

## Legitimate defense in Islamic law and jurisprudence

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**Abstract:** we investigate the subject of legitimate defense and requirements of defense and attack. How and based on what legitimate defense's rules is accepted in different countries laws and regulation. As far as we know, government is responsible to prevent crime and its impact and malfunction and the involvement of people in this field and committing criminal acts are prohibited. IN order for a legal defense to be and defendant is free from punishment, attack and aggression should be on special people and property. In Addition, self-defense is valid and legitimate, in which is done against aggression. When a person is committing the Necessary that action in respect to defense, his practice is not illegal.

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### 1. Introduction

Legal system of any society is the most important body and representing progress and growth of society in order to attain human right and values. Although people's merits, freedom and rights are determined by legal sources, specially civil law and constitution, but legal system guarantees and enforces these advantages and values because right and freedom is meaningful only when may be due to an enhanced criminal justice system it judges fairly and impartially. Self-defense is a phrase which is composed of two components.

First-rebuff means removing and giving up from force lexically defense in military terms means any tactic, which is used to neutralize enemy's attack (general criminal law, 1<sup>st</sup> vol H. Shambayati, p 328).

legitimate self-defense is One of the justifying reasons in Islamic criminal law. Legitimate self-defense in Islam is the principle of reciprocity. legitimate is derived from Sharia and means any action that is lawful and authorized by the Sharia (Islamic criminal law, Dr. Adel Sarykhany, published 2006, p 62).

Combining two provided definitions one can say that legitimate self-defense includes applying any forces, in which law authorizes to defend and removing the danger and aggression is legal. Generally in human societies government is responsible to protect people and people has no direct right of self-defense (general criminal law, Dr. Iraj Goldouzian, second edition, page 126). According to article 43 of Islamic penal law anyone who does something against attacker to defend his honor, body and freedom that seems a crime will not be prosecuted and punished. (general criminal law, P. sanaei, published 2009, page 245).

This principle is recognized by the holy Koran and states that anyone who attacks you reciprocate him (baqare sura / 194). The Prophet's (PBUH) has been

narrated that anyone defending his honor or property is killed, is martyr (vasael, kitab al Jihad).

### The nature of legitimate self-defense

Here the nature of the criminal law of Islam is discussed from the viewpoint of whether the defense is a right or verdict?

Briefly one can say that:

In shortest word it can be said that the right is considered to be given up or change and the can be left or done and based on Transverse point of view, basically legitimate defense is right who raped can make use of it and can defend he is a result of the transfer or leave and not considering the rights view transverse basically defense is right- you but from the Islamic viewpoint of human rights defense has various and double nature. Sometimes the defense is necessary to rule out and sometimes is the option and right (Source: D. Alatar, self-defense in criminal law of Islam, translated by A. Ghafoor, vol 2, publisher Astan Quds Razavi, p 43).

Five issues are necessary to be defended based on islam and one should defend otherwise he leads to his or TRESPASSER murder.

1 - Defending the Faith 2 - Defense of the Islamic country 3 - to defend the dignity and honor 4 - to defend the honor 5 - Defense of life (Islamic criminal law, Dr. Adel Sarykhany, p 64).

Imamieh jurists have expressed different opinions about the property. First point necessitates defending the property if it is necessary to have safety stops. Some people also consider it permissible to defend property (Lomeh, vol 2, 294).

### Protection of self, honor and property of others

Islam encourages cooperative culture in society and God says: (Virtue, righteousness) (Maede sura / 29) .The Prophet said: The best charity for you, is to

help desperate people. Prophet said: If the Muslim is asked to help and he doesn't help he is not a Muslim (javaher Alklam / C 21 / p 650). they allow other property (javaher Alklam, vol 21, p 650).

Some imameh jurists necessitate defense of others life provided that no harm is to be done for defender and some consider it permissible absolutely. Also in Imamieh jurisprudence there is a consensus that considers others honor defense as legitimate and permissible. Shiite jurists consider others property defense as permissible (javaher Alklam, vol 41, p 65/ Tahrir Alvasileh, vol 1, p 462/ Issue 12 – kashfol asnam, ketabe hodood).

### **Historical and philosophical basis for legitimate self-defense**

In different eras of history this principle is accepted that if a defender while defending against an illegal or illegitimate aggression commits a crime he shouldn't be punished or at least incurs low punishment. The right of defense is recognized in ancient Greece and Rome and Cicerone has pointed to the right. This was in the old French law and the was approved by the revolution criminal law. Today, in many countries, self-defense right is dedicated to people. Although different views have been expressed to explain it (the general criminal law, P. sanei, pp. 247).

