



Defence Mechanism In Criminal Liability Under Islamic Law

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ABSTRACT

If anyone is to be exonerated from liability and benefit from the principle of criminal liability under Islamic penal law, he or she must fall under one of the following defence mechanism: infancy, insanity, compulsion/duress, intoxication, mistake, ignorance of law and self defence. This paper discusses defences available under Islamic criminal justice system.

Keywords: insanity, criminal liability, Islamic law, self defence

INTRODUCTION

Frankly speaking the primary aims of any legal system, be it common law, French law or particularly Islamic law is to protect human lives, and as well as their properties. Any system of law that fails to protect lives and properties of people would not be regarded as law in any society.

Islamic law is not difference to other legal systems even if is not the first legal system which enforces protection of human life and their properties. More importantly Shari'ah does not only recognize protection of life it rather counted it as sacred to protect human life and their properties.

Allah says:

"Never should a believer kill a brother except by mistake".¹

He says again:

"Do not eat up your property among yourselves in vanity".²

The above two Qur'anic verses stipulate that human life must be protected and should not be taking unless by law and except by mistake. Likewise the divine law also establishes that on no account should property of others be taking or misappropriated. This is a direct indication that property should be protected.

In addition to that, the Prophet of Islam (SAW) vehemently condemned taking away human soul unjustly as well as misappropriate of property of theirs. He said it in his farewell speech in his last pilgrimage when He says:

"O men listen to my word I do not know whether I shall ever met you again after this year; your blood, your property and honour are sacrosanct until you meet your Lord, as this day (Ara-ssfat) this month (dhul-Hijjah) and this town (Mecca) are holy".³

This prophetic tradition has given clear cut judgment of protection of human life and property simultaneously.

However, the purpose of this paper is to know whether or not, there are defences of criminal liability in Islamic law or not.

¹ Q.4:92

² Q. 2:188.

³ Suman Abi Daud, (2003) Beirut, Darul Fikir, Vol. 1, P. 439 H. No. 56-57.

Defence Mechanism

If anyone is to be exonerated from liability and benefit from the principle of criminal liability under Islamic penal law, he or she must fall under one of the following defence mechanism. They are: infancy, insanity, compulsion or duress, intoxication, mistake, ignorance of law and self defence. We shall discuss them one after the other.

Defence of infancy

According to Islamic law human ability to discharge duties and commandments of Allah differ in status; adult or infant.

Adolescence begins from the age of discrimination to the age of maturity. The adult is liable, accountable, and responsible for his act. Contrarily, an infant (that is a period from birth to discrimination) is free from liability as far as Islamic law is concerned. But then there is between adult and infant, a Mumayizi (a child that can discriminate) and who for his discriminate is by law found liable for it act.⁴

Islamic law regards a child as non-discriminatory from infancy to the age of seven, and is as such considered unfit to be liable for criminal offences. Except civil cases and that is because of absence of mental elements required of criminal liability. Therefore, he is not liable to Hadd punishment, Qisas, retribution penalties and physical punishment.

The exemption of infant from liability is based on the tradition of the noble Prophet (SAW) which says:

*“Three categories of people are exempted from punishment and religious accountability an infant until he attains majority an insane person until he regains sanity and a period who is asleep until he wakes up”.*⁵

This tradition of Prophet Muhammad (SAW) had completely exonerated those three people from the criminal liability and particularly the infant in question. If an infant or minor commits crime hadd punishment cannot be applied on him but Ta'zir punishment is applicable on him subject to court's discretion. That is to say, the punishment of crime is changed to tortuous liability. This happens where the death, injuries and any other undesirable situation resulted on the victim. As a result, infant acts are indemnified by what is generally known as Diyyah or blood money.⁶

However, the Muslim jurists held that a Mumayyiz i.e. infant or minor is excused from criminal liability. Whether the offence was committed intentionally or otherwise. Since there is no binding legal judgment, the judge stills holds the power of discretion either to admonish the juveniles' delinquency or impose on him some restrictions which will help to reform him and stop him from committing further crime in future.

