijah when fighting is prohibited, he could defend himself and his companions.[877]

Thus, the Islamic positions is always to protect the Muslims or non-Muslims against any illegal attack and protect their rights and ensure their security Finally, the self-defence law under the *Quran* allows Muslims to repel any illegal assault on life or property. In *Sunna*, the concept of private self-defence is to guarantee five basic things for each person and to prohibit unwarranted infringement. The five things are: religion, life, mind, the posterity, and the property. The Prophet Mohamed (pbuh) said on the 10th of Dhu'l−Hijja (On 6th of March 632) in the Mosque of Arafa in Mecca: 'your blood, your property and your honour are sacred to you like the sacredness of this day of yours, in this city of yours, and in this month of yours. You will soon meet your Lord and He will ask you about your deeds. So, do not turn after me unbelievers (or misguided), some of you striking the necks of the others.[878] Evidently, *Sunna* prevents attacks on human life or property. One of the common Hadiths in private self-defence is reported by Abu Huraira as follows. Someone came to the Prophet

[876] Yahia Ibn Sharaf Al Nawawy, Rodat Al-Talibin (Al Muktab Al Islami first published Beirut, 1991) (Arabic) (Author Translation) ch 10 186.
[877] Surat Al-Baqarah, V: 194.
[878] See above n 170.

Mohamed (pbuh) and asked him: “what do you think if a man comes to me in order to appropriate my possession?” He (the Holy Prophet) said: "Don't surrender your possession to him". He (the inquirer) said: "If he fights me? ‘He (the Holy Prophet) remarked: "Then fight" (with him). He (the inquirer) again said: "What do you think if I am killed?". He (the Holy Prophet) said: "You would be a martyr". He (the inquirer) said: "What do you think of him (Messenger of Allah) if I kill him". He (the Holy Prophet) said: “He would be in the Fire”.[879] A martyr in Islam has many advantages and several of Muslims wish to gain these advantages such as being forgiven for all previous sins with the first drop of blood except a debt and being able to enter Paradise (God prepared this place for all Muslims after death). In other words, a person dying as a result of self-defence is akin to the person who was killed in war for homeland defence.

It is worth noting that there are different points of views about the applications of self-defence among the scholars of *Fiqh*, which is either Wajeeb[880] or Jâez[881].

4.1 Individual Self-Defence

Scholars of *Fiqh* have divided self-defence law in terms of the application into two essential views: a Wajeeb or Jâez. However, according to the majority of Muslim scholars such as Hanbali, Shafi, Maliki and Hanafi self-defence in terms of defending life is a Wajeeb.[882] The majority of Muslim scholars support their view by much evidence from the *Quran*, the *Qiyas*, the *Sunna*, and scholar of *Fiqh*.

Firstly, the *Quran* has stated about protecting the life of a person against any harms that it prevent people who go to Jihad (war) without money and power and likened that as

[879] Ibid [Kitab Al-Iman Hadith n 0259].
[880] It means a duty, in other words the person shall be punished if he didn't do it such as pry, fasting and Hajj.
[881] It means permissible, in other words the person has a choice to do or not such as marriage with more than one wife for men.
[882] See above n 398

going to destruction, because they are not ready yet for Jihad (war), Allah says in verse 2:195 " And spend in the cause of Allah, and do not throw yourselves with your own hands into ruin, and be charitable. Allah loves the charitable".[883] Furthermore, the argument of this verse is that a person who does not use self-defence during illegal attack is similar to a person who kills his/her self or causes his/her destruction. The other evidence from the *Quran* is that a person should repel any attack likewise and without excessive force and protect his/her life, even if the attack is during the sacred month such as month of Dhu al-Hijah, Allah says in verse 2:194 "The sacred month for the sacred month; and sacrilege calls for retaliation. Whoever commits aggression against you, retaliate against him in the same measure as he has committed against you. And be conscious of Allah and know that Allah is with the righteous".[884]

Secondly, the evidence from the *Qiyas*, the jurists of *Usul* have stated that a person must have used self defence against an illegal assault and use the same way to defend which is considered as natural reaction.[885]

Thirdly, there are many Hadith in *Sunna* that mentioned the right of self-defence and considered as a criminal justification in case of assault. Said Bin Zaid has reported that the Prophet Mohammed (pbuh) said that "The person who killed while defending himself or his property or his honor is a martyr".[886] Another Hadith Abu Huraira has reported how the Shari'ah protects person's life and his/her property. Prophet Mohammed said, 'If there is a person look into your house in order to spy you (from out the house by hole in the door or

[883] Surat Al-Baqarah, V:195.
[884] Surat Al-Baqarah, V:194.
[885] See above n 535,156.
[886] See above n 305.

window) without a permission, you can hit him in his/her eye by a small stone or by anything in order to protect your privacy and there is no penalty for damaging the eye'.[887]

Finally, according to *Fiqh* scholars, self-defence law imposes a duty to repel illegal assault for people according to principle of Shari'ah, which is the harm, must be removed and must be stopped.[888] A minority of scholars, such as the Shafi[889] and the Hanbali, have stated that self-defence is Jâez.[890] They support their view with the evidence from the *Sunna* and *Qiyas*. The evidence from the *Sunna* is Hadith's mention of Fitnah (a sedition where there is a battle between two groups of Muslims) that a person who was killed in the Fitnah is better than person who survives the fights. Abi Zar has reported that Prophet Mohammed (pbuh) said to Abi Zar 'If you see a Fitnah between Muslims do not go there and please go to your home to avoid killing your brother in Islam and please stay calm even if you saw the glitter of swords from the window do not look at it. (In another report from the *Sunna* that Prophet said to one of his companions that 'wish to be the person who has been killed').[891] Because murder is considered as a serious crime in Shari'ah, it is better to be killed than to kill. The evidence from the *Qiyas*, the (hi)story of killing Caliph Uthman[892] (May Allah be pleased with him) when he was quiet in his house and he did not fight against his murderers though he knew that those people would like to kill him.[893] Then, these people jumped into the house of Caliph Uthman and they killed him in *Medina* in 655 AD.[894] Hanbali, Shafi and

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[887] Mohamad Ibn Naser Al-Din Al Albany, *Sahih Al Tarqreeb and Al Tarheeb* (Muktabh Al Mareef first published Riyadh, 2000) (Arabic) (Author Translation) Hadith 2727.
[888] Dr Abdul Wahab Ebrahim Abu Suleiman, *"Applications in Fiqh Al Drorat*" (King Fahd Library First published Riyadh, 1993) (Arabic) (Author Translation) 69.
[889] See above n 759, ch 5 215-216.
[890] Abu Al Hasan Ali Ibn Suleiman Al Merdaddi, "Al Ensaf in Marifat Al Rajeh from Al Klaf in Mazhaf Emam Ahmed Ibn Hanbal" (Al Sunna Al Mohamadih First published Riyadh, 1956) (Arabic) (Author Translation) ch 10 304-305.
[891] See above n 305, ch 7 Hadith 4261.
[892] Uthman is the third Caliph of Islam.
[893] See above n 535, Ch. 1 475.
[894] Ibid.

Maliki have different views about self-defence, which is more detailed opinion.[895]

That is, self-defence is Jâez in case of Fitnah and Wajeeb if there is no Fitnah.[896]

In conclusion, the evidences from the primary and secondary source are clearly explained the Shari'ah position from the self-defence regard to defending the life, which considers precious thing for people.

4.2 Defence of Another person

The application of self-defence law to defend another person such as protection of family members, which are wife and daughter against rape or adultery crimes. Majority of Muslim jurists agree that under principles of Islam defending and protecting wife or daughters by using the necessary force, even if this means killing the attacker, is a duty or a Wajeeb.[897] Muslim jurists support this view with evidences of the two famous stories from the *Sunna*: the story of Saad Bin Ubadah (May Allah be pleased with him)[898] and the act of Caliph Umar (May Allah be pleased with him) in the case of a man defending a girl from rape. In the first case, Saad Bin Ubadah has reported the following conversation with companions of prophet. He said: 'if I saw a man in my house with my wife, I will hit him with the sword.' The Prophet (pbuh) said when he heard the words of Saad that 'Are you surprised from the jealousy of Saad for his wife? I'm jealous more than Saad for Muslim's wives and God is more jealous of me'.[899] Muslim jurists cite this conversation to show defence of another person is a duty as the Prophet has agreed with the view of Saad for protection of his wife. In the second case of self-defence Umar, in his judgment, accepted

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[895] Ibid.
[896] Ibid.
[897] See above n 679, ch 12 – 534 and See above n 288.
[898] By the way Saad Bin Ubadah is one of the best prophet's companions and he was leader of Al-Ansar tribe in Madina.
[899] Abu Abd Allah Mohammed Bin Esmaeili Al-Bukary, *Al-Jame Al-Sahih* (library of Salfi first published, 1979) (Arabic) (Author Translation) ch 4 Hadith n 6846, page n 262.

defence from a Hozil tribe girl's killing of a man who wanted to rape her while she was collecting firewood close of her country.[900]

In sum, Muslim jurists agree on the right of a man to defend his wife and daughters against the threat of rape by using force even the defence for himself against the threat of sodomy too.[901] .

4.3 Defending Property

Muslim jurists disagree about the application of self-defence law for protecting property. According to the majority of Muslim jurists such as Hanafi, Maliki, Shafi and Hanbali, defending property is Jâez and for others it is Wajeeb.[902] Therefore, the majority of scholars have based their opinion on the fact that Allah has ordered Muslims to protect their property and that money comes in the second place after human life.[903]

In addition, according to a minority of scholars Shafi and Hanbali this kind of defence is Wajeeb to protect property because the person could loss his/her life or the family while defending his property. There are scholars who indicate that the defence as Wajeeb if the property is living thing and has a soul such as animals. As reported by Abu Huraira, this view is supported by evidence from the *Sunna*. When a companion came and ask Prophet Mohammed "what do you think if a man comes to me in order to appropriate my possession?" He (the Holy Prophet) said: "Don't surrender your possession to him".[904] They have interpreted this opinion to refer to the property, because the property could be a deposit for someone else that should be protected according to Shari'ah.[905]

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[900] See above n 709.
[901] See above n 535,157.
[902] Zakaria Mohamad Al Ansari, Shihab Ahmad Al Ramli, Mohamad Ahmad Al Sobri and Mohamad Al Zhrawi (eds), Asnaa Al Matalib in Sharh Al Talib (Dar Al Mimanih) (Arabic) (Author Translation) ch 4 168.
[903] Ibid 166.
[904] See above n 170.
[905] See above n 904.

In summary , the Shari'ah has clearly confirmed the right of people to resist any threat in order to protect the life, family and property. Self-defence is considered as a justification for criminal responsibility.

5. Proportionality in self-defence

Proportionality constitutes one of the key principles of self-defence under both Islamic law and common law. The classical doctrine of self-defence associates this principle with *actus reus* (punishable offence).[906] Thus, in the context of *actus reus*, the principle of proportionality means that the force applied in self-defence—in other words, in halting a crime in progress—must be proportionate to the attacker's force. [907] Hence, it follows that killing or wounding an assailant in defence of life, honour or one's property or that of one's relatives is lawful and permissive as long as the act of self-defence is proportional to the acts of the assailant. For example, the act of self-defence would be deemed proportional if it does not exceed the level of violence required to ward off the assailant.[908]

In view of the above, Peters argues that the principle of proportionality makes self-defence closely related to the plea of halting a criminal offence in progress. [909] According to the scholar, the aforesaid plea can be made by an individual who applied proportional force against another individual to prevent him or her from continuing with a crime he or she was in the process of committing.[910] In this connection, all schools of Islamic law, with the exception of Hanbalites, infer the principle of self-defence from the *Quran* and construe that it is mandatory to defend individual life against assaults, even at the expense of the life of the attacker, Allah says in verse 2:195 " Whoever commits aggression against you, retaliate

[906] Ibid.
[907] Ibid.
[908] See above n 611.
[909] Ibid.
[910] See above n 188, 25.

against him in the same measure as he has committed against you".[911] This means that, under certain circumstances, it will be proportional to cause death to the assailant, unless the defender could prevent the infliction of fatal harm. [912] Moreover, the principle of proportionality in terms of self-defence is also derived from the general principle of proportionate repayment for crime. [913] For instance, it is incumbent upon the convicted offender to pay the proportionate share of the *Diya*.[914] In the sense of proportionality, Islamic law views self-defence as a means of repayment for a crime that is committed by the assailant.[915] That is, self-defence as a repayment for the assailant's actions must be proportionate in order to be deemed justifiable under the law of Shari'ah.[916]

