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Legality of the Right to Self-Defence under Islamic Law

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Abstract

The purpose of this paper is to delineate and explore the concept of self-defence under Islamic law as stated in the narration of Sahih Muslim hadith 140. Giving this, the current study is purposed to provide comprehensive answers to a series of research questions. Thus, the primary question of paper should be formulated as follows: What is the legal basis for self-defence under Islamic Law? To continue, the secondary question of paper should be articulated as follows: What are the principles of self-defence under Islamic Law? After everything has been given due consideration, it is necessary to generalise that self-defence under Islamic law has specific legal basis, specific principles, and peculiarities in their practical application of these principles 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 Law 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 by way of defending him/herself or by way of defending his family.

Keywords: Self-Defence, Islamic Law, Basic Right, Legality, Killing

1. Introduction

Self defence is one of the basic rights under Islamic Law. It is one of the defences that absorb the offender the punishment for the offence committed. Self defence absorb the offender from paying blood money or retribution when it is established that the offender tried all possible best to avert the killing or killing was done to protect his/her property from the attacker. Not many Muslims are aware of the basic right of self defence under Shari'ah. However, Islamic law, as a law with distinct rules and regulations, provides cases and instances where self defence can be said to be justified. To this end, this paper aims at explaining the condition for the plea of self-defence; the implication and result of successful plea of self-defence; the penalty for the person killed as a result of self-defence; the reward available for the person that is killed as result of defending his property. This paper will further examine the condition that must be satisfied before a Muslim taking benefit of self defence.

2. Conceptual Framework of Self Defence under Shari'ah

Islamic law is distinct law from other legal system. The acts that constitute offence or offences are well stated with their punishment under the law. There are different defences that are available to the defender who acted in a manner to defend him or herself against any act that may constitute offences under Islamic Law. Punishments are prescribed to anyone who commits offences under Islamic Law. However, under certain circumstances, the law exempts an offender of a criminal act from punishment. Reason abounds, that is due to absence of intention, mental defect, involuntariness, infancy, etc. The basis for this is the tradition of the Holy Prophet (S.A.W) 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 person who is asleep until he wakes up.'¹

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The word punishment from the above tradition is in relation to the prescribed offences namely Hadd² and Qisas.³ There are various types of defences under Islamic law available to the accused to exonerate him from the punishment prescribed for the offence committed, for instance, infancy/minority, insanity, mistake, necessity and self defence.

Above stated defences are available to the accused which must be established with other various conditions attached to each of the defences. As discussed above, self defence is one of the factors that vacate criminal responsibility; it is a principle of well recognized by Islamic Law. That is one is to defend not only his person or property from an illegal assault, but also to defend other persons and their property from a similar illegal assault, to the extent that if the person who assaults is killed or injured, one incurs no liability of any kind.⁴

The Qur'an provides clear evidence for the use of force in self-defence and for defending other Muslims who are oppressed but unable to defend themselves. Permission to use force to defend oppressed and weak Muslims is specified for Muslims. This is well stated in number of verses of the Holy Quran.⁵ Specifically in Qur'an chapter 49:9, allows the use of force against other Muslims in certain circumstances thus:

If two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command. So, if it comes back, seek reconciliation between them with fairness, and maintain justice.' Here again permission is given to fight aggressors.⁶

The above quoted verses of the Holy Quran are the bases for the principle of self-defence in Islamic Law. Although, those verses have been used and categorised as authorities for defensive and offensive Jihad.⁷ 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.⁸ This shows that self-defence is justifiable under Islamic Law as long as it is committed for the faithful cause.⁹ 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.¹⁰

² Hadd is a singular form of Hudud. Hudud are punishment that are textually designated and apply to crimes whose penalties are mandatory defined in the Holy Qur'an or prophetic tradition. Hudud are crimes with fixed punishment in the Holy Qur'an and Sunnah. Under Islamic Law, Hudud apply to only seven crimes, namely; Al-Zina, al-Qadhf, Al-Sariqah, Shurb-ul-Khamr, AL-Hirabah and Al-Baghye.

³ Qisas is another form of punishment for the crime committed and it is simply mean retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating etc.

⁴ Bambale Y Y, Crimes and Punishments under Islamic Law, (2nd Edn, Mathouse Press limited, 2003), .26.

⁵ See Quran 42 verses 41, where Allah says "if one avenges an injustice, he shall not be blamed." See also Quran chapter 42 verse 40, where Allah says "they counter aggression with an equivalent response." So also, in Quran chapter 42 verse 39, when Allah states that: when injustice befalls them, they defend themselves until victory."