According to Abu Sa'id Al-Qayrawani a Malik jurist, said there shall be no had punishment for infant or minor even in respect of leveling a false accusation of unchastity i.e. Qazif or in respect of committing fornication.⁷

A crime committed by a minor, either intentionally or otherwise are generally deemed to be committed unintentionally. However, the majority of the jurists contended that unintentional act must not be attributed to an infant or minor for a minor is basically unaware of the different consequence of such an act. But Imam Shafi'i contended that, a minor's act is to be taken as intentional once if it is proved that he committed intentionally. But majority jurists agree that a minor's relative is tortuously liable.⁸

However, to be an infant or minor is one of defence mechanism of liability in Islamic law, because the law of Allah is not addressed to a minor due to absence of maturity and possession of legal capacity i.e. Ahliyah ada'i whatever he/she does at that level is not legally binding. The prophetic tradition that was quoted earlier made it clear that a minor among the three categories of the people mentioned is exonerated from any legal and religious responsibilities until he or she is mature.

⁴ Ibn Qudamah (N.D) al- Mughni Vol. 4, Pp. 520-522.

⁵ Khar, M.M (N.D) Sahih al-Bukhar Arabic-English Vol. VIII, Dar al-Arab Beirut p. 528

⁶ Abu Zaid al-Qayrawani (N.D) Al-Risalah p. 127.

⁷ Abu Zaid al-Qayrawani, (N.D) Al-Risala

⁸ Awdah, Abdul Qadir (ND) al-Tashri al-Islamiy, Beirut, Muasasat al-Risalah Vol. Pp. 584-585

Definition of insanity

Insanity is defined as mental disease affecting mental capacity and causing someone to lose or disturb his reasoning capacity. ⁹In the light of this definition every man is presumed to be sane and to possess a degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the court. So to establish a defence on ground of insanity, it must be shown that at the time of committing the act, the person accused was labouring under such a defect of reasoning (disease of mind) as not to know the nature and quality of the act he was doing or mindful of exactly what he was doing .

Muslim jurists recognized insanity as defence which could exonerate a person or an accused person from criminal liability but the defence may be fully complete or partial in nature. This is because the accused will be liable tortuously for the property and injury caused to other person.

In Islamic law, Muslim jurists unanimously recognized insanity as a defence, because the command of riot addressed to insane person.

According to one of Islamic legal maxims which read thus:

*“Whoever is deprived of legal capacity is exempted from a legal obligation.”*¹⁰

The application of this maxim is that a person who was deprived of faculty of reasoning is not obliged under Islamic law to neither perform any obligation nor be liable for any offence he committed, Islamic law does not enforce punishment upon an insane person because one of the conditions of punishment under Islamic Penal law is sanity. Hence *Hadd* punishment contains two rights that is right of Allah and right of individual. Sometime right of Allah prevail that of the individual and vice versa. But right of Allah based on legal capacity. It is said that, if one committed theft, the property stolen will be returned to the owner.¹¹

Imam Abu Hanifa, Imam Malik and Hambal Schools of Law regard the deliberate homicide as accidental if committed by a lunatic or minor for which *Diyyah* is payable. Shafi'i School of Law regards such an act of an insane person as intentional and not accidental. Although for the fact that he is an insane it is considered as a defence for him to exempt him from civil liability.¹²

The tradition of the Prophet (SAW) repeated here is also relevant to the point in question where the Prophet is reported to have said:

*“Three categories of people are exempted from punishment and religious accountability, an infant until he attains majority, an insane person until he regain sanity and a person who is asleep until he wakes up”.*¹³

This Hadith of Prophet is a clear indication that an insane person does not have legal capacity and therefore is not responsible for any act done by him.

In addition, some where Allah (SAW) addresses the drunkards, to prevent them from coming near the salat (prayer) until they know what they were doing, He says:

*“O you who believe! Approach not As-Salat (the prayer) when you are in a drunken state until you know (the meaning) of what you utter...”*¹⁴

Comparably a drunkard in this verse is likened to an insane so he must not observe prayer until he is sane, even though his own insanity is sporadic, in that situation he should not observe that religious obligations.

Defence of Compulsion

Synonymous of compulsion are coercion or duress. The two terms would be used interchangeably. Compulsion is to force somebody to carry out a certain act or duty against his intention and wish by use of threat which may likely cause his death or to injure his body or his property.

Compulsion also defined as coercion exercised by a person or brought about by circumstances under which he does not intend or like to do or say.¹⁵

⁹ Ibid P. 585

¹¹ El-Awa, M.S. (1982) Punishment in Islamic Law, American Trust Indiana Polis, p. 22.

¹² Ibid. p. 88.

¹³ Kham, M.M Op. cit.

¹⁴ Q. 4:43.