Kamali also suggests that the principle of proportionality stems from the limits of repayment imposed on Muslims by the Shari'ah.[917] Kamali cites al-Nahl 16:126 to prove that the *Quran* permits the infliction of evil on the initial evil-doer as long as the punishment by evil is adequate and thus proportional to the offence 'committed against you'.[918] From a contrasting point of view, the principle of proportionality implies that although the defender may act excessively in the course of protecting his or her self, property or honour against the offender, his or her punishment must be in proportion to the gravity of his or her excessive harm.[919] In addition to this, it must be conceded that even justified conduct causes societal harm and that such conduct will be exculpable only if the greater harm is can be proven to a reasonable degree of certainty.[920] Here, the proportionality requirement serves

[911] Surat Al-Baqarah, V:194.
[912] Ibid.
[913] Ibid.
[914] See above n 195, 311
[915] See above n 618,18.
[916] Ibid.
[917] See above n 55, 36-41.
[918] Ibid.
[919] See above n 391, 56.
[920] Ibid.

the purpose of such proof: even if the threatened harm is immediate and no less harmful alternatives exist, the maximum harm that may be caused cannot exceed the threatened harm.[921]

6. Private defence as an excuse

Private defence may be considered either an excuse or a justification from criminal liability under both Islamic law and common law.[922] The theory of justification suggests that harmful conduct should be considered justified conduct if it is encouraged or at least tolerated under objectively identifiable conditions that are not exclusive to the defendant.[923] By contrast, excuse is directed at the actor's subjective apprehension of the conduct in question.[924] In other words, an excused actor commits an offence or other harmful conduct that the criminal law seeks to prevent or avert.[925] Unlike justification, excused conduct is neither directed at the avoidance of a greater societal harm or the promotion of a greater societal interest. [926] The actor is excused notwithstanding the harmful nature of his or her conduct because, under external and internal circumstances, he or she is not morally blameworthy.[927] In the context of self-defence, the defender is excused because the harmful nature of his or her act stems from the lack of a fair opportunity to choose meaningfully whether to cause the harm.[928]

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[921] See above n 185, 218.
[922] G Fletcher, 'The Right Deed for the Wrong Reasons: A Reply to Mr. Robinson' (1975) 23 UCLA L. Rev. 310.
[923] Ibid.
[924] K Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 Colum. L Rev 1900.
[925] J Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 J. Crim. L. & Criminology
[926] Ibid.
[927] Ibid.
[928] Ibid.

Unfortunately Islamic law is not very specific in terms of whether private defence should be considered as justification or excuse from criminal liability.[929] Thus, it is essential to have resort to common law theories of private defence.[930] In view of the fact that common law assumes the free will of an actor, an individual who is not capable of exercising a voluntary choice to adhere to or breach criminal law is not an adequate subject of criminal punishment.[931] As a result, the excuse of private defence is applicable under common law only when the wrongful nature of the defender's act is substantially attributable to coercive effects rather than to free will.[932] Due to the fact that private defence is not a voluntary act, the infliction of harm in self-defence is not determinative of the defender's moral blameworthiness.[933] Hence, it follows that the defender cannot be punished under criminal law merely by virtue of committing a harmful act.[934]

7. Summary

As discussed in the previous pages, Shari'ah has detailed rules for criminal liability since its establishment. It is interesting to note that the doctrinal basis for principles of criminal liability and their application were derived from Islamic primary and secondary sources.

Indeed, numerous studies by Muslims scholars which were conducted over hundreds of years affirm these principles in the Islamic criminal law. In this chapter, the concept of criminal liability and justifications in Shari'ah were discussed in view of different Islamic schools. This was under the frame of the relationships between commission of a crime and

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[929] Ibid.
[930] D A Donovan, & S M Wildman, 'Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation' (1980) Loy. LAL Rev., 14, 453
[931] See above n 670,108
[932] See above n 672.
[933] Ibid.
[934] H Packer, The Limits of the Criminal Sanction (Standord University Press 1968), 971.

the offender. Moreover, justifications for criminal liability in Islamic criminal law, such as nescience, age, necessity, coercion, intent and the most important factor which is the self-defence, have been discussed in detail. Each offence has special conditions and suited methodology to handle with it which was written in the *Quran* and *Sunna*. The role of the Islamic schools of thought relating to the justifications of criminal liability in the development of Shari'ah has been demonstrated. The differences in the views of Muslims scholars for dropping criminal responsibility were discussed. Furthermore, the justifications for defending the most important rights have been discussed such as one's life, another person's life, and property. Finally, Shari'ah confirmed for Muslims their right in justification for dropping criminal liability, and Shari'ah gave significant investigations behind the crimes and the role of criminal and victim in each criminal case.

CHAPTER 7

DISCUSSION

1. Introduction

The main objective of this part of the project is to reflect the procedure and results of analysis conducted in the framework of case studies. In other words, the analytical component of the methodology of case studies is fully represented, described, and explained in this part of the project. In this light, it needs to be pointed out that the analytical procedure was carried out in accordance with the steps and principles set forth in the methodology part of the project. To that end, it should be highlighted that the analytical component of the case studies constitutes the final and, thus, most important stage of the case studies as a primary research methodology. To every intent and purpose, the analytical component of the case studies reveals itself as the most thorough intellectual procedure that involves strenuous mental efforts and strict adherence to the laws of logic. In characterizing the analytical component of the case studies further, there is no exaggeration to say that the exploratory nature of research that emphasizes on the 'living' concept of self-defence under Islamic jurisprudence, makes the analytical component of the case studies all-embracing and multifaceted, because it required the researcher having recourse to multiple sources of Islamic law and jurisprudence in order both establish the linkages between ideas, concepts, and clauses, and to deduce good conclusions from viable premises.

In a nutshell, the analytical component of the case studies relies substantially upon deduction. The analytical process of deduction has helped establish the relationship

between variables within the research hypothesis by dividing the research hypothesis into variables and showing the nexus between the variables. It needs to be reiterated that the current project's research hypothesis is the following: Islamic legal practice (independent variable) substantially extends the Quranic meaning of self-defence (dependent variable). In confirmation to the requirements of qualitative analysis, as delineated in Chapter Methodology, the analytical component of the case studies was actualized through the following sequential steps: 1) non-numerical examination and interpretation of empirical evidence from the case studies; 2) search for and evaluation of discovered patterns of relationship between search variables in terms of the research hypothesis; and 3) conversation analysis – 'a meticulous analysis of the details of conversation, based on a complete transcript that includes pauses, hems and also haws.' [935]

2. First analytical stage: empirical evidence from Saudi Arabia

In starting the analysis of empirical evidence collected in the course of the case study of Saudi Arabia, it needs to be asserted that the independent variable of the research hypothesis ('Islamic legal practice') is easily discernible (typo) from other concepts. In reducing the meaning of the independent variable to 'Islamic legal practice related to self-defence', it is possible to notice that the scholars and practitioners in Saudi Arabia tend to view and apply the legal concept of self-defence from two perspectives. First, the concept of self-defence is used as a fundamental idea of Saudi criminal law. Second, the notion of self-defence is viewed from Saudi perspective, but in the context of international law and international relations between sovereign states, as well as between sovereign states and

[935] Abdulrahman M Almohideb, *Criminal procedures relevant to crimes of killing in the Kingdom of Saudi Arabia*, PHD Thesis (1996) University of Glasgow; Ibid 383.

non-governmental entities. Specifically speaking, the general principles of the former approach to 'Islamic legal practice of self-defence' may be deduced from abundant cases of criminal prosecution in the territory of Saudi Arabia. As a matter of Saudi criminal procedural law, the concept of self-defence is widely discussed and elaborated upon in the framework of the present-day legal criminal procedures in Saudi Arabia that are relevant to crimes of killing.[936] Unlike other crimes where self-defence may be utilized (e.g. assault, battery, burglary, grand theft auto, etc.), the criminal procedures relevant to crimes of killing in the Kingdom of Saudi Arabia can provide the richest empirical evidence concerning self-defence as a concept at issue. As a matter of fact, the issue of self-defence arises in the framework of contemporary criminal procedures in Saudi Arabia only when seriousness of harm is implicated. For instance, killing in self-defence may be considered a crime and, thus, will inevitably raise the issue of self-defence as a mitigating factor of killing.[937] Also, it is extremely interesting to note that the criminal procedural law of Saudi Arabia has specific objectives and functions that, if analysed in detail, may shed light upon the criminal procedural facets of self-defence as a concept of interest. One important objective of the Saudi criminal procedural law is to promote Islamic law through a criminal procedure. In order to fulfil this objective, the criminal procedural law of Saudi Arabia addresses the phenomenon of self-defence not as a universal concept of criminal law, but rather as an inseparable constituent of the Islamic law. Here, the Saudi criminal procedural law refers back to the roots of criminal law in the Islamic world – the *Quran* and other sources of the law of Shari'ah.[938] On the other hand, the criminal procedural law of Saudi Arabia, in contrast

[936] Ibid.
[937] B Wells and M Burnett, 'When Cultures Collide: An Australian Citizen's Power to Demand the Death Penalty Under Islamic Law' 22 Sydney L. Rev. (March 2000), 5.
[938] H Esmaeli and J Gansast, 'Islamic law across cultural borders: the involvement of western nationals in Saudi murder trials' 28 Denv. J. Int'l L. & Pol'y (Spring 2000), 145.

to its substantive counterpart, namely, criminal substantive law of Saudi Arabia, does not discern self-defence as some independent phenomenon, but views the phenomenon a factor, circumstance, or an essential element of the analysis of every violent crime. Although, the legal practice of Saudi courts shows abundance of self-defence cases related to crimes of killing, the excuse or defence of self-defence may be raised virtually in regard to any violent crime, such as robbery, burglary, assault, or rape. However, the degree of permissible self-defence, such as the use of deadly force, may have different coloration in the context of different crimes. Thus, in the case of Darsem, the offence of murder happened in the course of self-defence against a rape attempt. This means that not only murder cases, but also rape cases may involve the defence of self-defence. In the case of Darsem, self-defence is interpreted as private defence, taking into consideration that the locus delict is a private space.[939]

In view of the above, it is reasonable to agree with many experts that the most vivid portraying of self-defence can be actualized in the criminal cases that directly relate to killing. Besides, the significance of placing a special emphasis upon self-defence in criminal cases related to killing ensues from the fact that killing is sometimes permissible if it is committed in self-defence. Secondly, self-defence in murder cases can be viewed as an affirmative defence to an accusation and, thus, should be regarded with diligent care and seriousness. At third, under the criminal procedural law of Saudi Arabia, self-defence is directly connected with the rights of the accused[940] and, thus, needs to be approached from the perspective of individual entitlements rather than public prohibitions. In elaborating more upon the

[939] Inayatullah Hasyim, 'Saudi Arabian law and protection of RI migrants' The Jakarta Post (2011), <http://www.thejakartapost.com/news/2011/06/24/saudi-arabian-law-and-protection-ri-migrants.html>,(20 April 2017).
[940] See above n 940.

aforesaid points, it is deemed wise to point out that the criminal procedural law of Saudi Arabia cannot rule out or diminish the opportunity for self-defence, because, as the foregoing discussion must suggest, it is based on the law of Shari'ah. Under the law of Shari'ah, law is only supplementary to God and, thus, it is incumbent on each true Muslim to obey the Commandments of God by experiencing pleasure in the very act of obedience. Here, the concept of obedience surpasses the concept of law, because obedience to the Commandments of God originates from within, spontaneously, and without external enforcement.[941] By contrast, the concept of law necessitates obedience as a result of external compulsion and enforcement. That is, law exists as a conglomeration of written sources that impose certain models of conduct. In case of deviating from the prescribed modes of behaviour, the law enables the enforcement of sanctions. In this connection, even if the criminal procedural law of Saudi Arabia seeks to punish an individual offender for killing another person in self-defence, the law of Shari'ah, or, in other words, Islam does not see the restrictions and sanctions as a punishment, but rather as an act of mercy. In this light, the criminal procedural law of Saudi Arabia, as an incarnation of the law of Shari'ah, should ensure that the punishment for killing in self-defence is less severe that the punishment for killing in general. The concept of self-defence is given a divine nature and serves as a manifestation of the Islamic law and God's Commandments inside the system of Saudi criminal procedural law.[942] The existence of self-defence, as well as its mitigating essentiality, clearly speaks of the fact that the offender atones for his sin before God only to the degree that reveals that the injustice to the victim is actually redressed. From the perspective of the Islamic law, the application of self-defence levels the seriousness of

[941] Afzalur Rahman, *Islam: ideology and the way of life* (Muslim Schools Trust, 1980) 357.
[942] See above n 939.

killing, because it does not impose substantial risks and threats to the community, and, there is no indication that the accused would ever commit similar crimes to others. Nor dies it evince that the accused is inclined to commit the crime of killing.

