

OF PRIVATE DEFENCE UNDER
THE ISLAMIC LAW

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THE RIGHT OF PRIVATE DEFENCE UNDER THE ISLAMIC LAW

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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ABSTRACT

The topic of my dissertation is " The Right Of Private Defence Under The Islamic Law". This dissertation is divided into five chapters. The first chapter begins with a discussion of the concept of private defence as a right granted by the *syariah*, as well as the legal aspects of the exception, the sources of its legality before the law and the conceptual differences between private defence, necessity and duress.

The second chapter presents materials of prime importance in the scope of the defence. The chapter gives elaborative explanation about the circumstances or what should be defended and where the plea of private defence shall prevail. In the case of excessive force being inflicted on another party, an explanation is given to elaborate the matter further.

Chapter three focuses on the requirements needed to make the plea available to such an accused person. How far is the right allowed and can be determined by his use of weapons and the way a counter attack was inflicted.

On the basis that there are two kinds of private defence, chapter four solely concentrates on discussing that aspect which establishes that the general self defence or in other words, enjoining the right and forbidding the wrong is carried out to protect the rights of society in order to ensure their interest is guarded and well-protected.

To serve as an example, chapter five touches on the practical side of Malaysian Criminal Law regarding this defence. It is at the same time enable us to analyse and compare between the two systems so as to identify which law is more just, universal and complete. The focus is on The Penal Code (FMS Cap 45).

In the conclusion, a few words are given as an analysis and finalisation of the research.

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CHAPTER ONE

THE CONCEPT OF PRIVATE DEFENCE

INTRODUCTION

The concept of private defence is an important contribution to the preservation of life. The idea of defending one own self as well as honour and property has been widely acknowledged by all systems of law in the world and above all by the *Syariah*. Being a universal system and way of life, Islam caters to all needs human ever have.

To repel force with equal force is acceptable because normally, any reasonable man would not stand still and let himself be aggressed by others. Instinctively, he will resort to any necessary means and forces to fight against an aggression.

Islam is a complete religion which governs all aspects of human life. Not a single thing is left unattended by this sacred religion of thousands age. Being the law of nature (*din al-fitrah*), Islam regards the law of private defence as a basic right and permits people to defend themselves. The law is extended to defend honour and also property. The provision concerning protecting honour is not available in any modern laws, while life and property are obviously considered as two main privileges, thinkable to be protected. The right is not only confined to those of their own, but also extends to other people even though they are strangers to each other.

It is well known that as far as criminal law is concerned, private defence is one of the exceptions conferred as a practical proof that the law is based on human nature. This is certainly true because Our Creator is mighty knowledgeable about our interests, what is good and what is bad, what is needed and what is not.

In Islam, not only private defence is a topic discussed elaboratively under the Criminal Law, but it is also an important element under the Public Law. Mainly, as a defence, it is included substantively under the former, but where public law is concerned, the concept is expanded to generally protecting the interest of the people by the process called "enjoining" and "forbidding".

Between the two, the act of forbidding is given a due priority by the *Syariah* (although enjoining the right is established at the same time) for the peace and tranquillity of the public is really depending upon the existing of evils around. The more evils in their surroundings, the more their lives are drifted away from the right path. That is why the *Syariah* regards the duty as a sacred and religious one for it is meant to inculcate not only the sense of belonging among the people, but also to encourage people to feel connected to God Al-mighty. We are living under His virtue and it is His law that we should ascertain prevail in our society.

By elaborating both aspects of the concept and gather a true understanding, I believe that we will be more appreciative with our own religion and thus strengthen our own faith.

1.1 DEFINITION

Under Islamic Criminal Law, private defence is a personal right known as *daf'u al-sa'il* or *al-difaa al-syarie* or *daf'u al-siyal*. It is loosely translated as defending from attack¹. *Al-siyal* means attack or transgression.² *Al-sa'il* is a person who aggresses or attacks another person with the purpose of killing or taking away his property³. The person attacked has the right to defend

¹ Mohd. Al-Syarbini Al-Khatib, *Al-Iqna'*, v.2, p.240 (n.d)

² *Ibid.*

³ Yusof Ali Mahmood Hasan, *Al-Arkan A-'Adiah Wa Al-Syariah Li Jarimat Al-Qatl Al-'Amdl Wa Ajzlatuha Al-Muqarrarah Fi Fiqh Al-Islami*, p.125 (1982)

himself from the danger. Therefore, he is not liable to any criminal punishment or indemnity⁴.