¹⁵ Bambahe, Y.Y (1998) Crimes and Punishments under Islamic Law, Lagos p. 17

Division of Compulsion

Compulsion is divided into two types:

1. Partial compulsion i.e. Ikrah Naqis
2. Complete compulsion i.e. Ikrah tamat

Partial Compulsion is the one that destroys the wish of a person coerced but not destroy his choice example if someone is threatened that if he does certain thing or otherwise he would be imprisoned, or beaten to death etc.

Complete Compulsion: is the one that destroys both will and choice of a person coerced completely. This is a threat to do something or otherwise the person would be killed and with him the instrument that can kill.¹⁶

Some scholars or jurists added the third types of the division of compulsion which is Moral compulsion Ikrah Adabi that is not directly affecting the person coerced but rather affects the life or body of some other people whom may be his parents, brothers, sisters and kindness alike.

Condition of Compulsion

One cannot benefit from mechanism of defence criminal liability of crime under the Compulsion unless the following conditions are considered.

- a. Compulsion as a result of threat and act according to the dictates of coerced person. If a victim acts contrarily, it would not be taken.
- b. Victim must understand the nature of compulsion and bear in mind that he must act according to the given order under influence of threat. Also, the victim must be in apprehension that the thing threatened will actually take place, the apprehension is not suppose except it appears most probable person compelled that the compeller will execute what he has threatened so as to force and execute what he has threatened.
- c. Instrument used must be something that normally destroys life or any part of a body as well as property. This rule is not applicable where the compulsion consists of only a single blow or of imprisonment for a single day. Since fear is not usually excited by degree of beating or confinement the victim is a person of rank to whom such a degree of beating or confinement would appear detrimental or disgraceful.
- d. The act ordered to be done must be unwanted or prohibited by Shari'ah law even before the execution e.g. intoxication if one person threatens another by imprisonment or shews so as to eat or drink wine which are unlawful to him, the defence of compulsion will avail him from liability.¹⁷

The jurists have also divided compulsion into three different categories with respect to its effects offensively on the person coerced:

- a. Where compulsion changes a prohibited duty to obligation, the person compelled is free from liability for example eating of pork when one is extremely in the state of hunger and he has nothing to eat.¹⁸

Allah says:

*“And why should you not eat of that (meat) on which Allah’s name has been pronounced (at time of slaughtering the animal) while He has explained to you in detail what is forbidden to you, except under compulsion of necessity “.*¹⁹

And says in another place of the glorious Qur'an that:

*“But if one is forced by necessity without willful disobedience nor transgressing due limits, then there is no sin on him...”*²⁰

These two Qur'anic verses exonerate a compelled person from any liability.

¹⁶ 'Awdah, Abdul Qadir (N.D) al-Tashri al-Islamic, Beirut, Muasasat Risalah Pp. 563-564.

¹⁷ Ibid Pp. 565-568.

¹⁸ Awdah Qadir (ND) Op. cit Pp. 568-570

¹⁹ Q. 6:119.

²⁰ Q. 2:173.

- b. Where compulsion do not cause prohibition to fail at all, because prohibited act remains prohibited in law but on the contrary it becomes lawful to the compelled person due to absence of his willfulness. e.g. when a person is compelled to utter or say a word of unbelief the compulsion will not make the prohibition to fail, it remains prohibited and no sin committed by a compelled person.

Allah says:

*“Whoever disbelieved in Allah after his belief except him who is forced thereto and whose heart is at rest with faith.”*²¹

But a compelled person in this circumstances has an opportunity of making a choice out of two options given to him.

1. If he so desired he may choose *Azimah*: Resolution that is to stick with one’s word of belief, that is to say he has refused the order given to him by compeller and therefore he is ready to face the consequence.
2. In another hand, if he so want he may take *Rukhsah* i.e. permission that is to say to comply with order given to him by compeller so far his heart remains firm in faith and the prohibition remains the say till Allah pardons the compelled person²²

As far as Islamic law is concerned, the two situations have Shari’ah backing, example of the first one i.e. *Azimah*, which reflects in the case of a companion named *Habib bin Ady* who was caught by Meccan pagan and maltreated so as to abuse the Prophet Muhammad (SAW) and praise their gods: Similarly, *Yasir* and his wife refused to comply with the order given to them instead he continued praising the Prophet consequently he was killed. When the news of his death reached the Prophet Muhammad (SAW) he said:

*“This is the best of belief and he is in paradise.”*²³

In this situation the compelled person being rewarded with paradise according to the Prophet’s (SAW) statement.