In evaluating self-defence as a twofold phenomenon that combines the will of God delivered through *Quran* and Islam, on the one hand, and the will of Saudi law-makers reflected in the criminal procedural law of Saudi Arabia, on the other hand, it needs to be noted that the criminal procedural law of Saudi Arabia offers self-defence as a complex concept that combines in its nature the intertwining rights and duties of men to God, to each other, to all creatures, and to the state of Saudi Arabia.[943] In this connection, self-defence under the criminal procedural law of Saudi Arabia cannot lead to crime unless it can be qualified under three types of crimes as prescribed by the Shari'ah, such as: 1) *hadd* (a defined crime); 2) *Qisas* (retaliation); and 3) *Ta'azir* (discretionary crimes).[944] The first type of crimes – the hadd – refers to the offences denounced and punished under the *Quran*, Allah says in verse 1:65 , " These are the limits of Allah—whoever oversteps Al-lah's limits has wronged his own soul".[945]

The seven hadd crimes involve the following offences: 1) adultery, Allah says in verse 24:2 "The adulteress and the adulterer—whip each one of them a hundred lashes and let no pity towards them overcome you regarding Allah's Law, if you believe in Allah and the Last Day. And let a group of believers witness their punishment ".[946] 2) Killing, Allah says in verse 5:32 "Because of that We ordained for the Children of Israel: that whoever kills a person—unless it is for murder or corruption on earth—it is as if he killed the whole of man-

[943] See above n 940.
[944] Ahmad A. Galwash, *The religion of Islam* (Online 2d., 1961) 105.
[945] Surat at-Talaq, V:1.
[946] Surat an-Nur, V:2.

kind; and whoever saves it, it is as if he saved the whole of mankind. Our messengers came to them with clarifications, but even after that, many of them continue to commit ex-cesses in the land ".[947] 3) false accusation of adultery, Allah says in verse 24:4 Those who accuse chaste women, then can-not bring four witnesses, whip them eighty lashes, and do not ever accept their testimony. For these are the immoral ".[948] 4) apostasy (renouncing Islam), Allah says in verse 9:74 "They swear by Allah that they said nothing; but they did utter the word of blasphemy, and they renounced faith after their submission. And they plotted what they could not attain. They were resentful only because Allah and His Messenger have enriched them out of His grace. If they repent, it would be best for them; but if they turn away, Allah will afflict them with a painful punishment—in this life and in the Hereafter—and they will have on earth no protector and no savior".[949] 5) drinking spirits, Allah says in verse 5:90 " O you who believe! Intoxicants, gambling, idolatry, and divination are abominations of Satan's doing. Avoid them, so that you may prosper ".[950] 6) theft, Allah says in verse 5:38 " As for the thief, whether male or female, cut their hands as a penalty for what they have reaped—a deterrent from Allah. Allah is Mighty and Wise ".[951] 7) highway robbery, Allah says in verse 5:33 " The punishment for those who fight Allah and His Messenger, and strive to spread corruption on earth, is that they be killed, or crucified, or have their hands and feet cut off on opposite sides or be banished from the land. That is to disgrace them in this life; and in the Hereafter they will have a terrible punishment ".[952]

[947] Surat al-Ma'idah, V:32.
[948] Surat an-Nur, V:4.
[949] Surat at-*Tawbah*, V:74.
[950] Surat al-Ma'idah, V:90.
[951] Surat al-Ma'idah, V38.
[952] Surat al-Ma'idah, V:33.

In view of the above, the concept of self-defence may be applied only to theft and highway robbery, whereas, in the context of rest of hadd crimes, it is impossible or difficult to ascertain how the requirements of self-defence can be fulfilled. On the other hand, a *Qisas* crime constitutes an offence which grants the victim or the victim's relatives the right of retaliation. *Qisas* crimes encircle killings, whether intentional murder, quasi intentional killing, or accidental manslaughter, and deliberate amputation of a part of the body of another person.[953] The application of self-defence in legal cases related to killings under Saudi Arabia criminal procedural law constitutes the issue of particular interests, and, therefore, it is prudent to analyse *Qisas* crimes in detail. In this connection, it needs to be illuminated that, under the law of Shari'ah, and, thus, under the law of Saudi Arabia, *Qisas* crimes can be carried out in five specific forms, such as: 1) premeditated murder; 2) seemingly premeditated murder; 2) erroneous murder; 3) intended injury; and 4) unintended injury.[954]

Under Islamic law, there are specific requirements that need to be fulfilled for each type of murder in order to establish the existence of self-defence as either a mitigating factor of criminal liability or an excuse from criminal liability. Thus, under the Quranic norms and the *Sunna*, all *Qisas* crimes have private nature, because injury, either intended or unintended, was inflicted in a private manner. In this sense, the Islamic law requires that the prosecution and punishment for a *Qisas* crime must be triggered by the victim or the victim's relatives. Here, it is possible to deduce that, unless the victim of the injury, or the family members of the killed victim, initiate the criminal prosecution and punishment of the offender who acted in self-defence, the question of lawfulness or unlawfulness of self-defence, as

[953] R H Moore Jr., 'Courts, Law, Justice, and Criminal Trials in Saudi Arabia' (1987) 11 International Journal of Comparative and Applied Criminal Justice, 63.
[954] Sayed H Amin, *Islamic Law in the Contemporary World* (Royston, 1985) 28-29.

well as the question of whether the offender exceeded the degree of permissible self-defence, will not be raised at all. Another question to be considered when analysing self-defence in *Qisas* crimes in the framework of the criminal procedural law of Saudi Arabia is burden of proof.[955] Taking into consideration that the injury in *Qisas* crimes has private nature, and that only the victim or the victim's relatives can initiate the prosecution and the punishment of the offender, the burden of proof of the crime is logically placed upon the accusing party. However, the Islamic law does not provide insights into who is responsible for proving or refuting self-defence. In making parallels with other crimes where affirmative defences must be proved by the defendant – the party who raises them – it is attainable to infer that it is incumbent on the offender in *Qisas* cases to prove that he acted in self-defence.

In continuing the analysis, *Ta'azir* crimes constitute another category of crimes under the law of Shari'ah, and, thus, under the law of Saudi Arabia, that might help ascertain the facets of self-defence in the context of criminal proceedings in Saudi Arabia. The major specificity of *Ta'azir* crimes stems from the fact that they are offences for which the sanction or, in other words, the punishment, is not directly prescribed and, thus, over which the judge or qadi may act in broad discretion, confined only to the restrictions and limitations of the teachings of the Shari'ah.[956] For example, the qadi is provided by the Islamic law with the discretion to either admonish the perpetrator of crime or issue him a warning. As an alternative, the qadi may simply bind the offender over or give him a disapproving glance. In the course of the law practice, it is achievable to point out the following *Ta'azir* crimes: a) adultery; b) false testimony; c) petty theft that is not covered by the theft as a hadd crime; d)

[955] M Siddiqui, *The Penal Law of Islam* (Adam Publisher, 1988) 36.
[956] See above n 956.

bribery; and e) adultery.[957] The overarching purpose of the punishment for *Ta'azir* offences stems from the necessity to correct the perpetrator and, serves as a general deterrent to other individuals, whereas the punishments for hadd and *Qisas* crimes encircle deterrence in conjunction with retribution. The aforesaid discrepancy between various types of crimes under the law of Shari'ah facilitates the objective of delineating the parameters of self-defence in the criminal procedural law of Saudi Arabia. Thus, for instance, at the core of the criminal procedural law of Saudi Arabia lies the authoritative figure of the Islamic law judge, the qadi.[958] The significance of the qadi is so high that his discretion may determine the final qualification of self-defence. Similar to its common law counterpart, the Saudi qadi, represents the sovereign of the state and, thus, serves at the sovereign's discretion by dutifully exercising the jurisdiction granted by the sovereign.[959] Taking into consideration that a qadi in Saudi Arabia must be a scholar in his own status, he usually applies the concept of self-defence in the manner that reflects his subjective theoretical interpretation of what the phenomenon of self-defence actually is. In dealing with self-defence cases, a qadi in Saudi Arabia often illustrates exceptional knowledge of the concept gained from various sources of Islamic law, such as *Quran*, the *Sunna*, etc. In addition to this, each qadi may view the idea of self-defence through the prism of his academic and social interaction with other individuals.[960] All things considered, the qadi cannot interpret the concept of self-defence from some secular perspective, especially, taking into account the fact that he must remain throughout his entire career a great follower of Islam. From this finding, it is possible

[957] See above n 946,106-110.
[958] L Rosen, The anthropology of justice: law as culture in Islamic society (Cambridge University Press, 1989), 59-60.
[959] Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (The University of Chicago, 1969), 57-58.
[960] Ibid.

to make a twofold inference. First, the qadi must not interpret the concept of self-defence in some light that might contradict to the fundamental tenets and basic precepts of Islam or Islamic law. Second, the qadi is granted substantial discretion in terms of law-making and law-interpreting functions. This implies that qadi in Saudi Arabia may extent the dimensions of self-defence as a legal concept by ascribing his personal experience and subjective vision to the meaning of the concept at issue. This fact proves the validity of the research hypothesis that the qadi in Saudi Arabia, as a legal practitioner, extends the Quranic meaning of self-defence without distorting the Quranic core of the concept at issue.[961]

However, it is unwise to confine the analysis of self-defence under Islamic criminal law only to the domain of procedural law, because the category of self-defence is both a product and fundamental component of Saudi substantive law. In this connection, it needs to be pointed out that the Saudi substantive criminal law prescribes two facets of the case in *Qisas* that needs to be taken into consideration when analysing the applicability of self-defence as an excuse from criminal liability. Thus, in public cases, also known as public action, the accused is tried and punished according to his offences committed against the law and the society.[962] The substantive criminal law of Saudi Arabia prescribes that the obligatory punishments in the course of public action are lashes and jail terms. On the other hand, the private right of action, as an alternative to public action, can be triggered where the victim of a crime or his family has always possessed the right to make decision on whether to pursue with the *Qisas* punishment or whether to forgive the offender. In this

[961] E Hossein, 'On a slow boat towards the rule of law: the nature of law in the Saudi Arabia legal system' (2009) 26 Ariz. J. Int'l & Comp. Law, 1.
[962] See above n 939.

connection, the substantive criminal law of Saudi Arabia prescribes that the judge may choose between lashes, jail terms, and death.

In elaborating further, it is necessary to state that the evaluation of self-defence from case to case. For example, the substantive criminal law of Saudi Arabia differentiates among four cases of murder, such as qatl al-amd (intentional murder), qatl al-shabih al-amd (non-intentional murder), qatl al-khata (accident), and qatl al-nafs (suicide or self-murder). As a matter of fact, self-defence is not an applicable excuse to qatl al-Nafs. On the other hand, self-defence is well appreciated and manifested in rape cases as well.[963] The substantive criminal law of Saudi Arabia discerns the following rape cases categories that need to be taken into account when analysing the excuse of self-defence. The first type of rape cases is a real rape case. This type of the case is based upon the provisions of Hirabah for causing assault and bodily harms. For this case, the substantive criminal law of Saudi Arabia prescribes the punishments in the form of death under *Hudud*. However, the excuse of self-defence is available in this case as a justification for killing. Hence, it follows that self-defence can be applied by Saudi courts to rape cases of real rape cases as well.[964] The second type of rape cases is rape with consent. This type of rape cases is considered *Zina*, or, in other words, illicit affair. Real rape victim may be covered by this category of cases because of the following features: absence of medical report, late filing of complaints, and signs of struggles. Here, self-defence may be viewed as an attempt of the victim to cease or prevent the committal of the offence by the perpetrator. The victim (complainant) will be found guilty of *Zina* if it is established that the victim actually has a relationship with the perpetrator of the rape. In this case, it is impossible to demand private right or blood money from the

[963] AE Mayer, 'Universal versus Islamic human rights: a clash of cultures or clash with a construct' (1993) 15 Mich. J. Int'l L., 307.
[964] See above n 963.

perpetrator. However, self-defence may be permissible if it is proved that the victim did not actually consented to the intimate relationships. False rape accusations constitute the third type of rape cases. As a matter of fact, false rape accusations are considered not a *Qisas* but a *Hudud*. In this case, the false accuser is punishable by a jail sentence and eighty or more lashes. In this sort of criminal cases, it is impossible to apply the concept of self-defence, particularly because the victim does not act in defence of his or her actual rights and entitlements when harming the perpetrator of crime.

