the President is not answerable for exercise of his legislative functions and for that reason it was not possible to enquire into any legislation promulgated by him.

In addition to it the following privileged persons are also not liable under the Pakistan Penal Code:

(*i*) Foreign Sovereigns;

(*ii*) Ambassadors and other diplomatic agents;

(*iii*) Alien enemies;

(*iv*) Foreign armed forces personnel; and

(*v*) Warship.

Sections 3 and 4 relate to the extra-territorial operation of the Code. So an Indian committing an offence abroad may be tried in Pakistan in the same manner as if the act had been committed within Pakistan. For example if a Pakistani citizen commits a murder in Uganda he can be tried and convicted of murder in any place in Pakistan in which he may be found. Section 4 further enumerates that the provisions of the Code also apply to any person on any ship or aircraft registered in Pakistan wherever it may be. In this section the word "offence" includes every act committed outside Pakistan which, if committed in Pakistan, would be punishable under this Code, for example:

(*i*) C, a foreigner who is in the service of Pakistan commits a murder in London. He can be tried and convicted of murder at any place in Pakistan in which he may be found;

(*ii*) D, a British subject living in Junagadh, instigates E to commit a murder in Lahore. D is guilty of abetting murder.

According to the case of *Abu Bakar* v. *The State*, the application of the Pakistan Penal Code has been extended to offences provided for therein when committed by a citizen of Pakistan even in any country other than Pakistan itself by the provision made in Section 4 of that Code. It, therefore, follows that the penal provisions of the Pakistan Penal Code will be attracted if any citizen of Pakistan commits such offences even beyond the territories of the country. In order to give effect to such a substantive provision of law, provision has also been

made in Section 188 in the Criminal Procedure Code, 19[illegible] **PCr. LJ 369.**

Definition of crime : Many attempts have been made to define crime but it has not been possible to discover the most scientific definition workable in all cases. Some jurists have defined crime according to the interference by the State in criminal matters. That is why Austin while defining crime observed. "A wrong which is pursued at the discretion of the injured party or his representatives is a civil injury, a wrong which is pursued by the sovereign or his subordinates is a crime."

Blackstone defined the term 'crime' as "An act committed or omitted in violation of a public law forbidding or commanding it". His other definition is, "Crime is a violation of public rights and duties due to the whole community considered as community". Stephen slightly altering it observed: "A crime is a violation of a right considered in reference to the evil tendency of such violation as regards the community at large". Neither of the above definitions presents a vivid picture before us.

More authoritative definition of crime has, however, been given by Prof. Kenny, the authority on English Criminal Law. According to him, "Crimes are wrongs whose sanction is punitive and is in no way remissible by any private person, but is remissible by the Crown alone if remissible at all". The definition of Kenny is not of universal applicability and it does not apply to our own laws.

In fact "there is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community." **Halsbury's Laws of England, 4th Ed., Vol. II, para. 1.**

Whatever by the definition of crime it is clear that it is a wrong committed by an individual in a society. Russel has perhaps rightly remarked that to define crime is a task which so far has not been satisfactorily accomplished by any writer. That is why no definition of crime has been attempted in the Code which has used the term offence in place of crime. According to Section 40, the word 'offence' denotes a thing

made punishable by the Code. Test of criminality prescribed under the Code is its characteristic of punishment. Crime being a relative conception is an act prescribed by the State as a crime. Since the concept of crime changes from time to time, no fixed rules can ever be laid down for its determination.

Distinction between Crime and Tort : According to Winfield, "Tortious liability arises from the breach of duty primarily fixed by law, this duty is towards persons generally and its breach is redressible by an action for unliquidated damages". The definition of Tort clearly shows that an action for damages is the essential remedy. The case is otherwise in matter of crime. So there is some difference between tort and crime, although the difference is the fundamental and inherent but of degree only. In brief the differences are as under:

(*i*) Definition of Tort clearly exhibits that essential remedy for a tort is an action for damages. The objects of criminal law is always punishment or to punish the offender and not to compensate for the injury sustained. In civil proceedings imprisonment awarded due to defaults in payment is coercive but in criminal trial the same is always punitive.