⁶ Quran chapter 49:9

⁷ The classical fuqah' did not divide jihad into the two categories of "defensive" and "offensive." Rather, in their own peculiar way, they analysed the underlying cause ('illah) of the obligation of jihad and most of them concluded that its underlying cause is murabah (war against Islam or Muslims). As the existence and non-existence of the 'illah indicates the existence and nonexistence of the rule respectively, they also concluded that Muslims can fight only against those non-Muslims who commit murabah. They knew that for combating murabah sometimes it becomes necessary to strike them first. That is why for them the division of jihad into defensive and offensive categories was of little, if any, significance. It was more important for them to ascertain the situations, which were covered by the broader notion of murabah.

⁸ See Quran Chapter 9 verse 38-41

⁹ Peters R, *The Islamization of Criminal Law: A comparative Analysis*, (1994) *die Welt des Islams*, 246-274

¹⁰ *Ibid*

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⁸ See Quran Chapter 9 verse 38-41

⁹ Peters R, *The Islamization of Criminal Law: A comparative Analysis*, (1994) *die Welt des Islams*, 246-274

¹⁰ *Ibid*

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.¹¹ 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. Thus, it is undisputed that self-defence is permitted by the Quran under the circumstances of violent aggression of unbelievers.¹²

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 mankind.'¹³

The aforesaid passage conveys both unequivocal and unclear characteristics of self-defence under Islamic Law.¹⁴ To be more precise, the verse in question permits self-defence as an act of saving an individual's life, on the other hand, prohibits any form of killing.

In the Sunnah of the Holy Prophet (S.A.W), the popular authority on this principle is the hadith reported by Abu Hurairah (RTA) that Holy Prophet (S.A.W) said: It was narrated that Abu Hurayrah (may Allaah be pleased with him) said: A man came to the Messenger of Allaah (peace and blessings of Allaah be upon him) and said: O Messenger of Allaah, what do you think if a man comes wanting to take my property? He said: 'Do not give him your property.' He said: What if he fights me? He said: "Fight him." He said: What if he kills me? He said: 'Then you will be a martyr.' He said: What if I kill him? He said: "He will be in Hell."¹⁵

Another authority from the Hadith of the prophet Muhammed was the one reported by Sa'eed ibn Zayd. It was narrated that Sa'eed ibn Zayd (may Allaah be pleased with him) said: 'The Messenger of Allah (peace and blessings of Allah be upon him) said: "The one who is killed defending his wealth is a martyr, the one who is killed defending his family is a martyr, the one who is killed defending his religion is a martyr, and the one who is killed defending his life is a martyr".'¹⁶

The above quoted traditions of the prophet are the bases for the right of self defence under Islamic law. The hadith has clearly stated that it is forbidden for anyone to take over the property of another person unlawfully. It is also forbidden for anyone to use any form of force against another person unlawfully or without any legal or moral justification for it.

Imam Maliki, Shafi'i and Hambali jurists are of the view that the right of self-defence is available to any person who is being assaulted by a minor, insane person or an animal, especially where he cannot find any justification means of resisting the assault other than to cause the crime i.e death or injury, on the aggressor.¹⁷ But Hannafi jurists hold a contrary view. That is the person acting in self defence is tortuously liable for the death of minor or the insane and compensatory value of the animal. They argued that self defence is available to suppress a crime, but that the acts of a minor, insane or the animal is not considered a

¹¹ Hussain J, *Islam: Its Law and Society* (Vol. 3) (Federation Press, 2001), 38.

¹² Peters (n. 9), 246-274.

¹³ Yadav R D, *Law of Crime and Self-defence* (Mittal Publications, 1993), 93.

¹⁴ Ibid

¹⁵ Ibid, Narrated by Muslim (140)

¹⁶ Narrated by al-Tirmidhi (1421), al-Nasaa'i (4095), Abu Dawood (4772); classed as saheeh by al- Albaani in *Irwa'* al-Ghaleel (708).

¹⁷ Yunus, (n.4) 28

crime. There the right of self-defence does not arise. But that the attacked person may inflict wound or injury to ward off the attack as necessity but not to cause death.

3. Conditions for the Plea of Self-Defence

As a matter of fact, the recognition of self-defence cannot be carried out automatically unless the court handling the matter decides that all requirements of self-defence have been properly fulfilled in the case. 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.¹⁸ 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. 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.¹⁹

Islamic Law 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 murder.²⁰ However, Islamic law prescribes specific obligatory situations, in which it is lawful to resist aggression because of obligation and, thus, the killer can be found innocent and free from punishment.²¹ These situations correspond with the principle of innocence for killing in self-defence under Islamic jurisprudence. The conditions are as follows:

- i. There must be an attack. The first and foremost principle stipulates that killing in self-defence is permissible under Islamic Law 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.²² The key rationale underlying the above-captioned principle originates from the fact that such killing in self-defence is necessitated by the individual's first action to kill the other and that there was no other alternatives to avoid the killing in response. It becomes an obligation to act in self-defence arises under the aforementioned circumstances.²³ 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.
- ii. The second condition 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.²⁴ This is also in line with the hadith of the prophet Muhammed which permits Muslim to kill his attacker to defend his property or his life. "O Messenger of Allaah, what do you think if a man comes wanting to take my property? He said: "Do not give him your property." He said: What if he fights me? He said: "Fight him." He said: What if he kills me? He said: "Then you will be a martyr." He said: What if I kill him? He said: "He will be in Hell."²⁵
- iii. The third important condition 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

¹⁸ Dwyer D H, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

¹⁹ Vogler R, *A World View of Criminal Justice* (Burlington: Ashgate, 2005), 97.

²⁰ Ibid

²¹ Dwyer, (n. 19)37

²² Peters, (n. 9) 246-274.

²³ Dwyer (n. 21).

²⁴ Reichel P L, *Comparative criminal justice systems: A topical approach* (Upper Saddle River, NJ: Prentice Hall, 2002), 67.

²⁵ Ibid

endeavouring to protect his or her honour.²⁶ Under such circumstance, jurists agree that it requires no blood money or retribution, because the defence of one's honour is considered under Islamic law a lawful defence.²⁷ 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.²⁸

The force used in self-defence must be the only means of preventing the threatened violence and must be justifiable. The accused person who wants to rely on this defence must show that the force used in defending himself is only meant to prevent the threatened violence of the person he is defending himself against and must be justifiable. The defender must show that he acted in a just manner and that is the only way to prevent the accused from committing the offence.

The defender must show his bona fide belief on reasonable grounds that he had reasonable fear of violence which he could not prevent except by the use of force.²⁹

The injury inflicted must be proportionate to the violence threatened that is, should not use force more than absolutely necessary for the defence. The principle of proportionality is called to guarantee that the right to self-defence is not abused or misapplied under various conditions. To put it in other words, the principle of 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. 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.³⁰ To every intent and purpose, it is achievable to agree with Maliki Jurist that the principle of proportionality does not empower the act of self-defence as a permission to have recourse to violence and aggression.

Contrariwise, the principle of proportionality is conceived to function against any unsubstantiated and unrestricted act of violence for the benefit of its prevention.³¹ It is extremely interesting to note that Maliki Jurist 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.³²

Second, the principle of proportionality is not tolerated under circumstances when there are non-violent alternatives which can be exhausted in practice.³³

²⁶ Ibid

²⁷ Ibid

²⁸ Bassiouni M C, *The Islamic Criminal Justice System* (New York, Oceana Publications, 1982), 18.

²⁹ Yunus, (n. 4), 28.

³⁰ Hussain J, *Islam: Its Law and Society* (Vol. 3) (Federation Press, 2001), 38.

³¹ Peters, (n. 9), 97.

³² Yunus M, 'The Exercise of Self Defence to Cause Death; A Legal Analysis under the Malaysian Penal Code, (Thomson Reuters Malaysia Sdn Bhd, 2016), 60.

³³ Peters R, *The Reintroduction of Islamic Criminal Law in Northern Nigeria: A study conducted on behalf of the European Commission* (2001).

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 it 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.³⁴

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.³⁵

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.³⁶

It is important to emphasise that self-defence under Islamic Law has quite different meaning compared to the concept of self-defence under international law or other legal systems. 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.³⁷ In other words, under Islamic jurisprudence, the concept of self-defence in conjunction with the principle of proportionality is given the divine meaning. This can be seen in the word of the Holy Quran and hadith of the Prophet Muhammed that sanctioning the use of self-defence. 'Fight those in the way of God who fight you, but do not be aggressive.'³⁸

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. In other words, self-defence can be considered as such under Islamic Law as long as it is not aggression, because aggression is acrimie. Besides, the Quran and other sources of Islamic Law make it absolutely clear that it is morally correct and legally permissible to fight against those who wage war or other forms of aggressions. This doctrinal position implies that self-defence is not only a legal right, but also a moral obligation.³⁹

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.⁴⁰ 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 Law. 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.'⁴¹

It is very important to state that the amount of the property or wealth defending is immaterial in a case of self defence. The Sunnah and scholarly consensus are agreed that if a Muslim assailant cannot be warded off except by killing him, then he may be killed, even if the wealth that he wants to take is a small amount, as the Prophet (peace and blessings of Allaah be upon him) said in the saheeh hadeeth: 'The one who is killed defending his wealth is a martyr, the one who is killed defending his life is a martyr, and the

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Yunus, (n, 32), 60.

³⁷ Peter, (n.33).

³⁸ Malekian F, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 39.

³⁹ Dwyer, (n. 18).