As for the second situation another companion’s case could illustrate the situation better. Thus: *Ammar bin Yasir* was caught by Meccan pagan. He was asked to abuse the noble Prophet Muhammad (SAW) and praise their gods. He was seriously tortured, so he felt compelled to utter the word of unbelief and so his life was spared. *Ammar* quickly went to the noble Prophet Muhammad (SAW) and told him what happened to him and what he did in response to the case. Then the noble Prophet (SAW) asked him how he felt. Then *Ammar* told the Prophet (SAW) that his heart was full of belief (*Iman*).²⁴ It was for that reason this Qur’anic verse was revealed Allah says:

*“Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with faith”.*²⁵

In this situation the coerced person is free from the criminal liability, and anybody found himself in the circumstances alike can equally do the same thing and there would be no blame on him.

- c. This category is when the victim or the compelled person cannot be exonerated from liability as a result of compulsion or be permitted to free from criminal responsibility. For example, murder, or cutting limb or beating to death. When someone at gun-point is compelled to kill a third person, it is not lawful for him to kill him in other to safe his own life, because no life or soul is greater than another. The jurists unanimously agreed that, because if such is allowed many people would hide under the pretext of compulsion to kill others.²⁶ To buttress this point Allah says:

*“And kill not anyone whom Allah forbidden, except for a just cause.”*²⁷

And says in another verse

²¹ Q. 16:106.

²² ;Awdah, Abdul Qadir (ND) *Teshirh al-Janaj a-Islamiy*, Beirut Muassasatul Risalah, p. 570.

²³ Al-Sharawi, M.M (1991) *Tafsir Al-Sharawi* Vol. 13, Pp. 8232-33 in explanation of verse 1006 of Q. 16.

²⁴ Al-Sharawi, M.M (1991) *Tafsir Al-Sharawi* Vol. 13, Pp. 8232-33 in explanation of verse 1006 of Q. 16

²⁵ Q. 16:106.

²⁶ ‘Awdah, Abdul Qadir, Op. cit Pp. 568-569.

²⁷ Q. 6 :151.

*“And those who annoy believing men and women undeservedly, they bear (on themselves) the crime of slander and plain sin”.*²⁸

However, this segment is the only one that does not exonerate the spelling of compulsion from criminal liability. Because it is said that necessity cannot be removed by necessity, therefore someone's life cannot be save at the expenses of another life.

Defence of Intoxication

Al. Khamur i.e. wine as mentioned in the Glorious Qur'an, means anything which after taking it intoxicates one e.g. fermented juice, or grapes, barley, dates etc. it is defined as what covers brain after taking it or alike. When one loses his senses and he could not identify small or big thing, or distinguish between earth and heaven or man and woman according to Abu Hanifah, it means that such a person is drunkard.²⁹

Majority of jurists except Hanafi School of Law agree that whatever intoxicates one regardless of its quantity prohibited whether it bears Khamr i.e. wine or not, and that means taking an intoxicant, even if it does not intoxicates is punishable. But Hanafi School of Law differentiates between Khamr i.e. wine and other intoxicants considered as Khamr are punishable whether they intoxicate or not but other intoxicants besides Khamr according to them are not punishable.³⁰

The majority jurists supported their point with the prophetic tradition which says:

*“Every intoxicant is wine and every wine is forbidden.”*³¹

The jurists unanimously agree that punishment cannot be inflicted on a person who is compelled to take wine after taking it has intoxicated and commits an offence under the influence of wine, or he takes intoxicant but he does not know that the liquor he takes can intoxicate one, or he takes drug which eventually intoxicated him and through which he committed criminal offence. He is free from liability because he acted under the influence of wine like an insane person, he does not know what he was doing at that moment and as such he is not responsible for the consequence of his action. Allah says:

*“ O you who believe! Approach not As-Salat (The prayer when you are in drunken state until you know (the meaning) of what you utter...”*³²

This verse indicates that whoever in the state of intoxication does not know what and why he is doing, that was prevented to observe prayer until he knows what he is doing i.e. till the influence of the intoxicant ceases. That confirms that whatever offence he committed at that point in time is not liable.

However, if he is exempted from criminal liability he will be liable for any loss caused by him to another person's property. Even though it is an involuntary intoxication which provides him a good defence for any act committed under such state, without his consciousness, or negligence.