(*ii*) In tort action is always brought by the injured party for compensation, while in crime the action is always brought by the state which represents the society and takes the responsibility to punish the offenders. In civil matters damages awarded go to the injured party but in a criminal action the offender is imprisoned and the fine imposed goes to the State exchequer.

(*iii*) If the wrong is a civil injury the action is brought at the discretion of injured party but in crime the sanction is enforced at the discretion of State. It is so because tort does not threaten society as a whole but crime threatens the security and integrity of society.

In sum tort is civil injury and no great alarm is raised on its commitment. On the other hand crime is a serious threat to society and on its commitment a greater alarm is noticed in society.

Theories of Criminality in Islam : The main theory of criminality in Islam is that a man himself is responsible for his actions. It is due to his heinous and evil deeds that he is criminally prosecuted. According to Islamic view, no one is born criminal. These are his own acts which make him good or

bad. He is free to act. **Islamic Jurisprudence by Dr. M. Rashid Ahmed Khan.**

The crimes are due to one's own volition to act in a manner that violates the commandments of Allah. In short, the cause of crime is one's own evil acts. Another important approach to the theory of crime is that no one will be responsible for the actions of others.

Classification of Crime : Crime may be classified as:

1st Grade : Crime affecting the public. It includes all those crimes which affect the general public. It has two kinds and each has different law--

(a) First Kind : Crimes with full punishment are seven in number: (1) *zina'*, (2) slander, (3) drinking, (4) theft, (5) robbery, (6) apostasy, and (7) treason.

(b) Second Kind : (1) International homicide, (2) culpable homicide not amounting to murder, (3) unintentional murder (4) intentional injury, and (5) unintentional injury.

2nd Grade : This grade includes all those crimes which are not classified under the first grade. It has three kinds:

(1) The crimes relating to original punishments are those which are neither Hudood nor retaliation nor blood-money.

(2) The crimes relating to those Hudood whose punishment is not prescribed; either they are incomplete or their Hadd is averted.

(3) Crimes relating to retaliation or blood-money whose punishment is not prescribed, such as those crimes in which there is no retaliation or blood-money.

Exceptions : The punishment is averted by the following defective capacities:

(1) Coercion : It is a circumstance which affects one's consent. In order that consent may be justly allowed as a title of right, it must be free.

According to Islamic Law if under coercion a man's life is not in danger, he should not choose to break the law but rather put up with the consequences of conforming to it. If the coercive act is grave, all acts involuntarily done by a man do not render him liable. For instance, if a man is in a grave danger of death, he is allowed to drink liquor, but in case he is

forced to kill another Muslim under duress (not mild), he is forbidden to do so.

(2) Intoxication : So far as its effect on man's legal capacity is concerned, its cause may be taken into consideration, that is to say, how it is brought about. The legal capacity is affected if he is forced to drink intoxicating liquor: and all his disposition of property would be void in the eye of law. But he is liable, if he destroys or damages another's property.

(3) Lunacy : The legal capacity of an instant person except as to acts done in lucid intervals is affected. Lunacy does not give a general character to commit wrongs. But a lunatic, like an infant, will not be liable for fraud or malice unless the Court be of opinion that he was capable of conceiving such intention.

(4) Infancy or Minority : "In Islamic Law all acts done by a minor, if for his benefit, are upheld. He is not liable to penalties which are in the nature of private rights like retaliation, nor can he be deprived of inheritance from a person whose death he has caused. He is also exempted from all punishments which are public rights such as Hadd." The position of a minor is exactly the same in English law.

Common Intention : When a criminal act is done either by one person or more than one person with a common intention, all of them are liable. Common intention implies a pre-arranged plan. A pre-arranged plan may be made shortly or immediately before the commission of an offence. In fact, the criminal act is done by one of the accused persons in furtherance of the common intention of all.