3. Second analytical stage: empirical evidence from Pakistan

As far as the case of Pakistan is concerned, it needs to be asserted that the law of Pakistan also provides the right of self-defence. Thus, in *Bakshoo v. State*, it is decided by the court that the right of self-defence was always subject to general limitations under S.99, P.P.C.[965] Thus, no right of private defence is available if the public official has acted in good faith and under banner of his office. As a matter of Pakistani law, the right of self-defence was once utilized as a shield to ward off on warranted attack to property and person. However, self-defence should be exercised as a preventive measure and not for launching an attack for retaliatory purpose.

Besides, the court in the *State v Bahawal* ruled that the right of self-defence should extend to causing death.[966] The court arrived at the conclusion that the accused and co-accused had not exceeded the right of self-defence. Thus, presence of the accused at the place and time of occurrence were found to be doubtful. In elaborating further, in *Sarwar Khan v Muhammad Ayub*, the court decided that once the fact of the exercise of the right of private defence has been established, the accused should not be expected to regulate the

[965] *Bakshoo v. State* (2012) PCrLJ -1342 KARACHI-HIGH-COURT-SINDH.
[966] *State v Bahawal* (2012) YLR - 2498 LAHORE-HIGH-COURT-LAHORE.

extent of force to be applied by him to maintain his act within the restrictions prescribed by the law and thus, the law provides some marginal latitude to the accused.[967] Also, the court underlined that in case the force applied is grossly out of proportion to the danger precipitated by the assailant or the force used after the danger is over that the law considers such force to be in excess of the right of self-defence and impose punishment.

To continue, the court in *Mirdad and Other v the State* decided that the right of private defence should be considered by the court on material prior to the affirmative existence of circumstances establishing the right.[968] In the ultimate analysis, the court held that the accused was entitled to acquittal, because, under consideration of evidence as a whole, reasonable doubt was created in mind of the court.

4. Third analytical stage: empirical evidence from Malaysia

There is a wide range of cases from Malaysian legal system that helps better comprehend the significance and specificities of private defence as a justification to criminal liability under Islamic law. Thus, in *PP v Ngoi Ming Sean*,[969] it was decided by the court that the representative of the police was entitled to private defence because by virtue of the fact that the accused was deprived of any opportunity of escaping the threat, as he was cornered in a small area near the toilet. The fact of assault took place when the deceased aggressor had attempted to commit a dangerous act and the accused was threatened with such a great risk to his life that he had no enough time to deliberate on escape routes or do any other act towards withdrawal but to fire the shot from his gun. In addition to this, the Malaysian court held in *Tony Beliang v PP*,[970] that the accused was justified in murdering the assailant

[967] *Sarwar Khan v Muhammad Ayub* (2009) YLR - 1938 LAHORE-HIGH-COURT-LAHORE.
[968] *Mirdad and Other v the State* (1983) PLD - 48 PESHAWAR-HIGH-COURT-NWFP.
[969] PP v. Ngoi Ming Sean [1982] 1 MLJ 26.
[970] *Tony Beliang v PP* [2003] 1 CLJ 482.

because there was no other reasonable way to cease the assault other than shooting towards the attacker in order to defend himself from being struck by the attacker's vehicle.

The above-mentioned cases of private defence under Malaysian law bring into light the practical aspects of applying the general principles of proportionality and reasonableness as regards to private defence. Here, it needs to be asserted that Sections 99(4) of the Malaysian Penal Code (MPC)[971] regulates that the right of private defence can never be considered extended to cases when the harm inflicted on the assailant is more than necessary for the purpose of defence. In other words, Malaysian law requires a sense of proportion between the harm inflicted and the harm averted. Besides, the Malaysian legislator makes it clear that the only purpose of private defence is to defend the victim of aggression and not to punish the aggressor. Under Malaysian law, the principles of proportionality and reasonableness are intertwined. Specifically speaking, the principle of reasonable proportionality under Malaysian law embodies a set of restrictions and vital precautions as regards to the application of private defence in practice. To be more accurate, the principle of reasonable proportionality entails an approximate estimation and balancing between the obvious gravity of the assault or anticipated assault and the manner or destructiveness of the defensive actions. This principle of Malaysian criminal law rests on sound policy considerations.

Aside from the above, it needs to be asserted that the extent to which the exercise of the right of self-defence is justified under the Code is dependent fairly much on the reasonable apprehension of grievous harm or death threatened to the defender. Here, the

[971] Malaysian Penal Code (MPC) of 2015 (Act 574).

most critical element is the subjective perceptions of the accused; it does not actually matter whether the harm inflicted on the accused is substantial or minor. This notwithstanding, the amount and proportionality of the harm caused to the aggressor is taken into consideration in order to estimate whether private defence was not excessive. In evaluating whether the accused has actually exceeded the right of private defence, Malaysian courts usually take into account the style of assault, the conduct of the aggressor, the style of defence, the comparison between the physical qualities and abilities of the accused and deceased attacker respectively, as well as the antecedents of the deceased and his behaviour at the time of the assault. In this connection, the Malaysian court in *Hainie Hamid v. PP*[972] acknowledged that the appellant was in possession of a knife and that by virtue of that fact the appellant exceeded permissible boundaries of self-defence, because the attacker in the case was in possession of a Nibong baton as a means of attacking the appellant.

In elaborating further on the problem of private defence under Malaysian law, it is necessary to point out that Section 99 of subsection (1) and (2) of MPC provide specific prescriptions in respect of self-defence against public servants. According to the aforesaid provisions of Malaysian law, self-defence is prohibited against particular acts of public servants not connected with the grievous outcomes, committed in good faith in the scope of their service (employment), irrespective of the fact whether such acts are justifiable under law. The first clause of Section 99 of MPC pertains to the acts of public servants that are carried by them on their own discretion, whereas the second clause deals with acts of the public servants under the supervision or direction of the superior authority. The first clause

[972] *Hainie Hamid v. PP* [2003] 2 CLJ 137.

of section 99 of MPC prohibits self-defence even under the conditions when the authority of the public servant had minor defects. Thus, the Malaysian court in *Mohamed Ismail*[973] decided that when a police officer, acting in good faith and within the scope of his service, arrests an individual but without lawful authority, the individual so arrested is not entitled to self-defence against the police officer.

In *PP v Kok Khee*, the respondent was accused of hawking vegetables without the license and inflicting prohibited force against a police officer who executed his duty.[974] As far as the facts of the case are concerned, the policeman perceived the accused selling vegetables without the permission. The policeman approached the individual and conveyed him that he violated law. The accused started fighting with the policeman and picked up a dashing stick in order to attack the policeman by causing him harm. The judge in the case opined that the respondent was justified in applying force against the policeman, because he opposed an unlawful arrest.

In addition to this, it is also necessary to discuss other particularities of private defence under Malaysian law. Thus, section 97 of MPC makes it clear that a right of private defence is given rise when an individual defends his own body, life, property, as well as the body of any other individual against any offence directed at the human body. The right of private defence under MPC arises when there is a reasonable perception and anticipation of threat to the one's body and remains until the apprehension of such danger ceases. The problem of reasonable and mistaken apprehension of danger is discussed in a wide spectrum of legal cases. Thus, in *GFL Ewin v. PP*,[975] the major ground for appeal was whether the trial judge had correctly evaluated the appellants act under the circumstances

[973] *Mohamed Ismail* (1925) 6 Lah 463.
[974] *PP v Kok Khee* [1963] 1 MLJ 362.
[975] *GFL Ewin v. PP* (1949 15 MLJ 279 (CA, Malaya)

that the latter was in good faith and under apprehension of danger. Hence, it was decided by the appellate court that under the conditions at issue it was a mistake of fact and thus it was apparently but not actually necessary to shoot in self-defence.

In like manner, the court in *Ya Daud v. PP* pointed out that the appellant possessed more than a reasonable apprehension of grievous hurt or death.[976] According to the facts of the case, the deceased confronted the appellant and the appellant was forced to respond in order to prevent a gross injury. The appellant was found by the court to have been entitled to defend himself, because he had no escape route by being surrounded by three men. The attack by the deceased and his nephew had actually created a situation of substantial danger to the appellant's life and the appellant had not time to contemplate any other means of resistance than to strike back. This notwithstanding, the court in *Hanie Hamid v. PP*, set forth for consideration four exceptions to section 300 of MPC by stating and applied one of the exceptions in the case at issue – the use of disproportionate weapon negates the legitimate of defence.[977]

Apart from the defence of body and life, Malaysian criminal law also prescribes specific rules for the right of defence of property. Thus, Article 13 of the Federal Constitution of Malaysia prohibits any deprivation of property unless it is carried out in accordance with law. This means that any transgression committed against the owner of the property, as well as against the property of other individuals, entitles the individual to self-defence. In a nutshell, the right to self-defence emerges only when the person is subject to a wrongdoing regarding his property. That is, if the violation is not "ripe" or, in other words, does not exist, the act of the property owner cannot be viewed as self-defence.

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[976] *Ya Daud v. PP* [1996] 2 CLJ 540.
[977] See above n 974.

As a matter of Malaysian law, the right of property defence can be actualized only under the conditions of particularised violations of law against property that are committed or intended to be committed. Pertinent case law helps better understand the peculiarities of the right to defend one's property under Malaysian law. Thus, in *Mohd Rafi v. Emperor*,[978] a number of individuals, including the deceased, threatened to invade the house where the accused resided. Besides, the alleged perpetrators were also shouting threats to burn the house. However, none of them had ever touched inflammable materials or carried out any act of setting fire to the house.

The accused who was observing the situation in front of his house made a fatal shot towards the deceased. Under the circumstances of the case, the court ruled that there was no evidence of the deceased's intention to set fire to the accused's fire and therefore the threat had not been imminent to entitle the accused to shoot in order to repel the harm to his property. Nonetheless, the court also pointed out that the presence of deadly weapons in the possession of the deceased must be held beyond reasonable doubt to have given birth in the mind of the accused to a reasonable apprehension that he was going to suffer serious injury at the hands of the perpetrators. On these grounds, the court held that the accused did not exceed his right of self-defence with regard to this property. In analysing this case, it is possible to infer that the right of defence of property can only be lawfully exercised when there is reasonable apprehension of danger as to the individual's property.

The temporal dimensions of the right to defend the property constitute another issue in question that needs to be discussed in the framework of this study. As a matter of Malaysian law, the right of self-defence in respect of property starts as soon as a reasonable

[978] *Mohd Rafi v. Emperor* (1947) Lah 375 (HC, Lahore, India).

apprehension of danger to property arises. According to section 105 of MPC, the reasonable apprehension of danger may be caused by a threat or an attempt to commit the offence. In *Muhamad Shariff & Anor v. The State*,[979] a stolen bullock had been delivered to the house of the deceased and tethered there, whereas, after some time had elapsed, the appellants came to the house of the deceased in order to recover the stolen bullock and used the force to effectuate the recovery. In this case, the court held that the stolen bullock had been safely stowed away and the perpetrator had affected his retreat by barring the victims of theft from subsequently applying force in order to retrieve the stolen stuff.

In the case of *Hukam Singh*,[980] the accused forcibly made possession of two carts loaded with sugarcane by transporting the sugarcane to the public passage. It was ruled by the Supreme Court that, due to the fact that the accused were inside the field, the trespass in the land had not discontinued and H was entitled to stop the accused from going on committing the criminal trespass for any short distance they had still to cover prior to reaching the public pathway. By contrast, in *State v. Bhima Devraj & Ors*,[981] the deceased came to the house of the accused with the intention to outrage the modesty of the wife of the accused. The accused applied force to the deceased and continued to strike the deceased even after the latter fell down. It was decided by the court that the accused's right to self-defence ended after the deceased fell down.