Al-Janzuri defines private defence as " a defence against any unlawful act."⁵ Dr.Abdul Kadir Awdah views that what is compulsory for any person to adopt in preserving his own life or others' lives as well as his properties or the properties of others from any unlawful transgression by utilising any effort capable of.⁶

Yusuf Qasim when commenting on the definition brought by Awdah states that the definition is not conclusive because it does not mention anything about protecting self-respect or honour which in his opinion is more important to be protected than anything else. ⁷

Based on this reason, he gives a more comprehensive definition by stating that self defence is "opposing to any transgression which is unlawful in order to protect life, honour and property."⁸

In his view, the words life, honour and property are not confined to the defendant's *per se* but also include those of others.

Therefore, when an aggression is committed or about to be committed by one against another and that other has no time to seek any aid, he can take the law in his hands and prevent that one from committing or continuing to commit the offence. To add further, if that person is threatened with a reasonable apprehension of death or grievous hurt, he can cause that one death if he cannot otherwise avoid it. So, taking away human life or causing injury to another person is excusable when committed in self - defence.

Abdullah Yusuf Ali, noted that there are four possible situations where an individual may have to stand up against an oppressor :

⁴ *Ibid.*

⁵ Samu Al-Janzuri, *Al-Usus Al-'Ammah Li Qanun Al'Uqubah: Muqaranan Bi Ahkam Al-Syarlah Al-Islamiyah*, p.197 (1972)

⁶ Abdul Kadir Awdah, *Al-Tasyri' Al-Jina'ie Al-Islami*, v.1, p.473 (1985)

⁷ Yusuf Qasim, *Nazariat Al-Difaa Al-Syarie Fi Al-Fiqh Al-Islami Wa Al-Qanun Al-Wad'ie*, p.35 (1985)

⁸ *Id.* at 36

- i. for his own trampled rights,
- ii. for the rights of others within his kin,
- iii. a community may have similarly to stand up for its own right collectively or,
- iv. for the rights of others.⁹

1.2 AUTHORITIES AND BASIS OF PRIVATE DEFENCE

One who is attacked is perfectly justified to deliver counter - attacks to the assailants regardless of the aggressor's status or condition. It is immaterial whether he is a muslim or non-muslim, a free man or a slave, sane or mentally retarded, child or even animal.¹⁰ This ruling is founded upon holy sources of Al-Quran and Sunnah of the Prophet s.a.w.

a) From The Holy Quran

Allah s.w.t said to the effect":¹¹

فَمَنْ اَعْتَدَى عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا
اَعْتَدَى عَلَيْكُمْ وَاتَّقُوا اللَّهَ وَاعْلَمُوا ان
اللَّهَ مَعَ الصَّادِقِينَ - البقرة : ١٩٤

" whoever aggressed onto you, It is allowed for you to strike back on them the same way they did to you. Fear Allah and you should know that Allah will always be with those who restrain themselves".

In the light of discussing this ayat, the commentators stated that the word "I'tida' " connotes two things. First is hostility or enmity that goes beyond the limit unjustly while the second is to assault or attack.¹²

⁹ Abdullah Yusof Ali, *The Meaning Of The Holy Quran*, p. 1257 (1991)

¹⁰ Yusof Ali Mahmood Hasan, *loc.cit.*

¹¹ The Qur'an, Al-Baqarah:194

¹² Al-Tabari, *Jami' Al-Bayan Fi Ta'wil Aayl Al-Quran*, v.3, P.581 (1374II)

Other commentators elaborated that the very ayat means " whoever from the group of *musyrikin* attacks and kills you, it is allowed for you to kill them in return."¹³ It was said that this ayat was revealed to the Prophet s.a.w. in Madinah.¹⁴

Syed Qutb¹⁵ elaborated that the transgression to be inflicted to the aggressor should not exceed the limits based on the law of equality.