The forms of participation and assistances are four-fold. The accused may take part in committing the material element of crime with others. He may agree with others in committing an offence either persuading the others or committing it in different means without his actual participation. All of them will be considered equal in crime either personally or physically participating in committing the material element of crime or without physical participation.

To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them. For example, where a number of persons equipped with weapons attacked a man and killed him, all of them are held guilty of murder.

There are two conditions of common intention:

(*i*) That they are greater in number. If they are not greater in number, there is no criminal intention either direct or indirect.

(*ii*) That a criminal is accused of committing a forbidden act having a punishment. If the act committed is not punishable, then there is neither crime nor a common intention.

Conspiracy : Conspiracy begets crime directly without any aid and it is the cause of a crime. For instance, a man is slaughtered with a knife, the act of slaughtering brings about death directly. Actually it was the cause of death at that time strangulating causes the death of a man, at that time it was the cause of death. In stealing one's property, the act of stealing brings about or causes theft and this is the cause or 'illat of theft.

Abetment : According to Islamic Law, abetment causes crime not by itself but with some aid, and this is the cause of crime. The evidence does not by itself causes death directly, but brings about death with the aid of the act of a hangman who executes the order of a judge with respect to the sentence of death

Difference between Conspiracy and Abetment : Conspiracy causes crime directly, whereas abetment causes conspiracy or it is the aid for bringing about the conspiracy which in its turn causes crime.

If a person joins another in the commission of a crime by which he is to benefit and which it would not be possible to commit but for his aid, he is guilty of the commission of the crime. **AIR 1950 All. 639.**

Attempt : Attempt is an intentional preparatory action which fails in object. In Islamic Law the offence of attempt is not punishable like retaliation and Hadd, but with Ta'zir according to the nature of crime.

No specific punishments are prescribed for the offence of attempt in the Islamic penal law under the head of Ta'zir because the rules of Ta'zir are sufficient for the punishment of attempt. Ordinarily, the punishment in the form of Ta'zir is awarded in all the crimes except Hadd and atonement.

Punishment for Attempt: Under the Islamic Law, the crimes punishable with Hadd and retaliation are not equal if their execution is complete or incomplete in nature.

Consequently, the punishment of attempt at Zina' cannot be like a punishment which is prescribed for a complete Zina' and that is the stoning. In the same way, the punishment for attempt at theft is not the cutting of hands. So it is necessary that the accused should be punished according to the nature or intensity of his criminal act.

Pardoning Powers of the State: In man-made law the right of mercy and pardon vests in the Head of the State, but it is otherwise in the Islamic Law. Only the wronged person can forgive or pardon the accused. Islam gives this right to the wronged person only. The oppressed man has the discretion to waive his right of retaliation by forgiving the accused. The Head of the State or his functionaries are not empowered to do so.

The State has no pardoning powers in the crimes of Hudood, retaliation and blood-money. On the other hand, in cases of Ta'zir, the State has got such powers.

Punishment in Islam : Criminal Law the Shari'a divides crime into three categories: Hudood, Qisas and Ta'zir.

1. Hudood : Hudood offences are acts prohibited by God and punished by defined mandatory penalties because the acts violate a right protected by the Qur'an. Jurists differ on the number of Hudood offences. Some list seven such crimes; theft, highway robbery, adultery, defamation (false accusation of adultery), wine drinking, apostasy, and rebellion. Some jurists omit rebellion, while others restrict the list to the first four crimes only, classifying wine drinking and apostasy as crimes of Ta'zir, since neither the Qur'an nor the Sunnah prescribed specific penalties for them. A penalty imposed by virtue of being a divine right means that the proscription is necessary for the protection of a fundamental public interest.

2. Qisas: Qisas crimes which include murder, maiming and battery, are crimes against the person. Qisas refers to a specified punishment in the Qur'an and Sunnah and the decision to inflict it rests with the closest of kin as avenger of blood. It is his right to choose between inflicting the prescribed penalty, taking compensation (Diyyat), or pardoning the offender. The ruler cannot pardon crimes incurring Qisas penalties, but if the nearest of kin grants a pardon, the

ruler may in his discretion impose a Ta'zir punishment on the criminal.