But whoever takes any intoxicant liquor without any excuse, and commits criminal offence would not benefit from defence of intoxicant under compulsion.³³

Defence of Mistake

Jurists define mistake, as occurrence of a thing without intention of the doer. That is to say, a person mistakenly commits crime did that without intention or want, and he is different from one who is intentionally committed the crime.

Sometimes one may intend to do a specific lawful act not a crime abinitio, and the lawful act may turn to be criminal act without intention of the doer. Example may illustrate the point in question: if a person who is fasting during Ramadan in a day light or voluntary fasting gargle with water while fasting and water runs down his throat, or he shot a bird and turned to hit human being. In this example the doer intends to do a lawful act while both turn to something different from the desire of the person.

²⁸ Q. 33: 58.

²⁹ 'Awdah Abdul Qadir (ND) Teshirh al-Janaih al-Islamiy, Beirut Muassasatul Risalah, p. 582.

³⁰ Ibid p. 581.

³¹ Sunan Ibn Majah (2004) Beirut Darul Fikir Vol. 2, p. 316 H.No. 3390.

³² Q. 4:43

³³ Ibn Qudamah (ND) Al-Mughni Vol. 9 p. 358 and Vol. 10 p. 325 and Tabsiratul Hukam Vol. 2, p. 227.

However, the rule of Shari'ah is that one cannot be found guilty of any offence unless his intention to commit such offence is manifested and therefore in the absence of intention, the act becomes a mistake.³⁴

This Qur'anic verse may throw many lights on this Allah says:

*"And there is no sin on you concerning that in which you made a mistake, except in regard to what your hearts deliberately intend..."*³⁵

And the Prophet tradition also relevant here when the noble Prophet (SAW) says;

*"God has lifted away from my people the responsibility for acts done by mistake, in forgetfulness and under coercion".*³⁶

With these two authorities, it may be clear that mistake is one of the defence mechanism that exonerates one from criminal liability as far as Islamic law is concerned. However, Islamic law made an exception to this rule that a punishment could be inflicted on a person who mistakenly commits criminal offence provided that the lawgiver prescribes for such punishment, e.g. murder, otherwise no punishment for one who commits mistake.³⁷

Allah say in the Glorious Qur'an:

*"It is not for a believer to kill a believer except (that it be) by mistake, and whoever kills a believer by mistake (it is ordained that) he must set free a believing slave and a compensation (blood money i.e. Diah) be given to the deceased's family unless they remit it".*³⁸

This verse clearly indicates that not every mistake committer goes scout free particularly in a murder case. The lawgiver has prescribed the punishment for such type of mistake otherwise it would have been a difficult issue for mankind to manage. The situation could be looking into from two perspectives. One, if the punishment is not prescribed for the committer of mistake in the case of murder particularly, people would be killing each other under the pretext of mistake at the end of the day it could cause chaos in the society.

The punishment is to free believing slave and payment of Diah concurrently and presently the amount value of diyah is approximately thirteen million Naira (N 13, 000,000) excluding the slave value which may also be estimated roughly to ₦ 10, 000,000. Definitely is not an easy task before one can be able to raise such a huge amount. This is to show one how God values human soul, if one is ask to pay such huge amount for an act that was mistakenly done. What more of if the act was intended?

On the other hand, if everyone who kills by mistake is to be killed, many people would have been victims of this law particularly those who died through an accident while on journey or otherwise the law would have been a bad law to my mind. But Gods is the wiser.

Since punishment is originally meant for whoever commits offence intentionally and to punish who commits crime by mistake is an exception, and he should not be punished unless there is an authority to that effect from the lawgiver³⁹ as authority cited above.

Division of Mistake

Mistake is divided into two

1. Khatail Mutawalid: Generated mistake or Mutlaq
2. Khatail Ghayri Mutawalid: Ungenerated mistake, Ghayri Mutlaq.

The generated mistake is the one that generated from lawful act or the doer did it believing that the act is lawful directly e.g. A man shot a bird and hits human being, or aim at a bird and kills human beings.

The ungenerated mistake, it may emanate directly from the person who makes the mistake without any means e.g. like a man who sleeps and turned over upon a child behind him and the child died.

Meanwhile, the rule governing this type of mistake are two:

³⁴ Udah Abdul Qadir Op. cit p. 432.

³⁵ Q. 33:5.

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³⁷ Ibn Hazm (ND) Ihikam fi Usul Ahkam, Beirut Vol. 5, p. 149.