5. Fourth analytical stage empirical evidence from the United States

After the case study of the Kingdom of Saudi Arabia, it is essential to shift the focus to the common law countries, such as Australian and United States. The analysis of the

[979] Muhamad Shariff & Anor v. The State (1959) PLD, Lahore, 987.
[980] *Hukam Singh* (1961) AIR SC 1541.
[981] *State v. Bhima Devraj & Ors* (1956) Cri LJ 1234 (DB).

common law is expected to shed more light upon the differences between the Islamic law and common law in regulating the concept of self-defence. As far as the United States is concerned, self-defence is widely recognized and expected by the US courts as an excuse from criminal liability for the harm inflicted upon the perpetrator of a crime. In *Commonwealth v Webster*, it was established by the court that self-defence as an occurrence should be evaluated separately from other features and that defendant's positive character was not to be taken due heed before the jury because defendant was accused of murder.[982] In other words, the fact of self-defence did not justify the murder itself. However, the fact of murder did not diminish the value of self-defence as an excuse from criminal liability. Also, in *Runyan v State*, it was ruled by the court that prior to taking life in self-defence, it is necessary that the individual be pressed by his assailant and must actually have retreated as far as he conveniently and safely could be in good faith.[983] In elaborating further, the court in *Wiggins v Utah* decided that threats made by a murder victim concerning defendant, of which defendant had no knowledge and awareness should be admitted at a defendant's murder trial to illustrate the state of mind of the victim towards defendant at the moment of the fatal encounter.[984] Also, the court in *District Columbia v Heller* held that prohibition on the possession of usable handguns in the residence under D.C. Code Sections 7-2501.01, etc., violated the Second Amendment to the U.S. Constitution, which provided protection of the individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes and objectives, such as self-defence with the home. This case clearly recognized the right of individuals to self-defence

[982] *Commonwealth v Webster* (1850) 59 Mass. 295.
[983] *Runyan v. State* (1877) 57 Ind. 80.
[984] *Wiggins v Utah* (U.S. 1876) 93 US 465, 23 L Ed 941, 1876 US LEXIS 1401, 3 Otto 465.

against any perpetrator and any offence connected with the individual's home or any residence.[985]

Regardless, the court in Tenn v Davis decided that, in the defendant's quest to have his state murder case removed to federal court, the U.S. Constitution allows the removal of state criminal and civil cases to federal court. More importantly, the court in this case pointed out that self-defence may manifest itself as necessary self-defence or not necessary self-defence. Specifically speaking, necessary self-defence takes place when it is rational and essential for the defendant to protect his rights or interests through self-defence.[986] Not necessary self-defence takes place when there is no need to have recourse to self-defence, due to the fact that other options are available. Besides, in *Ins v Chadha*, it is established by the court that the right to self-defence in any criminal case is guaranteed by the U.S. Constitution.[987] According to the court, the power to self-defence must be effectual in order to help attain the constitutional ends. Not opposed to the aforesaid decision, the court in *McGowan v Maryland* found out that self-defence can be qualified as the entitlement only if it is directed at the protection of fundamental rights and freedoms of an individual, such as the right to life or the right to property.[988]

In proceeding further, the court in *Beard v United States* decided that defendant had the right to self-defence in the charge of manslaughter, because, while staying at the premises, outside of his dwelling-house, the individual did not have a legal duty to get out of the way of his assailant who had threatened to kill him.[989] Another interesting approach to the value of the defendant's right to self-defence is manifested in *Rowe v United States*. In

[985] *District of Columbia v Heller* (2008) 554 US 570, 128 S Ct 2783.
[986] *Tenn. v Davis* (1879) 100 US 257.
[987] *Ins v Chadha* (1983) 462 US 919, 103 S. Ct. 2764.
[988] *McGowan v Maryland* (1961) 366 U.S. 420, 81 S. Ct. 1101.
[989] *Beard v United States* (1895) 158 US. 550, 15 S. Ct. 962.

the above caption case, the court pointed out that, notwithstanding the fact that the defendant initially provoked the conflict, his attempt to withdraw from the conflict coupled with a clear announcement of his desire for peace actually manifested that he had not lost his right to self-defence, or, as an alternative, his lost right to self-defence was revived.[990] Apart from the above, the court in *Andersen v United States* provided its own interpretation of self-defence in murder cases. The court decided that the inferior federal court correctly convicted the defendant for killing his friend on an American ship on the high seas.[991] However, on the other hand, the court stated that the murder was triggered by shooting and drowning and, moreover, the victim was found to have not provoked the defendant. In this case, the court helps understand the nature of self-defence in murder cases by construing that the elements of self-defence cannot be fulfilled under the circumstances when a killing is made "with deliberate mind and formed design".[992]

6. Fifth analytical stage: empirical evidence from Australia

Australia is another common law country that has a specific bunch of cases dealing with the concept of self-defence as a concept of both criminal procedural law and criminal substantive law. In conducting review of Australia's law of homicide, it is attainable to notice that self-defence is a well-recognizable defence to homicide under Australian law. Moreover, in Australia, self-defence is considered a complete defence to homicide. That is, if a person kills another individual for the purpose of defending herself, himself or another individual, and the elements of the defence are established, the defendant will be found not guilty of murder. The rationale underlying self-defence is well explained in the *Zecevic* case.[993] The

[990] *Rowe v. United States* (1896) 164 U.S. 546, 17 S. Ct. 172.
[991] *Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S. Ct. 2129 (2005).
[992] *Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S. Ct. 2129 (2005); Tex. State Bd. of Pub. Accountancy v. Bass, 2010 Tex. App. LEXIS 5421 (Tex. App. Austin, July 9, 2010).
[993] *Zecevic* (1987) 162 CLR 645.

court in the aforesaid case construed that the legal defence of self-defence is entrenched deeply in ordinary principles of what is just and fair. Hence, it follows that the fundamental principles of justice and fairness may be viewed as a clear justification for self-defence if it is rested upon the application of reasonable defensive force. However, on the other hand, the Australian law of self-defence is not as perfect as it may seem. The fact is that the elements and legal requirements of self-defence are developed in the course of the historical context, and, thus, the traditional case of self-defence under the law of Australia is usually depicted as an isolated act committed in a public place between two strangers of relatively equal strength, size and fighting ability.[994] However, most of the Australian courts highlight that the accused has the evidential burden with regard to self-defence. However, on the other hand, the courts acknowledge that, once there is certain evidence of self-defence, it is incumbent on the prosecution to prove beyond a reasonable doubt that the accused was not acting in self-defence.[995] Hence, it follows that the burden of proof in regard to self-defence is not eternally placed upon the defendant. At the specific moment of time, this burden shifts from the defendant to the prosecution.

In elaborating upon the concept of self-defence under Australian law, it is essential to note that, in various parts of Australia, law makes various distinctions between types of self-defence. Specifically speaking, the legal provisions of the Criminal Code of Western Australia discern self-defence against unprovoked assaults (Section 248) and self-defence against provoked assaults (Section 249).[996] The ground of such distinction lies in the actual participation of the accused in the provocation of the attack. To that end, the law of Western

[994] Australian Law Reform Commission (ALRC), 'Equality Before the Law: Justice for women' (1994) 69 (1) Final Report, 12.2; F Manning, 'Self Defence and Provocation: Implications for battered women who kill and for homosexual victims' (1996) Briefing Paper No. 33 (New South Wales Parliament), 6.
[995] *Muratovic* [1967] Qd R 15, 17 (Gibbs J; Lucas J concurring).
[996] Criminal Code 1899 (Qld) ss 271 & 272.

Australia prescribes more stringent requirements for establishing self-defence against a provoked assault than against an unprovoked assault. In addition to this, it needs to be asserted that the test for self-defence under the Code of Western Australia embodies both objective and subjective elements of self-defence. A subjective element of self-defence may be explicated as the component of what the accused individual has actual belief in, whereas an objective element implies the reasonableness of a belief the accused has or the reasonableness of his behaviour. On the other hand, self-defence against unprovoked assaults under the law of Western Australia has two prongs. The first prong of this defence addresses self-defence against minor assaults and cannot be lawfully triggered when the individual kills or seriously injures the victim when applying the defensive force. The second prong of self-defence against unprovoked assaults applies in cases where the defensive force is directed against the force that was intended to kill or inflict grievous bodily harm. In general, the second prong of self-defence applies in homicide cases. Irrespective of the differences in the interpretations of self-defence under statutory law of Australian states, a series of explanations and tests of self-defence can also be retrieved from the common law. Although all jurisdictions of Australia have a legislative test for self-defence, recourse to the common law may help provide new important insights into the nature of self-defence as a justification from criminal liability. The common law test is stated in *Zecevic* case. The test can be formulated as follows: it is essential to establish whether the defendant had belief on reasonable grounds that it was essential for him to commit in self-defence what he committed.[997] If it is established that that the defendant believed so and there were

[997] *Zecevic* (1987) 162 CLR 645.

reasonable grounds for his belief, or, alternatively, if the jury keeps having reasonable doubt about the issue in question, then the defendant has the right to be acquitted.[998]

7. Comparison and Contrast of the Case Studies

After everything has been given due consideration, it is vital to compare and contrast the findings from the three case studies, as well as to provide the final verification of the research hypothesis. Here, it should be reminded that the research hypothesis is the following: Islamic legal practice (independent variable) substantially extends the Quranic meaning of self-defence (dependent variable). Prior to making the ultimate conclusion with regard to validity of research hypothesis, it is essential to enumerate the following similarities in regulating self-defence under the law of Saudi Arabia, Pakistan, Malaysia, the United States, and Australia:

1) The three analysed systems of law address the concept of self-defence as a justification or excuse from criminal liability. In other words, under both Saudi criminal law, as well as criminal laws of the United States and Australia, the concept of self-defence is a well-recognized defence to criminal liability that manifests itself as either a justification or excuse from criminal liability.

2) In addition to this, in both Islamic and common law countries, such as the United States and Australia, courts are prone to associate self-defence with killing. That is, the raise of self-defence as a defence to criminal liability is widely noticed in murder cases. This notwithstanding, there are many other types of felonies where recourse to self-defence may

[998] Ibid 661.

be permitted by the court, including, but not limited to, rape, burglary, grand theft auto, theft, assault, battery, etc.

Besides the above captioned similarities, the concept of self-defence is regulated differently in different jurisdictions, such as Saudi Arabia, Pakistan, Malaysia, the United States, and Australia. Thus, for instance, in the Kingdom of Saudi Arabia, the concept of self-defence originates from the *Quran*. This means that not the legislator, but God gave birth to the concept of self-defence through Islam and Islamic law. By contrast, both in the United States and Australia, the concept of self-defence is enrooted in the common law and statutory law. In the common law countries, courts play significant role in construing the legal dimensions of self-defence and making them adequate to the requirements of every cases. On the other hand, in Saudi Arabia, a judge (qadi) has a very wide discretion on the interpretation of self-defence. Moreover, a qadi is entitled to adjust its interpretation of the concept of issue to every different situation. Moreover, the subjective factor plays more important role for the interpretation of self-defence under Saudi law as compared to the common law of the United States and Australia.

As far as the case of Malaysia is concerned, it is possible to discern the below particularities of the regulation of private defence in this country. First, Malaysia has very rich and influential case law that helps shape the legislative aspects and practical understanding of private defence. Malaysian courts are particularly focused on the general principles of proportionality and reasonableness of private defence. Moreover, it is highlighted in many Malaysian cases that the issue of self-defence arises in the court as the issue of controversy only if the defender exceeded limits of defence. To be more specific, Malaysian judges will never consider self-defence when the harm inflicted on the offender is more than necessary. Another interesting aspect of Malaysian law of self-defence is that

it distinguishes specific situations when self-defence is employed against public officials. The last but not least, Malaysian law delineate clear boundaries between reasonable and mistaken apprehension of danger as two major determinants of the right to private defence.

Another important difference in the regulation of self-defence in Saudi Arabia, Malaysia, Pakistan and the common law countries, such as the United States and Australia, lies in the fact that the former prescribes a universal conception of self-defence that is adjusted by a qadi to every specific patterns of facts, whereas the latter is more specific on defining self-defence and distinguishing various types of self-defence. In a nutshell, the common law definition of self-defence is more positivist and detailed, whereas the Islamic definition of self-defence is more naturalist, and religion based.

8. Description and analysis of unstructured interviews

8.1 Interview with Mr. Faisal Falah Elshamry

The first interview conducted in the framework of this dissertation project is an interview with Mr. Faisal Falah Elshamry (**Exhibit**). In answering the first question of the interview, Mr. Elshamry revealed that, in his opinion, the Islamic concept of self-defence severs as a prevention of any aggressive conduct in a suitable and fair way. The second question of the interview related to the interviewee's opportunity to apply self-defence in practice. Mr. Elshamry answered the second question of the interview by confessing that he had actually had an opportunity to have recourse to self-defence in practice.

The third question of the interview was expected to shed light on the interviewee's position regarding the regulation of self-defence under law. In answering the third question, the interviewee opined that the legal concept and topic of self-defence must be codified from judicial decisions and academic researchers in the field of Islamic law and public laws. In

answering the fourth question of the interview, Mr. Elshamry acknowledged that he had knowledge of the concept of self-defence under Islamic jurisprudence, because he had graduated with Islamic law major and familiarised himself with relevant regulations in the Kingdom of Saudi Arabia. Mr. Elshamry answered the fifth question of the interview by revealing that the key legal sources of self-defence in Islamic countries were *Quran*, *Sunna* and the public laws.