3. Ta'zir : Ta'zir crimes include all crimes for which there are no specified penalties in the Qur'an or Sunnah. Whether an act is punishable under Ta'zir is left to the ruler or judge to determine in accordance with the public interest and changing conditions and times.

Furthermore, Islamic jurists agree that punishment cannot be imposed unless three requirements are satisfied. It must:

(1) be consistent with the principle of legality;

(2) be individualized; and

(3) apply equally to all persons.

1. Hudood Laws : An important step towards Islamisation of the laws was taken on the 12th of Rabi-ul-Awwal, 1399 A.H. (10th February, 1979) when five Ordinances were promulgated by the President of Pakistan whereby the existing Penal Code of Pakistan was amended in significant respects. Under these Ordinances both the conceptual nature of the acts which were considered to be offences under the said Penal Code as also the quantum of punishment and the mode of punishment prescribed therein, affecting property of persons and affecting the moral and social order of the society were radically altered with a view to bringing the law on these questions in conformity with the Holy Qur'an and Sunnah.

It may be pointed out at this stage that Islamic Penal Laws are based on two notions of crime, *i.e.*, Hadd and Ta'zir. By Hadd (plural of which is Hudood) is meant punishment fixed by the Qur'an for an offence, whereas by Ta'zir (plural of which is Tazirat) is meant penalty or punishment fixed by the State. Traditional Islamic Criminal Law, therefore, consists of both Hudood and Tazirat. In Pakistan for the first time steps were taken to Islamize the Penal Code by repealing the existing provisions relating to offences of theft, robbery, dacoity, abduction, rape, fornication, adultery, false accusation of adultery, drunkenness, *etc.*, and replacing them by Hudood and Tazirat Laws. In this process the entire Penal Code has not been recast but it has been amended through the promulgation of several new Orders and Ordinances which came into force on 10th February, 1979. These Laws are--

(1) Offences Against Property (Enforcement of Hudood) Ordinance, VI of 1979;

(2) Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979;

(3) Offence of Qazf (Enforcement of Hadd) Ordinance, VIII of 1979;

(4) Prohibition (Enforcement of Hadd) Order, 4 of 1979;

(5) Execution of the Punishment of Whipping Ordinance, IX of 1979.

In addition to the promulgation of the Hudood Laws, the Council of Islamic Ideology has examined the laws enacted during the British rule as also several other Acts promulgated thereafter with a view to ascertaining whether the provisions of the laws contained therein conflicted with the injunctions of Islam and submitted recommendations to bring them into conformity with the Injunctions of Islam or to re-enact them, after repealing the existing law. The Evidence Act, 1872 was repealed, in accordance with its recommendations and the Qanun-e-Shahadat, 1984 promulgated to replace it.

2. Qisas and Diyat: In the Pakistan Penal Code as amended by the Criminal Laws (Amendment) Ordinance, 1994 the offences affecting human body are divided in two classes; one: offences affecting life, two; offences relating to injuries to body of a person:

(1) Culpable homicide either amounts to murder as defined in repealed Section 300, P.P.C. and punishable under Section 302, P.P.C. or does not amount to murder as defined in exceptions of Section 300, P.P.C. and punishable under Section 304, P.P.C. In the Ordinance culpable homicide (Qatl) has been classed in two groups.

(2) Culpable homicide which amounts to murder, *i.e.*, Qatl-i-Amd is defined in substituted Section 300, P.P.C. This definition is similar to the definition of murder in the repealed Section 300, P.P.C. There is, however, material difference in the punishments provided in two enactments. In Section 302, P.P.C. the offender is liable to sentence of death or imprisonment for life and fine. In the substituted Section 302, P.P.C. punishments provided are Qisas (if proof under Article 17 of Qanune-Shahadat is available) or death or imprisonment for life as Ta'zir or with imprisonment of either description for a term which may extend to 25 years where Qisas is not