³⁸ Q. 4:92.

³⁹ 'Awdhdah Abdul Qadir Op. cit p. 433.

1. When a person does a lawful act or thinking that the act is lawful, and the act turned not to be lawful, 1 criminally liable whether he did it directly or through another means; that is if it is confirmed it is possible for him to have taken proper care against commission of it, but if it is not possible for him to have taken proper care against it he is not liable.
2. When a person did an unlawful act or do thing without necessity, it would be counted as unnecessary 'whatever bears the consequence of it, the person would be criminal liable whether it is possible to take proper care against it commission or not.⁴⁰

Another division of mistake is Khatai Shakhasi and Khatai al-Shakhsyah i.e. specific mistake and non-specific mistake.

Khatai al-Shakhasi i.e. specific mistake is the one which a person aims to kill a specific person and the bullet went to kill a different person. Khatai ghayr al-Shakhasiyat -non-specific mistake is when a person aims to kill A and killed him, but only to discover that it is B not A.

Muslim jurists differed on these two categories. Maliki and some of Hambali Schools of Law are of the view that both mistakes whether specific or non specific the person is liable for criminal offence due to manifestation of his intention. Having said that, they differentiate between the acts whether or not the act is initially unlawful, if the act is initially unlawful, specific mistake or non specific mistake is not a defence for him because he aims at committing an unlawful act and he must face its consequence.⁴¹ But if the act is initially lawful, then the mistake can have impact on the consequence of the act and therefore no initial intention, and the absence of intention makes the doer free from liability.

Another group of jurists headed by Hanifi, Shafi'i and some of Hambalis School of Laws are of the view that in both circumstances of mistake, the person who commits the act has committed a mistake because he aims at a specific person and it turned to be somebody else or aims at A and it turned to be B contrary to his aim in both regardless of whether the act was initially lawful or not. Because he did not aim to kill the person he eventually killed, if he knows that is not the one he aims he would have not do it and there he is not liability according to them.⁴²

However, mistake is a good defence in Islamic law and exonerates the offender from the criminal liability provided is not a murder.

Defence of Ignorance

The fundamental issue in Shari'ah is that an accuse person should not be punished on committing an unlawful act unless he has a prior knowledge about the unlawfulness of the act. If he claims ignorance of it is not liable for it.

However, and according to Muslim jurists they say that it is enough for one to know the law, if it is possible for the claimant of ignorance to have the knowledge. Whenever a person is mature, sane and is possible for him to know unlawful or prohibited issues whether directly from the provision of law or through enquiry he or she cannot claim defence of ignorance. That is why the jurists said "ignorant of law is not an excuse".⁴³

A mature and legally responsible person is considered to know the laws for many opportunities available to him; not necessarily that he must acquire its knowledge but at least to know. Therefore, it is presumed that everybody know the provision of law, even if not all had opportunity to read it, but since is possible for them to read it if they so wish.

Shari'ah law does not make actual acquisition of knowledge as a prerequisite of knowledge of law, because that would have opened a way or opportunity for people to claim ignorance of it and that would have made application of law very difficult if not impossible.⁴⁴

This is a general rule of law in Islamic law without exception. Even though, jurists do accept defence of ignorance of law from one who is living in a village and has never mixed with Muslims or someone who

⁴⁰ Awdhdah Abdul Qadir Op. cit p. 433.

⁴¹ Ibid p. 437.

⁴² Ibn Qudamah (ND) Mughni Beirut Vol. 9, p. 339.

⁴³ 'Awdah Abdul Qadir (ND) Op. cit p. 430.

⁴⁴ Ibid Pp. 430-431.

has just embraced Islam and never lived in the Muslim community. This is not an exception, it is an implementation of original rule of law which exonerates one under defence of ignorance till he knows as it was explained above.

Hence, in as much as ignorance of law is not a defence that could exonerate one from liability ignorance of provision of law is not a defence too. For example, if someone claims that a certain provision of law does not make a certain act unlawful, or he claims that there is another provision which makes such act lawful. For the fact that he is ignorant of proper meaning of that law or he makes mistake of its interpretation does not exonerate him from liability.⁴⁵ A situation like this could be found in the Islamic history when a group of people took wine in Syria to make it lawful by citing a Qur'anic verse as a justification of their act.⁴⁶ The verse reads:

*"Those who believe and do righteous good deeds, there is no sin on them for what they ate..."*⁴⁷

They misinterpreted the verse to justify the act of drinking wine, and they were punished by *Hadd* punishment of 80 lashes.