In answering the sixth question of the interview, Mr. Elshamry named the following other sources of self-defence under Islamic law: traditions of public people confirming existence of the right of self-defence as one of the sources of Islamic laws. In providing answer to the seventh question of interview, Mr. Elshamry stated that, in his opinion, the five particularities of self-defence under *Quran*, such as the self, the money, the honour, etc., are of a great significance, because of their pivotal role in human life.

In answering the eighth question of the interview, Mr. Elshamry confessed that he did not have sufficient knowledge of how self-defence was regulated in common law countries. In the context of the ninth question of the interview, the fundamental difference between the common law and Islamic law regulations of self-defence consisted in two disparate ways whereby the concept of self-defence is summarised in terms of how to ascertain and prove the offender's liability, whether the alleged self-defence was lawful and legitimate or not.

The tenth question of the interview was conceived to get more information from Mr. Elshamry regarding his vision of the aforesaid disparity. In answering the tenth question of the interview, Mr. Elshamry pointed out that the key discrepancies originated from the practices of self-defence, such as personal defence of self and the assessment of the victim. The last but not least, Mr. Elshamry answered the eleventh question of the interview by stating that self-defence can only be proved in Saudi Arabia in the court by way of providing

physical (material) evidence, whereas witnesses and other means of proofs can be used in acknowledgement of self-defence.

After Mr. Elshamry's answers to the questions of the interview have been described, it is essential to analyse them. Thus, the interviewee confirmed his knowledge of the concept of self-defence under Islamic law. Moreover, he specified *Quran* and *Sunna* as the key sources of self-defence under Islamic law. The interviewee's responses are well reflected in the studies by Al-Alfi, who defined *Quran*, *Sunna* and other sources of Islamic law as the legal basis for self-defence under Islamic jurisprudence.[999] Moreover, Mr. Elshamry's vision of self-defence as a complex phenomenon – the one that originates from judicial decisions and academic researchers in the field of Islamic – coincides with Wasti's viewpoint that the legal basis of self-defence is constituted by both theoretical and legal foundations.[1000]

8.2 Interview with Mr. Walled Mohamed

The second interview was conducted with Mr. Walled Mohamed (**Exhibit**). In answering the first question of the interview, the interviewee provided that he perceived self-defence under Islamic law in the light of preventing any aggression by suitable and fair means. Mr. Walled Mohamed answered the second question of the interview by asserting that he had multiple opportunities to have resort to self-defence. For instance, he had a case where the offender threatened by a gun and the victim took an action to defend himself in order to avoid the threat in the right time. All this made the action lawful before the judge.

In answering the third question, Mr. Walled Mohamed consented that self-defence should be regulated by legal experts and judges. Concerning the fourth question, the interviewee told the interviewer that his knowledge of self-defence was based on the fact

[999] See above n 354.
[1000] See above n 195, 57.

that Islamic Jurisprudence was one of the sources of law in his country (Egypt).

Mr. Walled Mohamed answered the fifth question by defining *Quran* and *Sunna* as the principle legal sources of self-defence. Also, his answer to the sixth question revealed that the interviewee knew many other legal sources of self-defence, such as the common traditions of Islamic countries.

In answering the seventh question, Mr. Walled Mohamed underscored the value of human rights as an object protected by self-defence. The interviewee unveiled his knowledge of self-defence under common law by answering the eighth question of the interview. That knowledge was derived from Mr. Walled Mohamed's attendance of law conferences and seminars. In answering the ninth question of the interview, the interviewee stated that the key difference in the regulation of self-defence under Islamic and common law traditions originated from different approaches to the problem of liability. The interviewee answered the tenth question by contending that the assessment of the victim is one of the major issues aggravating the gap between Islamic and common law regulations of self-defence. Mr. Walled Mohamed answered the eleventh question of the interview by arguing that only physical evidence and evidentiary testimony before the judges can prove self-defence.

After Mr. Walled Mohamed's responses to the questions of the interview have been delineated, it is vital to analyse them. Thus, in the answer to the tenth question of the interview, the interviewee suggested that the evaluation of the victim constituted one of the main issues expanding the gap between Islamic and common law regulations of self-defence. In this connection, Mahmood writes that the concept of self-defence is constituted by a multiplicity of diverse and frequently conflicting issues, taking into account that this law

is not only complex but also 'parti-coloured'.[1001] Following Mahmood's reasons, it is possible to agree with the interviewee that the gap between Islamic and common law regulations of self-defence may be to a great consideration extend caused by the lack of uniformity and consistency in the framework of Islamic law. Also, Mr. Walled Mohamed's standpoint that varying approaches to offender's liability constitutes a salient feature of the Islamic concept of self-defence is in accord with White's contention that the legal basis of self-defence under Islamic law is characterised by its variability and evolutionary nature.[1002]

8.3 Interview with Dr. Ibrahim Elmoghiry

The third interviewee was Dr. Ibrahim Elmoghiry (**Exhibit**). In answering the first question of the interview, Dr. Ibrahim Elmoghiry discerned three types of killing in the Islamic law, such as wilful murder, almost wilful murder and manslaughter. As far as the first type is concerned, Dr. Ibrahim Elmoghiry construed that wilful murder should be considered the kind of murder through the use of killing devices, such as a cold steel or gun. In Dr. Ibrahim Elmoghiry's opinion, the second type of killing is something between wilful murder and manslaughter. Besides, Dr. Ibrahim Elmoghiry argued that manslaughter constituted a significant issue as it could happen if a group of friends took part in hunting. In answering the second question of the interview, Dr. Ibrahim Elmoghiry opined that the act of murder by virtue of self-defence cannot be justified unless the killer had evidence that he acted in defence of himself, his honour or his money.

Dr. Ibrahim Elmoghiry answered the fourth question of the interview by stating that the commitment of murder is justified in self-defence irrespective of whether it is defence of one's money, property, the honour and the self, but only if it is possible to prove the fact of

[1001] See above n 359, 47.
[1002] See above n 362,11-78.

self-defence by witnesses. In answering the fifth question of the interview, the interviewee confessed that the influence of drinking alcohol cannot be justified as self-defence and will be deemed wilful murder and thus will entail legal retribution.

After the interviewee's answers have been depicted, it is essential to analyse them. Thus, Dr. Ibrahim Elmoghiry's inclination to discern different types of killing, such as wilful murder, almost wilful murder and manslaughter, corresponds with findings of Western scholars that the legal basis of self-defence under Islamic jurisprudence is susceptible and sensitive to global influences and, thus, is subject to evolution and alteration.[1003] Moreover, Islamic law clearly provides that every individual is entitled to the natural right to life: "if one slayeth another, unless it be a person guilty of manslaughter, or of spreading disorder in the land, shall be as though he had slain all mankind, but that he who saveth a life shall be as though he had saved all man-kind."[1004] Also, Dr. Ibrahim Elmoghiry's arguments regarding manslaughter, especially in terms of hunting, proves Lippman's statement that the evolutionary nature of self-defence under Islamic law is particularly driven by the disintegration and fusion both of traditional tenets of the Shari'ah and non-Islamic legal principles of self-defence.[1005]

8.4 Interview with Dr. Mosa'ed Hamd Elsheridy

The next interview was conducted with Dr. Mosa'ed Hamd Elsheridy (**Exhibit**). In answering the first question of the interview, Dr. Mosa'ed Hamd Elsheridy provided that there were different definitions of the concept of self-defence, though all of them had the same sense, meaning the defence against any harmful attack. The second question of the

[1003] See above n 364, 86.
[1004] See above n 409.
[1005] See above n 365, 29.

interview was answered by Dr. Mosa'ed Hamd Elsheridy by way of stating that he had adjudicated multiple cases in the court, in which self-defence was committed with the use of either guns or cold steel.

In answering the third question of the interview, Dr. Mosa'ed Hamd Elsheridy confessed that self-defence had to be diligently regulated in terms of criminal penalties, personal rights and public rights as well. Dr. Mosa'ed Hamd Elsheridy answered the fourth question of the interview by pointing out that he was knowledgeable of the idea of self-defence under Islamic law. The interviewee answered the fifth question of the interview by unfolding that *Sunna*, doctrines of Muslim jurists as well as humanmade laws of the present time constituted the key sources of self-defence. Regarding the sixth question of the interview, Dr. Mosa'ed Hamd Elsheridy pointed out that their legal traditions should be considered other important sources of Islamic law, in addition to the main ones, such as *Quran* and *Sunna*.

In the context of the seventh question, Dr. Mosa'ed Hamd Elsheridy answered that regardless of the origin of the law, the common thing for all laws should be the protection of human specificities. In answering the eighth question of the interview, Dr. Mosa'ed Hamd Elsheridy stated that the principal issues regulated in the common law countries were the issues of a legal retribution and prevention of crimes. Dr. Mosa'ed Hamd Elsheridy answered the ninth question of the interview by asserting that one of the major differences in the regulation of self-defence under the common law and Islamic jurisprudence was the way in which law regulated the question of honour.

In expatiating on other noticeable discrepancies between the common law countries and Islamic countries in terms of self-defence (Question 10), Dr. Mosa'ed Hamd Elsheridy provided that the issue of killing in self-defence was differently regulated under Islamic law

and common law, particularly in terms of punishment and evidence. In considering the eleventh question of the interview, Dr. Mosa'ed Hamd Elsheridy pointed out that self-defence regulations might be improved through the adoption of additional means of proving self-defence in order to prevent fraudulent claims of self-defence. Dr. Mosa'ed Hamd Elsheridy answered the last question of the interview by stating that murder cannot be justified in self-defence.

After Dr. Mosa'ed Hamd Elsheridy's answers to the questions of the interview have been described, it is necessary to conduct analysis of the above answers. Thus, Dr. Mosa'ed Hamd Elsheridy's argument that all definitions of self-defence have the same meaning – the defence against any harmful attack coincides with Kamali's proposition that principles of Islamic jurisprudence play crucial role in regulating and defining various concepts of Islamic law, including the concept of self-defence.[1006] Hence, it follows that the underlying role of Islamic legal principles is a possible reason why diverse definitions of self-defence have the same meaning of self-defence in the ultimate analysis. Also, the interviewee's highlights of a complexity and variety of Islamic legal regulations in terms of punishment and evidence issues in self-defence cases. These findings reflect conclusions of Weimann regarding the complexity and variability of Islamic jurisprudence.[1007]

8.5 Interview with Dr. Ekramy Abd Elhay Basiouny

Dr. Ekramy Abd Elhay Basiouny was another interviewee who participated in the interview (**Exhibit**). In answering the first question of the interview, Dr. Ekramy Abd Elhay Basiouny revealed that he perceived self-defence as a positive conduct directed at the protection against both moral and physical abuses. Dr. Ekramy Abd Elhay Basiouny

[1006] See above n 224, 3.
[1007] See above n 368, 240-286.

answered the second question of the interview by confirming his application of self-defence in practice against a cold steel threat.

In answering the third question of the interview, Dr. Ekramy Abd Elhay Basiouny opined that self-defence should be regulated by law through the conversion of the criminal act into a lawful act. The fourth question of the interview was answered by the interviewee through the statement that there were a large number of Quranic verses meaning that saving of one's life could lead to the saving of all mankind. In answering the fifth question of the interview, Dr. Ekramy Abd Elhay Basiouny pointed out that *Quran* and *Sunna* constituted the fundamental principles of self-defence, whereas there could be other secondary sources, such as discretion, traditions, analogy and jurists' opinions.

Dr. Ekramy Abd Elhay Basiouny answered the sixth question of the interview by traditions, jurists' opinions, analogy and discretion should be considered secondary legal sources of self-defence in Islamic countries. In answering the seventh question of the interview, Dr. Ekramy Abd Elhay Basiouny suggested that the key peculiarity of self-defence under Quranic verses was the requirement of ubiquitous protection any time and everywhere. The interviewee answered the eighth question of the interview by contending that, in common law jurisdictions, self-defence was regulated in the context of cases that allowed the commitment of a harmful act as well as the cases that converted the harmful act into a lawful act.

The ninth question of the interview was answered by the interviewee by the following contention: Dr. Ekramy Abd Elhay Basiouny provided an opinion that the Islamic law was extended to provided protection of all moral and physical facets of individuals, such as money, honour, religion, mind, and, especially, self. On the other hand, in common law countries, self-defence could be limited to protect the self and property only. In answering

the tenth question of the interview, Dr. Ekramy Abd Elhay Basiouny explained that the right of honour defending for close relatives and family members in the common law countries did not provide the victim the license to kill the offender – there had to be only punishment of the assailant for his crime. The last but not least, Dr. Ekramy Abd Elhay Basiouny answered Question 11 of the interview by suggesting that self-defence could only be proved in Saudi Arabia through the introduction of physical evidence before the court.