applicable according to injunctions of Islam. The sentence of fine has been eliminated. There should, therefore, be no difficulty for Courts to administer justice in accordance with the provisions of the Ordinance. If Qatl-i-Amd is not liable to Qisas or it is not enforceable, the offender shall be liable to Diyat. The Court, having regard to the facts and circumstances of the case, may in addition to Diyat, punish the offender with imprisonment as Ta'zir under Section 308, P.P.C. which may extend to fourteen years. Similarly, even after wavier or compounding of right of Qisas in a Qatl-i-Amd, the Court may in its discretion, having regard to the facts and circumstances of the case punish, an offender, against whom right of Qisas has been waived or compounded with imprisonment as Ta'zir which may extend to 14 years. The idea behind this provision is the philosophy that there are two aspects of every crime. One relates to Haqooq Allah and second relates to Haqooq-ul-Ibad. The wali may waive or compound Qisas but still it may be considered necessary to punish an offender keeping in view the nature of crime committed by him. For example an offender recklessly fires in street murdering and injuring some persons.

(3) The culpable homicide which does not amount to murder, *i.e.*, Qatl-i-Amd is defined in substituted Sections 315, 318 and 321, P.P.C. respectively as Qatl Shibh-i-Amd, Qatl-i-Khata and Qatl-bis-Sabab. These kinds of Qatl do not attract punishment of Qisas. These are punishable with imprisonment as Ta'zir and Diyat. These definitions do not specifically provide for situations contemplated by the exceptions of repealed Section 300, P.P.C. but are wide enough to include cases which used to be punished under Part I and Part II of repealed Section 304, P.P.C. and Section 304-A, P.P.C.

3. Miscellaneous offences: It will be appropriate to examine some miscellaneous offences dealing with hurt cases:

(1) Attempt to commit Qatl-i-Amd (murder): The wording of substituted Section 324, P.P.C. is identical with first paragraph of repealed Section 307, P.P.C. except the later part which provided punishment if hurt is actually caused in the attempt. The second para of Section 307, P.P.C. stands repealed by the Ordinance which means that a convict in jail commits an offence of attempt to murder, will not be liable to enhanced punishment.

(2) Attempt to commit suicide is punishable under substituted Section 325, P.P.C. Its provisions are identical to the provisions of repealed Section 309, P.P.C.

(3) The definition of Thug provided in substituted Section 326, P.P.C. is identical with definition in repealed Section 310, P.P.C., except that the word Qatl instead of murder has been used in its last line. The punishment for a Thug is provided in substituted Section 327, P.P.C. which is identical with repealed Section 311, P.P.C.

(4) The wording of substituted Section 328, P.P.C. and repealed Section 317, P.P.C. regarding exposure and abandonment of child are identical except that in the explanation instead of the word murder, three kinds of Qatl have been incorporated.

(5) The provisions of substituted Section 329, P.P.C. regarding concealment of birth by secret disposal of dead body are identical with provisions of repealed Section 318, P.P.C.

(6) The provisions of substituted and repealed Section 301, P.P.C. are in substance identical.

(7) The Ordinance defines "Ikrah-e-tam" which means putting any person, his spouse, or any of his blood relations within prohibited degree of marriage in fear of instant death, or instant permanent impairing of any organ of body or instant fear of being subjected to sodomy or zina-bil-jabr. "Ikrah-e-Naqis" means any form of duress which does not amount to Ikrah-e-Tam. The two definitions read together are very wide. These do not state the reasons or object of duress. A Qatl committed in the circumstances of Ikrah-e-Tam or Ikrah-e-Naqis has been made punishable under substituted Section 303, P.P.C. This is a new provision of law. Ikrah-e-Tam or Ikrah-e-Naqis, involve two persons. *Firstly*, the person who causes Ikrah-e-Tam or Ikrah-e-Naqis, *i.e.*, puts another person under duress, *Secondly*, who is subjected to duress, *i.e.*, Ikrah-e-Tam or Ikrah-e-Naqis. Both of them, *i.e.*, person committing Qatl under Ikrah-e-Tam or Ikrah-e-Naqis and the person causing Ikrah-e-Tam and Ikrah-e-Naqis seem to have been made liable to punishment under Section 303, P.P.C. The Court will, therefore, be under onerous duty to determine the precise nature of offence committed by each of them.