This judgment indicates that, it is not for one to give wrong meaning of a provision of law or claiming ignorance of such provision does not exonerate him from criminal liability.

Meanwhile, ignorance of law is not a defence as far as Islamic law is concerned, except on the situation explained early.

Defence of Self-Defence

The principle of self defence is well known in Islamic law in that it is an obligatory duty of Muslim to protect one's life and life of others as well as to protect his properties and properties of others from any source of assault. The legal terminology given to it by the Muslim jurist is self defence.⁴⁸

The authority for the act of self defence are many in the Glorious Qur'an and the Prophetic traditions.

Allah says:

*"Then whoever transgresses the prohibition against you, you transgress likewise against him..."*⁴⁹

Allah also says:

*"And those who, when an oppressive wrong is done to them, take revenge..."*⁵⁰

The above two Qur'anic verses signifies defence mechanism whereby it allows against a transgressor or oppressor by way of revenge. In the process of taken revenge if the transgressor or oppressor is killed by the oppressed one no liability against him.

The following tradition of the noble Prophet Muhammad (SAW) throws more light on this.

It was reported by Ya'la bin Umaiyah from the Prophet (SAW) that Umaiyah had a worker who fought with someone and one of them bit the other in his finger, the one who was bitted removed his finger from the mouth of the biter in the process of doing that two of his teeth's was removed, and both of them went to the Prophet to lay their complaints and the Prophet put no blame on the one who was bitted, and He said that, as he wants you to put your finger in his mouth, so he would eat it as a camel eats grass.⁵¹

This Hadith shows that even if his teeth was removed when the one who was bitted was trying to remove his finger from his mouth, no blame on him. It means that he removed his finger by force to safe his finger from been cut off and consequently the teeth of other was removed.

The Prophet Muhammad (SAW) says:

*"Whoever his property desired (unlawful) and fight to protect it and was killed, died as a martyr..."*⁵²

⁴⁵ Ibid p. 431.

⁴⁶ Ibid. p. 431.

⁴⁷ Q. 5:93.

⁴⁸ Awdah Abdul Qadir Op. cit p. 473.

⁴⁹ Q. 2:194.

⁵⁰ Q. 42:39.

⁵¹ Awdah Abdul Qadir Op. cit p. 473.

⁵² Sunan Ibn Majah (2004) Beirut, Darul Fiki Vol. 2, p. 64h. No. 2580.

Again it was reported by Abu Hurayrat that the Prophet of Islam (SAW) said:

*“If anyone were to look into house or (privacy) without permission and you were to throw a pebble at him and put out his eye, you are guilty of no offence “.*⁵³

The two traditions of the noble Prophet (SAW) served as an authority on self defence in two different types of defence. The first Hadith focused on self defence on wealth, property while the second Hadith talks on self defence on human, honour and dignity, which tantamount to the fact that as well as law permits protection of human soul or life against any assault the same thing it permits protection of human property, honour and dignity.⁵⁴

The Position Adopted by Law on Self Defence

There is no disagreement among the Muslim jurists on provision made by Shari'ah on protection of life, property, honour and dignity. But they disagree on whether or not is a legal issue or an obligatory matter of self defence or is it just an ordinary right to do so. Jurists view on this is divided into three divisions.

1. Defence of Honour

The jurist unanimously agree that it is obligatory for one to defend himself in protection of his or her honour and dignity e.g. if a man intends to rape a woman, and the alternative left for her to protect her dignity is to kill the rapist she should do so. Or a man sees his wife being raped and has no option for him to protect his wife than to kill the man he could do so. In the above two examples it become absolute obligatory to both of them to defend themselves and no blame on them for consequence of their act.⁵⁵

2. Defence of Life

But Muslim jurists disagree on defence on life whether or not is obligatory or is just permissible to n defence oneself.

Hanafi School of Law is in agreement with the view of both Maliki and Shafi'i Schools of Law that it is an obligatory for one to defend his life from any assault and aggression.⁵⁶ This is the correct view of these schools.

But the probable view of Maliki and Shafi'i Schools of Law which corresponds with the correct view of Hambali School of Law is that it is not obligatory for one to defend his life against any assault rather it is just an ordinary right to do so.⁵⁷ This school relied on the tradition of the Prophet (SAW) which says:

“Be Allah's savant who is to be killed and be not Allah's savant who would kill others “.