After the interviewee's answers have been delineated, it is essential to underscore that Dr. Ekramy Abd Elhay Basiouny's belief in the ubiquitous protection by self-defence of human rights equals to Peter's statements that human rights may constitute new reasons why it is necessary to make insights into the nature of self-defence as a concept of Islamic law.[1008] Besides, Dr. Ekramy Abd Elhay Basiouny's position that *Quran* and *Sunna* are not the only sources of self-defence and that there are other important sources of self-defence, such as discretion, traditions, analogy and jurists' opinions, is in accord with Bassiouni's legal standpoint of diverse methods of reasoning under Islamic law, such as juristic preference (*Istihsan*), analogy (*Qiyas*), presumption of continuity (*Istishab*) and the rules of interpretation and deduction, affect the meaning of self-defence.[1009]

8.6 Interview with Dr. Jazy Bkahud Eljohany

The next interview was performed with Dr. Jazy Bkahud Eljohany (**Exhibit**). In answering the first question of the interview, Dr. Jazy Bkahud Eljohany replied that self-defence served as the power that could stop the damage and harm. The second question of the interview was answered by the interviewee affirmatively. Dr. Jazy Bkahud Eljohany answered the third question of the interview by pointing out that the clarity of the self-defence

[1008] See above n 375,70-90.
[1009] See above n 377, 23.

rested both on the Holy *Quran* and instructions of the Prophet (PBUH) that kept the one's self safe. In answering the fourth question of the interview, Dr. Jazy Bkahud Eljohany provided another affirmative answer by claiming that the Islamic legislation, in conjunction with international regulations and rules consistent with norms of Islamic law, was applicable in both Saudi Arabia and other Islamic countries.

In answering the fifth question of the interview, Dr. Jazy Bkahud Eljohany revealed that both Quranic verses and passages from *Sunna* could be used to explain the meaning of self-defence as the right to repeal harm. Dr. Jazy Bkahud Eljohany answered the sixth question of the interview by pointing out the existence of international systems and regulations of self-defence in Islamic countries. Regarding the seventh question of the interview, Dr. Jazy Bkahud Eljohany provided that the witnesses, other evidence and acknowledgements were clearly mentioned in the Holy *Quran* as the means to prove self-defence.

In answering the eight question of the interview, Dr. Jazy Bkahud Eljohany provided an affirmative answer stating that, in French law, truthfulness of the information should be considered given for the interests of the person who acknowledge self-defence. Dr. Jazy Bkahud Eljohany answered the ninth question of the interview by asserting that one advantage that could be characterized by the application of self-defence in the Islamic law consisted in the increase of justice provided to the individual and community.

In answering the tenth question of the interview Dr. Jazy Bkahud Eljohany unravelled that the issue of individual protection of immoral offences constituted one of such examples. The eleventh question of the interview was answered by Dr. Jazy Bkahud Eljohany in his statement that, under Islamic law, self-defence could be proved by acknowledgements, testimony of a witness or other evidence.

After the interviewee's answers have been ascertained and analysed, it is necessary to analyse the aforementioned answers. First and foremost, Dr. Jazy Bkahud Eljohany's conclusion that the Holy *Quran* and instructions of the Prophet (PBUH) constitute the basis of self-defence may be viewed through the prism of Akhtar's findings that *Quran* produces 'an enthusiastic embrace of the divine will.'[1010] Also, Dr. Jazy Bkahud Eljohany's conviction that the application of self-defence is capable of increasing justice provided to the individual and community is reflected in studies by Lippman, McConville and Yesushalmi who claim that the Islamic concept of self-defence makes positive changes on the Islamic legal practice by metamorphosing the Islamic customs of blood revenge and retaliation.[1011]

8.7 Interview with Dr. Abdullah Abd Elaziz Eljohany

The next interview was conducted with Dr. Abdullah Abd Elaziz Eljohany (**Exhibit**). In answering the first question of the interview, Dr. Jazy Bkahud Eljohany unveiled that he apprehended self-defence as an individual's right to protect himself from any damages that could influence on him, his property (money) and honour. Dr. Jazy Bkahud Eljohany answered the second question of the interview by claiming he applied self-defence laws in many cases in conformity with his professional duties. In answering the third question of the interview, the interviewee suggested that self-defence could be regulated by many sources, whereas each case of self-defence should be categorized independently, as the assault on the self, honour, money (property), etc.

Dr. Jazy Bkahud Eljohany answered the fourth question of the interview by acknowledging that he was knowledgeable of the concept of self-defence under Islamic jurisprudence. In answering the fifth question of the interview, Dr. Jazy Bkahud Eljohany

[1010] See above n 383.
[1011] See above n 391.

claimed that all Islamic laws had their own sources. For instance, Saudi Arabia adopted both the provisions of the Islamic law, views of the rules, regulations and the penalty actions as sources of Islamic law.

Dr. Jazy Bkahud Eljohany answered the sixth question of the interview by stating that there could be other sources if self-defence in Islamic countries, such as the principles of self-defence that were receipted from the common law countries. In answering the seventh question of the interview, Dr. Jazy Bkahud Eljohany opined that the fundamental peculiarity of self-defence under Quranic verses was the prohibition for excessive force as an abuse of the right of self-defence. Dr. Jazy Bkahud Eljohany answered the eighth question of the interview by claiming that the existence of damages (harms) constitutes the salient feature of the regulation of self-defence in common law countries.

In answering the ninth question of the interview, Dr. Jazy Bkahud Eljohany pointed out that the underlying discrepancy between the legal regulations of self-defence in common law countries and Islamic countries stemmed from the different consideration of legal sources of self-defence under the two jurisdictions. Dr. Jazy Bkahud Eljohany answered the tenth question of the interview by contending that there were other noticeable discrepancies between the common law and Islamic regulations of self-defence, such as a disparity in the understanding of the moral and ethical facets of self-defence. The last but not least, Dr. Jazy Bkahud Eljohany answered the eleventh question of the interview by confirming that, in his opinion, the application of self-defence could be proved by a variety of evidence, including fingerprints, other traces of human body, existence of stolen money, methods of attack, etc.

After the interviewee's responses have been described, it is vital to analyse the key issues. Thus, Dr. Jazy Bkahud Eljohany's statement that Quranic prohibition for excessive force is necessary to prevent abuses of the right of self-defence is underlined in Weimann's

research, who states that *Quran* has supremacy and priority over other interpretations of self-defence that may conflict with local customs and other sources of Islamic law in different Islamic cultures.[1012] Moreover, Dr. Jazy Bkahud Eljohany's argument that there is disparity in understanding of the moral and ethical facets of self-defence coincides with Malekian's revelation that the major difference between various sources of self-defence lies in their disparate regulative effects on the concept of self-defence.[1013]

8.8 Interview with Mr. Abd Elaziz Ben Saleh Elaglan

The last interview was performed with Mr. Abd Elaziz Ben Saleh Elaglan (**Exhibit**). In answering the first question of the interview, Mr. Abd Elaziz Ben Saleh Elaglan characterised self-defence as a means of preventing aggression in a suitable and fair manner. Mr. Abd Elaziz Ben Saleh Elaglan answered the second question of the interview by stating that he had applied laws regulating self-defence multiple times and that he got advantage from those laws every time he applied them, because of the resulting facts and realistic applications of the laws. In answering the third question of the interview, Mr. Abd Elaziz Ben Saleh Elaglan uncovered that self-defence should be regulated by law through the adoption of certain limits and frameworks within which the application of self-defence would be lawful and justifiable.

Mr. Abd Elaziz Ben Saleh Elaglan answered the fourth question of the interview by confessing that he was conscious of how self-defence was regulated under Islamic jurisprudence. In answering the fifth question of the interview, Mr. Abd Elaziz Ben Saleh Elaglan pointed out that *Quran* and *Sunna* constituted the two fundamental sources of self-defence in Islamic law. Mr. Abd Elaziz Ben Saleh Elaglan answered the sixth question of

[1012] See above n 393.55.
[1013] See above n 208,39.

the interview by stating that the common traditions of an Islamic country constitute a source of self-defence in that country.

In answering the seventh question of the interview, Mr. Abd Elaziz Ben Saleh Elaglan pointed out that, in his opinion, the main particularity of *Quran* consisted in a significant importance as it could save the minimum requirements for human rights. Mr. Abd Elaziz Ben Saleh Elaglan answered the eighth question of the interview by uncovering that he was conscious of the way how self-defence was regulated, because he attended some legal conferences and seminars. In answering the ninth question of the interview, Mr. Abd Elaziz Ben Saleh Elaglan opined that the major difference between the common law and Islamic regulations of self-defence was the ways the two jurisdictions defined the offender's liability.

Mr. Abd Elaziz Ben Saleh Elaglan answered the tenth question of the interview by stating that the two jurisdictions (common law and Shari'ah) differed in the methods of identifying criminal aspects of self-defence. The last but not least, Mr. Abd Elaziz Ben Saleh Elaglan answered the eleventh question of the interview by suggesting that self-defence should only be proved in Saudi Arabia by means of physical evidence and witness testimonies provided to the court.

After Mr. Abd Elaziz Ben Saleh Elaglan's answers have been depicted, it is the right time to analyse the key points made by the interviewee. To start with, the interviewee's inference that *Quran* and *Sunna* constitute two fundamental sources of self-defence in Islamic law similar to Hussain's findings that *Quran* is the principle source of self-defence under Islamic law, because all major principles of Islamic law can be inferred from *Quran*.[1014] In addition to this, Mr. Abd Elaziz Ben Saleh Elaglan's argument that the major difference

[1014] See above n 400.

between the common law and Islamic regulations of self-defence is the ways the two jurisdictions define the offender's liability corresponds with Malekian's assertions that the differences in how to measure proportionality determine the discrepancies in interpretations of self-defence in various jurisdictions.[1015]

9. Interpretation and synthesis of unstructured interviews

The following patterns and trends have been revealed in the answers of all interviewees. First, all interviewees provided a very similar definition of self-defence as a way of preventing aggression related harm and damages in a fair and suitable way. Second, all interviewees acknowledged the fundamental role of *Quran* in providing the legal basis for self-defence under Islamic law. Third, all interviewees envisioned the necessity of regulating self-defence not only through the use of legislation and judge-made law, but also through the codification of legal researches. Fourth, all interviewees showed that *Quran* is not the only source of self-defence in Islamic countries and that traditions of Islamic people constitute secondary sources of self-defence. Fifth, all interviewees acknowledge differences in the legal regulation of self-defence under common law and Islamic law, especially the disparate treatment of offender's liability, evaluation of self-defence and the lack of defence of honour in common law countries. Sixth, all interviewees highlighted the fundamental role of physical (material evidence) and witness testimony in proving self-defence under Islamic law.

The above-captioned patterns and trends may be interpreted in the light of the recent case study (Exhibit). The case rotates around deadly fighting with weapons between people. It completes corresponds with the objective of research and provides new contribution to

[1015] See above n 208,38.

the field. As a result of the case the offender was proved to have acted in his full capacity by committing a legal and legitimate forbidden action. The case results in the contention that the offender must be punished with the suitable punishment to prevent other people from committing similar offences. The above conclusion has been reached because of the provision of the following relevant evidence in the case: 1) the offender's acknowledgement; 2) witnesses' sayings; 3) the statements in the arrest report; 4) the statements in the inspection report; 5) the attached medical reports, etc.

CHAPTER 8

CONCLUSION

1. Conclusion

This study fulfilled the overarching aim of the research by exploring and explaining the phenomenon of self-defence as it is regulated by Islamic law. All research questions were answered in the course of the research: 1) The position of Islamic judges, lawyers, jurists, and other participants in the legal process was explored in terms of the justification of self-defence resulting in murder through the Islamic juridical concepts of *qatl shibh al-amd* (unintentional murder) or *qatl al-khata* (murder by mistake), 2) It is possible to discern the doctrine of self-defence under Islamic jurisprudence, and 3) The major discrepancies between the Islamic legal understanding of self-defence and the legal doctrine of self-defence under English law were verified.

In addition, the following research objectives were met. Firstly, insights into the understanding of self-defence and its principles under Islamic law were made. Secondly, it was determined how the principles of self-defence could apply in practice by Islamic judges, jurists, lawyers, and other participants in criminal legal proceedings. Thirdly, multiple case studies were carried out to provide an empirical rather than theoretical investigation of the role and functions of the principles of self-defence and their role in shaping the legal reasoning of Muslim jurists, judges, lawyers, and other participants in criminal legal proceedings. Finally, various approaches were taken towards the legal understanding of self-defence in different countries and in Islamic law countries. These were compared and

contrasted in order to discern and construe the major pros and cons of the Islamic legal model of self-defence.