⁴⁰ *Ibid.*

⁴¹ Malekian, (n. 38).

one who is killed defending his womenfolk is a martyr....' Fighting off an assailant is established in the Sunnah and by scholarly consensus.⁴² If a person or one of his womenfolk, such as his mother, daughter, sister or wife, is attacked, or his property, whether a slave or an animal is attacked, then he has the right to defend that by the least means that he thinks will ward off the attack. If he is able to ward it off with the least means, then, it is haraam for him to do more than that because there is no need for it. If he cannot ward off the attacker except by killing him, then he may do that, that is, killing the assailant, and he is not liable for that, because he killed him to ward off his evil.

It is important to state also that 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 Allaah, 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.

4. Legal Effect of Successful Plea of Self-Defence Under Islamic Law.

It is the responsibility of the accused to establish and proof the defence of self defence under Islamic law. Unlike other legal system, where it is needlessness of accuse raising issue of self defence before can be entitled to it. The court will advert its mind to it in the exercise of its discretion.⁴³ Successful plea of self defence under Islamic criminal law exonerate the accused person of criminal liability and no punishment would be available for the accused. This is in line with the statement of Allaah in the Holy Quran to the effect that 'if one avenges an injustice, he shall not be blamed.'⁴⁴

5. Conclusion

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-protection cannot be deemed unjustified. 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.

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 and Sunnah of the Prophet. 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. Besides, self-defence as a legal right is not absolute but relative. Moreover, this right is not deprived of restrictions and limitations.

⁴² Ibid.

⁴³ Asiyabala Orubo V. The State (2021) MWLR 1 (PT 9 1-203) PG 41-42

⁴⁴ Quran Chapter 42 verse 41.

A Critical Appraisal of Judicial Attitude Towards Judicial Corruption in Nigeria

Ibrahim Shuaib* & Halima Jimada**

1. Introduction

In response to the growing nature of corruption in Nigeria, the government enacted several statutes to deal with the menace. These laws prohibit corrupt practices amongst the three organs of government, including the judiciary. So far, several judges have been dismissed or suspended by the President on recommendation of NJC while some were arraigned before the court by anti-graft agencies on misconduct and corrupt charges including the Nation's Chief Justice. Unfortunately, the menace continues to thrive. This is because some factors have hindered the effectiveness of the anti-graft laws.

This paper reviews some selected cases on judicial corruption and corruption related offences in Nigeria. The cases under review are: *Hon. Justice Nganjiwa v Federal Republic of Nigeria*¹ and *Federal Republic of Nigeria v Hon. Justice Onnoghen Nkanu Walter Samuel*.² The cases are recent decisions of the court which generated a lot of controversies on how the Court applied the legal framework on judicial corruption in Nigeria. They also revealed the extent to which the framework has been applied by the courts and why the framework on judicial corruption has not been effective in curbing the menace. The decision of the Court of Appeal in *Nganjiwa v FRN* that a judge accused of corruption must first be sanctioned by the NJC before anti-graft agencies can prosecute them interferes with the power of anti-graft agencies to combat corruption. This is one of the factors affecting the effectiveness of the legal regime on judicial corruption in Nigeria. The decision sets a precedent to be followed before prosecuting judicial officers. Thus, in *FRN v Onnoghen*, the jurisdiction of the Court to hear the matter was challenged based on the decision of the court in *Nganjiwa v FRN* that the condition precedent to the arraignment of Justice Onnoghen was not complied with. This paper therefore investigates the decision of the court in the two cases as well as the arguments for and against the decisions.

2. Review of Hon. Justice Hyeladzira Ajiya Nganjiwa v Federal Republic of Nigeria (2018) 4 NWLR (Pt. 1609) 301

2.1. Facts of the Case

The appellant Hon. Justice Nganjiwa was charged before the High Court of Lagos State for the offences of unlawful enrichment by a public officer contrary to section 82 of the Criminal Law of Lagos State, No 11, 2011 and making false information contrary to section 39 (2) of the EFCC (Establishment) Act, 2004. The appellant however filed a Notice of Preliminary objection to challenge the jurisdiction of the trial court to hear the case against him on the ground that the conditions precedent to the filing of the Information had not been fulfilled. The preliminary objection was dismissed by the trial court by its ruling dated 23rd June, 2017. Being aggrieved with the ruling, the appellant appealed to the Court of Appeal vide a Notice of Appeal dated 7th July, 2017.

The Court of Appeal dismissed the trial court's decision and upheld the appellant's preliminary objection. The court held that the condition precedent for the filing of the charge was not complied with. Therefore, the trial court lacks the jurisdiction to entertain the matter.

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¹ (2018) 4NWLR (Pt. 1609) 301.

² CCT/ABJ/01/19.