They also cited the situation of the third Khalifah Usman (RA) to strengthen this point that he (Usman) had the power to fight the resurgent when he knew they wanted his life, but he decided to ignore them.⁵⁸

However, some of Hambali jurists tried to differentiate between the period of problems or war and peace and period of peace and said that in the period of war it may be ordinary right for one to defend his life, but in the period of peace it is an obligatory for one to defend his life and that is the view of Maliki and Shafi'i School of Law.

3. Defence of Wealth or Property

The dominant view of jurists is that, defence of wealth or property is an ordinary right not an obligation, which he may or can defend it if he so wishes. That is because, wealth or property is what one is permitted to give out no one is empowered to give life to another.⁵⁹

Hence, some see it as an obligatory duty if the wealth or property of someone is in the wrong hand like property of a bankrupt person or endowment money etc.

However, if one is to follow the dominant view of jurists in this respect. It is better to forfeit his property at gun-point, which is definitely not an act of cowardness or non-compliance with law of self defence.

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⁵⁴ Abu Zaharah (1971) Al-Jarimat wal'uqubah, Cairo Maktabat Darul Uruba.

⁵⁵ Awdhah Op. cit p. 474.

⁵⁶ Ibn 'Abidin (ND) Hashiat Cairo, Daru Nashir, Vol. 5, p. 481.

⁵⁷ Ibn Qudamah, Al-Mughni Op. cit Vol. 10, p. 350.

⁵⁸ Awdhah Op. cit p. 475.

⁵⁹ Ibid Pp. 473-474.

The jurists do not agree on whether or not there is self defence from assault of a minor, or an insane person or an animal. Majority of jurists headed by Maliki, Shafi'i and Hambali Schools of Law are of the view that it is an obligation for one to defend himself if he is being assaulted by a minor, insane person or an animal provided there is no any means for him to protect himself from them than to use force which consequently resulted to death or killing of the aggressor.

But Hanafi School of Law holds a contrary view except Abu-Yusuf that the person acting on self defence is tortuously liable for death of the minor or the insane person and also liable for compensatory value of the animal. To them, self-defence is permitted to suppress crime being committed against someone and the act of a minor, an insane person or an animal is not considered as a crime. Therefore, the right of self defence does not arise. But what the attacked person can legally do is to inflict wound or injury to stop the attack not to kill.

However, Abu-Yusuf of Hanafi School of Law is of the view that the attacked person only need to pay compensatory value of the animal. To him the act of a minor and an insane person is a crime only they are not to be punishable because of absence of sense while the act of an animal is not a crime at all. Therefore an attacked person can defend himself from both minor and insane person. But he can do the same under necessity in respect of animal.⁶⁰

Conditions for Plea of Self Defence

There are four conditions for plea of self defence in Islamic law, they are as follow:

1. There must be an attack
2. The attack must be of an immediate nature i.e. no time for him to seek prevention of the attack
3. No other means of preventing the violence than use of force
4. He must use his utmost force, appropriate and proportionate to the violence.⁶¹

CONCLUSION

Now it has become clear that defence mechanism in Islamic law which can exonerate one from criminal liability are many. Although the writer has attempted to discuss part of it. The one which has been discussed so far are not the only mechanisms. The aims and objectives of Islamic law are meant to take care of survival of human life, religion, wealth or property, intellect and offsprings, the basic needs of human life, which should be defended and or fought in defence.

However, a minor, insane person, and compelled one etc. are not in their senses when they commit crime against others. The law is naturally directed to those that are in their senses. That is why the law exonerates them from any form of liability due to their status. Whatever they do they cannot be prosecuted. The same could apply to someone who as at the time of his action is in the state of involuntary intoxication, so his action cannot be counted against him for the purpose of punishment.

Hence, mistake and self defence are also one of the defence mechanism that exonerates one from criminal liability. It may amount to injustice if one has to be punished on account of mistake, because the act done by him is not a deliberate act so, he should not be held responsible. Various types of defence were discussed to enable people to know the law available for them in terms of defence.

As it has been said earlier that Islamic law is protecting human life, property and dignity, and whoever in the process of defending himself, his property and his honour kills the oppressor is not to be blamed under the law.

⁶⁰ Awdhah Op. cit p. 476.

⁶¹ Awdhah Abdul Qadir Op. cit p. 478.