(8) Qatl-e-Khata (death) by rash or negligent driving has for the first time been made punishable in substituted Section

320, P.P.C. and Qatl-e-Khata by rash or negligent act has been made punishable in substituted Section 319, P.P.C. These both were earlier punishable under Section 304-A, P.P.C.

4. Hurt : In the repealed provisions, simple hurt is defined in Section 319, P.P.C. as "bodily pain, disease or infirmity" to any person. The repealed Section 320, P.P.C. defines grievous hurt as:

Firstly, Emasculation;

Secondly, permanent privation of sight of either eye;

Thirdly, permanent privation of hearing of either ear;

Fourthly, privation of any member or joint;

Fifthly, destruction or permanent impairing of the power of any member or joint;

Sixthly, permanent disfiguration of head or face;

Seventhly, fracture or dislocation of a bone or tooth; and

Eighthly, any hurt which endangers life or which causes the sufferer to be, during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits.

Human body has been divided into various sections--

(*i*) Limbs and organs;

(*ii*) Head and face;

(*iii*) Trunk;

(*iv*) General-remaining human body.

Thus keeping in view various parts of human body, five kinds of hurt have been stated in substituted Sec. 332:--

I. (*a*) Itlaff-i-udw -- The word Itlaaf means to 'destroy' 'to ruin' and 'decay'. The word Udw means 'limb' or 'organ'. Itlaaf-i-Udw means to dismember, amputate, sever any limb or organ of body. This definition corresponds with provisions of clauses fourthly and fifthly of repealed Section 320, P.P.C.

(*b*) Itlaf-i-Salahivyyat-i-Udw--means destroying or permanently impairing the functioning power or capacity of a person or causing permanent disfigurement of some organ.

General : Itlaaf-i-Udw and Itlaaf-i-Salahiyyat-i-Udw, respectively, are defined in substituted Sections 333, P.P.C.

and 335, P.P.C. and made punishable under Section 334 and Section 336, P.P.C. These sections provide three kinds of punishments:--

(*i*) **Qisas**. As stated above, the basic principle of Qisas is "equality" or in common man's language "similarity". If Qisas is not executable keeping in view the principles of equality it will not be exacted. Suppose an offender inflicts single blow with sword resulting in amputation/dismemberment of one-fourth of left forearm. The punishment of Qisas will thus be executable only if the authorised medical officer gives an opinion that similar result could possibly be achieved without any additional damage to the offender. The person causing such damage will be liable to action. In practice, therefore, it may rather be difficult for any medical officer to opine that Qisas in a particular case was executable keeping in view the principles of equality. The Court will, therefore, in each case of hurt involving punishment of Qisas, require the authorised medical officer, appearing as witness in the case, to give opinion "whether Qisas will be executable keeping in view principles of equality". The punishment of Qisas shall under Section 337-P, P.P.C. be executed (*a*) in public, (*b*) by an authorised medical officer, and (*c*) in presence of victim or, if the victim dies before execution of Qisas, in presence of wali of victim.

(*ii*) The second punishment provided in Sections 334, P.P.C. and 336 P.P.C. is Arsh. The word 'shall' has been used for this punishment. This means that if Qisas is not found executable, the offender shall be punished with Arsh. The Court will have no discretion to decline this punishment. The value of Arsh for various kinds of hurt is given in Sections 337-Q to 337-W. These are self-explanatory sections and require no discussion. However, one point need be mentioned that in working out percentage of the value of Diyat to determine the value of Arsh, the minimum value of Diyat fixed by the Federal Government on first day of July each year will be taken in consideration. Arsh is a compensation which is recoverable even from the estate of offender if he dies before payment. The Court will be required to record a direction in the judgment under Section 337-X, P.P.C. that the offender shall be kept in jail until Arsh is paid. This will be simple imprisonment without fixing of time limit. It will be of the kind of civil imprisonment. The Court may on application by an offender order his release on bail if he furnishes security equal to the amount of Arsh to the satisfaction of Court for payment of Arsh. The Court may

also order payment of Arsh in instalments spreading over a period of three years from the date of judgment.