### **SELF DEFENSE RIGHT IS OF HUMAN NATURAL RIGHT**

Some historians recourse to natural right to justify legitimate defense. Defense is a requisite for survival for any living, therefore it is a natural right. Human or animal to keep his survival and to defend his property protect himself against any event. This hypothesis was established by the cicerone and later on others supported it. Cicerone believed that legitimate defense is natural right and civil one, and this right is given to human by the nature and not by subjective laws (D r peymani, preference of legitimate laws in iran penal law 1978 p.9).

### **Social contract theory**

Famous French philosopher and writer Jean-Jacques Rousseau justifies the right otherwise.

He believes that, resorting to Social contract, human is a social animal and obliged to keep some regulations, which is necessary to survive the society and this duty, is made in the society, immediately and simultaneously after being a member. As soon as Social contract is breached, any member who is damaged, is able to enact his right and freedom (Social contract, Jean-Jacques Rousseau, translated by z. zadeh, edition 6<sup>th</sup>, p97).

### **Theory of two rights two rights Conflict**

According to this thesis which is stated as rejecting the justification of legitimate self-defense, if there is two conflicting rights and one of them should scarify for another one, that one is scarified which has low importance. Obviously, the man who raped should be protestor against aggressor and should be supported. The wrong person is corrupt and dangerous, if he is killed because of self-defending, the society and members of that would not be affected much. In contrast, trembling one's innocent or its long-lasting effects may make the society more concerned.

In this case, German philosopher, Hegel to justify legitimate self-defense and elaboration based on its legal base says: attack is to reject the right and defense to reject attack and consequently defense is to enact the right (general criminal law, 1<sup>st</sup> vol H. Shambayati, p 331).

### **Theory of spiritual obligation**

Some have established the non- guilt in the case of self-defense based on thinking (most and spiritual force) endodontic practice and according to this theory the committed crime in self-defense suggests the right but the offense is not punishable. Because it happened under the influence of determination unwavering and also the result of rape and assault and consequently leads to limit person's determination removing and will, and in fact makes kind of spiritual obligation, in which is one of the reasons of non-responsibility or more accurately is of guilt removing reason and in confronting reasons isn't considered as crime ( Atarod Aldfa Alshry fi al- al published in Beirut , page 43 ).

Accepting this theory leads to limit legitimate defense since in this case we can't exempt from punishment anyone defending in quiet manner and confidently because of the danger of invasion shouldn't apparently disturb the will of a person who loses his control.

### **Islamic legal theory**

Self-defense in Islamic law is known as right. Even the Shia jurists in some cases take action to protect religious duties. According to the rules of Islam, defending the (sole and privacy) is personal ability and invasive blood to be injured or killed is wasted. If the defender dies while defending will be considered as a martyr. The requirement of self-defense is an aggressive intent to attack. (Necessity of defensive measures) is sufficient to establish the legitimacy. At the same time keeping the order of defensive measure respect to severity of received damage has been necessary. Generally in the Shiite jurisprudences of exempting factors and removing any criminal and civil

responsibility and wrong doer not only is deserved to Limit 3 Punishment (Ta'zir) but also should guarantee and compensate any received damage to the victim. of the ablative any ( tahrir alvasileh , Imam Khomeini, islamic Defence).

### Conditions of legitimate self-defense

Indeed, the two basic elements of the defense, which should be considered, are:

1 - Rape ( danger ) 2 - the action of Defense ( safe disposal ).Evidently, in order to achieve legitimate self-defense, two above-mentioned elements should have some features in which if they don't exist, the practical features committed defense won't be legitimate. Jurists in terms of risk used ( Sayl ), which means oppression. ( Sayl ) means oppressor or the one who is going to attack and invade ( Dr. Adel Sarykhany , criminal law of Islam , p 65 ) .

### Illegitimate Risk:

Some risks are legal , including the risk of victim patrons have when they ask capital punishment for the offender or executing those who are sentenced to death. is the danger of Illegitimate action is forbidden based on Shariah and is on aggression and oppression. ( SeyedAli Tabatabaai Riyadh almasael , Volume 2 , Tahrir Alvasileh , Imam Khomeini , vol 1 , p 467).

Based on Islam illegitimate risk is established when an honorable right is at risk, which means the origin of danger isn't important in defense permit. Therefore the origin of danger, whether is criminally responsible or not (as a low-aged and insane) or the origin maybe is an animal, anyway because an honorable right is in danger it should be protected. The realization of the illegitimate threat risk is meant the risk of matter does not permit the defense . So what is the origin of the risk or not criminally responsible, or may even be a source of danger in any case , since animal rights respected threatened against it is permissible ( Muhammad Hasan Najafi , javahery , alhodod va almabsut , the book , page 625).