This research has substantial implications for future research. The present study was conceived as applied research and the recommendations derived from it are thus discussed under two subsections: 1) implications for practice; 2) implications for further research.

1.1 Implications for practice

The implications for practice should be presented as a model of private defence that is the wholly based on the precepts of Islamic law and seeks to utilize statutory law and common law as the cornerstones of Western jurisprudence. The proposed model can be applied by any Islamic country. The model does not seek to undermine the authority of the *Quran* or any source of Islamic law. It is derived from the findings of this project and rests utterly on the precepts of self-defence.

There are three levels of the model: strategic, tactical, and operational. Each of the levels consists of specific structural elements. All of the levels are interdependent and function as one whole.

1.1.1 Strategic level

The strategic level involves the entire system of self-defence, starting with the underlying purpose and philosophy of self-defence in a specific Islamic country. Here, it is essential to look forward to where the doctrine of self-defence will be in many years. This level also serves as the framework (basis) for the tactical and operational levels. In light of this, the strategic level of self-defence is comprised of the fundamental provisions of self-defence, which needs to be adopted or amended in the future.

It is suggested that an Islamic country that implements this model learns the doctrinal nature of all the aforementioned fundamentals of self-defence before setting them as

strategic goals in legislative or adjudicative activities. The fundamentals of self-defence include the following concepts: defence of oneself, defence of another, defence of property, defence of chastity, mistake in self-defence, defence and necessity, etc.

These determinants are strategic elements of self-defence that determine the tactical and operational level of the Islamic model of self-defence. Moreover, these determinants of self-defence have strategic significance for the Islamic model of self-defence because they show the boundaries within which the concept of self-defence is to be developed in Islamic countries.

Before proceeding to the next level of the model, it is prudent to clarify the nature of each determinant. It is incumbent on every participant in the model to be aware of the precise dimensions of every determinant. Thus, it should be reiterated that the extension of self-defence regulations always precedes the multiplication of self-defence provisions. It is incorrect to plan the multiplication of self-defence provisions without first making a strategic plan for extension.

The next phase of self-defence regulations in Islamic countries is the multiplication of self-defence provisions. This phase will be accomplished only if the lawmaker continues to multiply the regulations or provisions of self-defence on an annual basis. The success of the first phase depends on the will of a developer of norms of self-defence, while the success of the second phase is dependent on the will of the Islamic lawmaker—the one who adopts the developed norms. These two phases may or may not coincide.

Given this, Islamic lawmakers should elaborate strategic plans of self-defence extension and the multiplication of self-defence provisions, which will involve all participants in the law-making processes. They must determine approximate deadlines for the accomplishment of each step by taking into account that everything depends on the will of

God. Also, they must ensure that the magnification and multiplication of self-defence are conducted in the correct sequence— extension followed by multiplication.

It is incumbent on the Islamic lawmakers to elaborate adequate strategic plans for the practice of other determinants of self-defence. Before planning what measures to undertake, the Islamic lawmakers should clearly understand their capabilities and limitations and explain to others the nature of legal concepts such as self-defence, private defence, mistake in defence, and necessity.

In the strategic level of the model, the above-mentioned concepts must underlie the functioning of Islamic criminal law. In other words, each country's lawmakers must attain a clear understanding of these concepts and convey their Islamic criminal law meaning to people. It is then incumbent on the Islamic lawmakers to compose strategic doctrinal programs under the titles of *Self-defence*, *Private defence*, *Mistake in defence*, *Necessity*, etc. Each of such programs must contain a general evaluation of how a particular determinant can help achieve the development of criminal law. Also, unstructured plans must be incorporated into each of the programs.

More generally, the strategic level of planning lacks structural plans. Strategic decision process is characterized by complexity, novelty, and open-endedness. The researcher also purports that strategic decisions affect not only an Islamic lawmaker, but society as a whole. In the context of the recommended model of self-defence, the strategic level is reduced to unstructured open-ended planning for many years ahead, which involves all participants in the lawmaking process and all Islamic determinants of self-defence.

1.1.2 Tactical level

The strategic level of planning is the transformation of system goals into desired system dynamics. In the strategic level, the system goal of self-defence regulations is

offered to be transformed into the desired system dynamics by considering, interpreting, studying, teaching, and actualizing the Islamic determinants of self-defence. In this level, it is expected that the Quranic and other sources of self-defence will initiate desired system dynamics by showing the direction of the subsequent decision-making process and undertaking practical measures.

In contrast to the strategic level, the tactical level is a lower level that creates a sequence of actions in order to spur the system into the desired form of dynamics. The tactical level of the proposed model of self-defence may be reduced to the introduction of sequences of pertinent acts (measures) to be implemented in the framework of every strategic plan of self-defence (a plan of determinants). In the context of the strategic level, sets of strategic plans are proposed. Each of these plans resembles the corresponding determinant of self-defence. In the tactical level, it is recommended that sets of acts (measures) are elaborated for implementation in the framework of the strategic plan for self-defence regulation. The following tactical acts (measures) are suggested for each strategic plan:

- The plan for the extension of self-defence regulations.
- The plan for the multiplication of self-defence regulations.
- The plan for the recognition of the will of God in the regulation of self-defence.
- The plan for the maintenance of public order within self-defence regulations.
- The plan for adhering to the Quranic roots of self-defence.
- The plan for active and passive self-defence.

This list of tactical plans is not exclusive. Every Islamic lawmaker is entitled to include additional tactical elements in the proposed model of self-defence. However, in offering novelties in the tactical level, an Islamic lawmaker must remember that tactical elements

cannot contradict the strategic elements—the determinants of self-defence under the *Quran* and other sources of Islamic law.

1.1.3 Operational level

In the operational level, each Islamic lawmaker must decide on the specific operational measures to be taken by every participant in self-defence regulations in terms of the strategic and tactical elements of self-defence. The only requirement is that such measures must be compatible and subservient to the strategic and tactical elements of the model of self-defence.

1.2 Implications for further research

In addition to the practical implications, this project has implications for further research. Before making suggestions for subsequent research, it is essential to recapitulate the main features of this work, which are as follows:

- The fusion of secondary data collection methods with primary data collection methods.
- A combination of qualitative research methods.
- A combination of general scientific methods (comparative analysis, doctrinal study, review, and critique) with specialized legal methods (doctrinal study and case law study).
- An in-depth investigation of the legal and theoretical foundations of self-defence under Islamic and common law.

Taking these into consideration, it is possible to infer that the main significance of this work lies in (1) its comprehensiveness, both theoretical and methodological, and (2) its applied nature.

Nonetheless, the following aspects of the researched topic were not properly addressed in the context of this research, and thus should be diligently approached by future researchers:

1) The study of self-defence in correlation with the civil law concept of self-defence.

2) The peculiarities and viability of the civil law doctrines concerning self-defence.

3) The influences of civil law doctrines on the understanding of self-defence in Islamic countries.

TERMINOLOGY

For the purposes of this research, the following descriptions of terms will apply.

- *Quran*: “primary source of Shari’ah and all other sources are subordinate to it”.[1016]
- *Sunna*: “The *Sunna* is the second major source of Shari’ah after the *Quran*. It explains and elaborates the *Quran* and at the same time constitutes an independent source as well”.[1017]
- *Ijma*: “*Ijma* or consensus of opinion is the third source of Shari’ah. Whether *Ijma* means the Jima of the whole community, the companions, the jurists as a class, or just those of a particular locality is a debatable question, yet in classical theory it is the agreement of the qualified jurists”.[1018]
- *Qiyas*: “Literally *Qiyas* stands for measuring the length, weight or quality of something or its comparison with a similar one. In Shari’ah, *Qiyas* means the deduction of legal prescriptions from the *Quran* and the *Sunna* by reasoning and analogy. When a judge exercised his discretion to extend the principle in one case to another by virtue of a common cause shared by the two, the process was termed as analogical deduction or *Qiyas*”.[1019]
- *Ijtiihad*: “Ijtihad is the ability occasioned by knowledge to derive legal rule that requires learned effort. A Mujtahid must have the knowledge of the legal

1016 See above n 56, 26- [3].
1017 Ibid 28 [3].
1018 Ibid 30 [2].
1019 Ibid 31 [4].

contents of the *Quran* and a full grasp of occasions of revelation and the doctrine of abrogation".[1020]

- *Istihsan*: "It literally means to approve or to deem something preferable. *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".[1021]
- *Urf* (Custom): "A custom may be defined as a conduct that is common among the people and to which they have become habituated. Shari'ah did not impose such laws on the people as were absolutely unknown to them. 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"[1022.]
- *Hudud*: "A *Hudud* may be defined as "Fixed punishment to be implemented as the right of God".[1023] It refers to offences specified in the primary sources of the Shari'ah, which comprises of the *Quran* and *Sunna*, and their punishments are prescribed therein. Offences that fall within this category are considered to be offences against Allah or offences against public justice. These offences and their subsequent punishments have been clearly specified in the primary sources.[1024]

1020 Ibid 38 [3].
1021 Ibid 34 [2].
1022 Ibid 36-37 [4]-[1].
1023 Ibid 93 [1].
[1024] Dr Mamman Lawan, Dr. Ibrahim N. Sada and Shaheen Sardar Ali, edit Shaheen Mansoor , An Introduction to Islamic Criminal Justice (UK Center for Education 2011), 25.

- *Qisas*: “The word *Qisas* means equality, and the Muslim jurists have defined it as the infliction of the same harm upon the offender as he caused to the victim. *Qisas* is the best example of retribution and the principle of proportionality emphasised by Shari’ah. Shari’ah provides the punishment of *Qisas* for the offences against the human body in the case of intentionally causing death or loss of any organs or limbs”.[1025]
- *Ta’azir*: “*Ta’azir* offences are less serious than the *Hudud* and *Qisas*; they include any conduct that violates Islamic norms such as obscenity, usury, breach of trust, false testimony, and contempt of court”.[1026]
- *Fiqh* means the knowledge about Islamic legal rulings from the *Quran* and *Sunna* that derive religious rulings or laws. The person who works in this field is called *Mujtahid* and he should have a deep understanding of the different discussions of jurisprudence.
- *Diya* is a compensation of money, usually paid by an aggressor to the victim’s family. It is an amount of money in the case of crimes committed by mistake to avoid retaliation. For example, 100 camels for the life of a Muslim man. Full blood-money is to be paid not only for homicide but also for grievous bodily harm, especially the loss of organs that exist singly, such as the tongue (likewise for the loss of the beard and of the head of hair). While half the blood money is to be paid for the loss of organs that exist in pairs, but one-tenth for one finger or one toe and one-twentieth for one tooth. a detailed tariff covers most other wounds. This punishment for wounds is called *Arsh* and if no

1025 Ibid 95-[3].
1026 Ibid 97-[2].

percentage of the blood-money is endorsed, the supposed *Hukaima* becomes due. For example, it is assessed by how much the bodily harm in question would reduce the value of a slave, and the corresponding percentage of the blood money must be paid.[1027]

- *Fatwa* is an Islamic religious ruling or law that derives from a jurist's opinion on a new matter in Islamic law.[1028]
- *Istishab* means 'escorting' or 'companionship', and any law that has been established in the past is still valid today, unless there has been a proof that changes it.[1029]
- *Tawbah* in Arabic literally means 'return'. It means to return from something to something else.
- *Usul al- Fiqh* is roots of Islamic law, expound the indications and methods by which the rules of *Fiqh* are deduced from their sources. These indications are found mainly in the *Quran* and *Sunna*, which are the principal sources of the Shari'ah. The rules of *Fiqh* are thus derived from the *Quran* and *Sunna* in conformity with a body of principles and methods which are collectively known as *Usul al-Fiqh'*.[1030]
- *Riba:* unlawful interest.
- *Tabi:* Muslims who pursued the Sahaba ("companions" of the Islamic prophet Muhammad), and in this way got Muhammad's lessons second hand. A *Tabi* who knew at least one Sahaba. In this capacity, they had an imperative

1027 See above n ٧٨٣, 185.
1028 See above n 54, 313-314.
1029 Ibid 384.
1030 See above n 54, 12 [1].

influence in the development of Islamic thought and reasoning, and in the political advancement of the early caliphate. The next generation of Muslims after the *Tabi'un* are known as *Tabi‘ al-Tabi‘in*. The three generations make up the *salaf* of Islam.

- *Darura* in Arabic relates to the fear of death, bloody injury on human life or loss of money and property
- *khid’a*: *Khid’a* means unlawful killings by trick or betrayal in order to steal, amongst other things, money

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