(*iii*) Imprisonment as Ta'zir is the third punishment provided in Sections 334 and 336, P.P.C. The words "may also" have been used for this punishment. This means that the Court, for offences of Itlaaf, may or may not award punishment of imprisonment. This is discretion whereas the punishment of Arsh is mandatory.

II. Shajjah: It is an Arabic word which means injuries on head or face. These injuries are defined in substituted Section 337, P.P.C. The parallel provisions can be seen in Clause Sixthly of repealed Section 320, P.P.C. The difference between two provisions is that the repealed clause makes mention of "permanent disfiguration of head or face" and the substituted Section 337 specifies various kinds of Shajjah, *i.e.*, injuries on the head or face of a person, given as follows:-

(*a*) Shajjah-i-Khafifah means simple hurt by any weapon, on head or face without exposing bone of the victim.

(*b*) Shajjah-i-Mudihah means simple hurt by any weapon on head or face where though bone is exposed but no fracture is caused.

(*c*) Shajjah-i-Hashimah is grievous hurt by any weapon on head or face, resulting in fracture of bone of victim and without dislocating it.

(*d*) Shajjah-i-Munaqillah is grievous hurt, by any weapon, on head or face, resulting in fracture and dislocation of bone of victim.

(*e*) Shajjah-i-Ammah is grievous hurt by any weapon, causing fracture of the skull of the victim, where the wound touches the membrane of the brain.

(*f*) Shajjah-i-Damighah is grievous hurt by any weapon, causing fracture of the skull of the victim, so that the wound touches the membrane of the brain.

These six kinds of injuries on head or face previously punishable under repealed Sections 323, 324, 325 and 326, P.P.C. are now punishable under substituted Section 337-A, P.P.C. Only Shajjah-i-Mudihah is punishable with Qisas or in alternate with Arsh and imprisonment. Shajjah-i-Khafifah is punishable with Daman and may also be punished with imprisonment. The value of Daman is not fixed in the Ordinance. It is to be fixed by Court in its discretion. The

remaining kinds of Shajjah are punishable with Arsh and may also be punished with imprisonment as Ta'zir. As stated earlier, the punishment of Arsh is basic and mandatory whereas the punishment of Ta'zir is discretionary.

III. Jurh : The word Jurh is derived from the word Jarooh which means injury. The word Jurh is used for injuries on human body other than injuries on head or face. These injuries primarily on trunk of human body are of two kinds:--

(1) Jaifah, (2) Ghayr Jaifah, Jaifah means injury which extends to the body cavity of the trunk. Ghayr Jaifah means injury which does not amount to Jaifah. There are six kinds of Ghayr Jaifah Jurh:--

(*i*) Damiyah means injury with any weapon, on any part of body, except head or face in which skin is ruptured and bleeding occurs.

(*ii*) Badiah means injury with any weapon, on any part of body except head or face, by cutting or incising the flesh without exposing the bone.

(*iii*) Mutalahimah means injury with any weapon on any part of body except head or face by lacerating the flesh.

(*iv*) Mudihah means injury with any weapon, on any part of body, except head or face in which bone is exposed.

(*v*) Hashimah means injury with any weapon, on any part of body, except head or face resulting in fracture of a bone without dislocating it.

(*vi*) Munaqqilah means injury with any weapon on any part of body except head or face resulting in fracture and dislocation of bone.

Punishment for Jaifah is provided in substituted Section 337-D, P.P.C. and punishment for Ghayr Jaifah is provided in Section 337-F, P.P.C. All Ghayr Jaifah hurts are punishable with Daman and the offender may also be awarded imprisonment as Ta'zir:--

IV Other kinds of offences including hurt:--

(1) Hurt by rash or negligent driving previously punishable under Sections 337 and 338, P.P.C. is now punishable under substituted Section 337-G.