The risk should be present. The danger can be divided into three categories based on its realization time : A –future danger**b** - a threat that currently threaten human **c** - the risk of past

The first kind defense is not permitted because defense is to trespass Almbst , the book , page 625).

Moreover, defend against the future threat is punishment before the crime. In addition maybe trespasser withdraw before his crime that there is appeal to the powers of government. In addition, self-defense causes chaos and in the past threat or forgotten one, defense is not permissible because we cannot punish the trespasser. But also defense is a deterrent force to prevent danger or its progress and there is no danger to prevent it, in this case court

should enact the spoiled rights, Self-defense in criminal law of Islam book, criminal law of Islam Dr Davdalatar and Adel Sarykhany).

Defense is legitimate only under the danger in the present time. In this case two present forms of risk are:

1-when danger is likely to happen. So by defense we want to prevent danger, it is not logical to wait for it, but also by emerging the evidenced the present danger is recognized and should be defended(tahrir alvasileh, vol 1 , p 469 / and man Layhzh Alfqyh , Saduqi , vol 4 , p118).

Present risk or danger that it is not finished yet.2- clearly there is defense when there is Present attack then if trespass is started defender can stop aggression.The duration of legitimate defense depends on end of danger then by withdrawal,in any case, defense time is terminated either by stopping the aggression or trespasser withdrew or trespassed. ( Tahrir Alvasileh , vol 1 , p 471).

### Reality of danger

A danger is real when defender is sure about the danger. It is not allowed for defender to defend, unless trespasser's intent to attack or his belongings is likely. However if it is otherwise he is responsible toward the trespasser (fazel hendi kashfalam aljodood).

### 4. Discussion

Jurists discussed two conditions to fulfill legitimate self-defense for the defender :

1-The need for defensive action 2 – Fitness of defensive function, hodood , vol 41 , p 656(javaher).

Firstly, the necessity of defensive action The necessity provision pertains to defensive action not principle of defense legitimacy or being necessary. Whether the defense is obligatory or permissible it should have some features that one of them is necessity of defense. And by necessity means resistance and defense is the only possible way to remove the attack, then defense is permissible when there is attack .

If defender of wealth ,honor or life can escape and save himself because escapes is the easiest way to defend ( Muhammad al- Jamal al-Din , Lmh Dmshqyh , Volume 9, Beirut , Daralalm al , page 303 , and tahrir alvasileh , vol 1 , p 492).

Khomini says:in any struggle if there is possibility of freedom by escaping it is better to escape if someone's honor is attacked he can resort to another way rather than direct fighting(tahrir alvasileh , vol 1,p 468,question 11).

Secondly: Fitness of defensive function: there should be kind of match between degree of attack and defense. There is no justification for the use of severe violence.

The defensive action should be performed according to the principle of proportionality, that is, while defending the rule (Fa easy to easier) should be kept. If defender is in a place receiving help he should just shout and scream and nothing more, if shouting doesn't work defender should use hand and if hand doesn't work he should use stick otherwise he should use gun(mohaqeq heli,sharaei, kitab almabsut p.265).

#### **Judgments of honor, wealth and life self-defense**

Imamieh jurists consider self -defense necessary ( Lomh , Shahid sani , pp. 386 / khalaf tusi , vol 2 , pp. 169 and 170).some have emphasized the necessity of self-defense and state, in this case,that permission of withdrawal belongs to property and not life and honor but also life and honor self- defense is absolutely obligatory and jurist emphasized life self- defense (Tahrir Alvasileh , vol 1 , p 496 / Riyadh almasael , Volume 2 , Book of hodood).

So life self- defense is necessary according to prophet as he says:God considers enemy who sees thief and aggressor in his house and says nothing. Based on reason necessity of removing the loss is of clarified points and clear ( tahzib Ahkam , Vol 6 , pp. 57 and 167 , and tafzil vasaal Shia , Book of Jihad).

Imamieh Jurists have three implications to defend the honor: 1 - defend the honor, however, when provisions of adultery are obligatory and yielding isn't permitted. 2 - If the defender is killed in veneration of Defense it is imposed , but by the fear of murder ,defense is permissible for him ( kashfol asam,ketabe hodood, Msalk , Shahid sani vol 2 ketabe hodood - Lmh vol 2 , p 394 / Tahrir Alvasileh , vol.1 , pp. 467 and 268).3. Defense of family honor is necessary.

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