(2) Hurt by rash or negligent act other than driving previously punishable under Sections 337 and 338, P.P.C. is now punishable under substituted Section 337-H, P.P.C.

(3) Hurt caused by mistake is punishable under Section 337-I.

(4) Hurt by means of poison previously punishable under Sections 327, 329, 330 and 331, P.P.C. is now punishable under substituted Section 337-J, P.P.C.

(5) Hurt not mentioned hereinbefore which endangers life or which causes the sufferer to remain in severe bodily pain for 20 days or more or renders him unable to follow his ordinary pursuits for 20 days or more is now punishable with Dhaman and imprisonment under substituted Sections 337-K and 337-L. This kind of hurt was previously defined in Clause *Eigthly* of Section 320, P.P.C.

(6) Under the provisions of P.P.C. mere rash or negligent driving is punishable under Section 279, P.P.C. There is in P.P.C. no specific provision to make death or hurt by rash or negligent driving punishable. It is for the first time in the Ordinance that death by rash or negligent driving has been made punishable, under substituted Section 320, P.P.C. Similarly hurt caused by rash or negligent driving has specifically been made culpable for the first time in Section 337-G of the Ordinance.

It will be appreciated that in most of hurt cases intention and knowledge are necessary ingredients of offences. *Secondly*, the principle of enforcement of Qisas is same in all hurt cases. *Thirdly*, in awarding punishment emphasis is on compensation in the shape of Arsh or Daman which has been made mandatory punishment leaving no discretion with Court whereas punishment of imprisonment is discretionary. *Fourthly*, specific procedure has been provided to ensure recovery of compensation of every kind under the Ordinance. However, nothing is said about situation if the offender has no property to discharge the said liability, and *Fifthly*, value of Arsh for various organs has been fixed in Sections 337-Q to 337-W. All offences of hurt may be waived or compounded. The word Qisas has not been used in Section 338-E. Instead the word offence has been used. This means that offences may be waived or compounded irrespective of punishment provided for the offence.[1]

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1. Article 'Law on Qisas and Diyat and its application' by Justice (Retd.) Mian Qurban Sadiq Ikram.

CHAPTER 2

ELEMENTS OF CRIME

Physical element, *actus reus* and mental element, *mens rea*, are two tests of criminality known to our law which is based on English Law. These are not only two elements of a crime but there are in all four elements that go to constitute a crime, *viz.*, (*i*) A human being; (*ii*) Guilty intention or *mens rea* on the part of such human being; (*iii*) *Actus reus*, illegal act or omission, and (*iv*) injury to another human being. Now I will discuss each separately in the briefest possible way.

1. Human Being: The first element requires that the act must be committed by a human being. In ancient times punishments were inflicted on animals also for the injury done by them. However no such practice was followed in Pakistan and with the development of the notion of *mens rea* such trials and punishment were completely abandoned. So the first essential of a crime is a human being who--

(*i*) must be under legal obligation to act in a particular manner; and

(*ii*) should be a fit subject for award of appropriate punishment.

Section 11 of the P.P.C. provides that the word 'person' includes a company, or association or a body of persons, whether incorporated or not. The word 'person', hence, includes artificial or juridical persons. "A Corporation" according to Salmond, "is a group or series of persons which by legal fiction is regarded and treated as itself a person." According to the case of *Abdul Qadeer* v. *Ishtiaq Hussain*, **1971 PCr. LJ 537**, the word "person" as appearing in sections describing offences where imprisonment is mandatory, does not include corporate body. Corporate body or company not indictable for offences which can be committed only by human individuals or for offences punishable with imprisonment. Officer or Agent authorised to act on behalf of corporate body, individually liable for criminal action. In the beginning the view prevailed that Corporations entail no criminal liability. It is due to the following reasons:

(*i*) A corporation has no physical body of its own and so it cannot be imprisoned.