In another ayat, the Holy Quran lays down¹⁶ :

وإن طائفتان من المؤمنين اختلفتا فاصلحوا بينهما .
فإن يفت إحداهما على الأخرى فقاتلوا التي تبغي
حتى تفي إلى أمر الله .

" If two parties among the believers fall into a quarrel, make ye peace between them, but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah."

This ayat shows that killing is permissible in private defence, provided that it was not excessively done. This, of course depends upon reasonable apprehension of danger to the person under the particular circumstances of the case.

In Surah Al- Syura, ayat 39-41, Allah s.w.t. said :

والذين إذا أصابهم البغي هم ينتصرون
وجزاء سيئة سيئة مثلها فمن عفى وأصلح
فأجره على الله إنه لا يحب الظالمين

" and those who, when an oppressive wrong is inflicted on them (are not cowed but) help and defend themselves. The recompense for an injury is an injury equal there to (in degree), but if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loveth not those who do wrong."

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Syed Qutb, *Tafsir Fi Zilal Al-Quran*, v.1, p.191 (1986)

¹⁶ The Qur'an, Al-Hujurat: 9

A.Y. Ali comments that this right follows from the high value attached to an individual soul's personality in Islam. He then, further elaborated it by saying:

" when you stand up for rights, either on private or public grounds, it may be through processes of law, or by of private defence, in so far as the law permits private action."¹⁷

Another ayat which indicates that self-defence is allowed is ¹⁸ :

وانصروا من بعد ما ظلموا

" and defend themselves only after they are unjustly attacked."

b) Sunnah of The Prophet s.a.w.

The right of private defence has also its basis in the Traditions. Among them which is decisively mentioned is ¹⁹ :

من قتل دون دينه فهو شهيد . ومن قتل دون
دمه فهو شهيد . ومن قتل دون ماله فهو شهيد .
ومن قتل دون أهله فهو شهيد

" those who was murdered in defence of his religion, he died as a martyr, those who was murdered for his life, he died as a martyr, those who was murdered for his property, he died as a martyr and those who was murdered for his family also died as a martyr."

¹⁷ Abdullah Yusuf Ali, *loc.cit.*

¹⁸ The Qur'an, Al-Syuaraa:227

¹⁹ Al-Kahlani, *Subul Al-Salam*, v.4, p.40 (1970)

The tradition clearly mentioned the position of those who died in self-defence. Not only is he a martyr when protecting his life but his effort was also acknowledged in his plight to save others and also property.

Another saying is²⁰ :

عنه أبي هريرة أنه سمع رسول الله (ص) يقول :
 نحن الآخرون السابقون وبأسناده : لو أطلع في بيتك
 أحد ولم تأذن له حذفته بحصاة فقفاة عينه
 ما كان عليك من جناح .

narrated Abu Hurairah r.a. that he heard Allah's Apostle s.a.w. saying: We muslim are the last (to come) but will be the foremost (on the Day of Resurrection) and added :
 "If someone is peeping (looking secretly) into your house without your permission and you throw a stone at him and damage his eyes, there will be no blame on you."

In another narration²¹ :

عنه أبي هريرة رضي الله عنه قال قال الرسول (ص) :
 لو أن امرأاً أطلع عليك بغير إذن فحذفته
 بحصاة فقفاة عينه لم يكن عليك جناح .

" If someone is peeping into you without any permission, and you throw a stone at him and damage his eyes, you won't be blamed."

The Prophet s.a.w gave assurance that nothing is an offence which is done in exercise of private defence for it is our ample right granted by Allah s.w.t. The aggressor is the one who commits an offence as clearly understood from another tradition below, narrated by Muslim from Abu Hurairah in which he said:²²

²⁰ Muhd. Muhsin Khan, *Sahih Al-Bukhari* (trans.), v.9, p.18 (1979)

²¹ Abu Abdullah Al-Bukhari, *Sahih Al-Bukhari*, v.8, p.45 (1981)

²² Muslim Ibn Hajja, *Sahih Muslim Bi Sharh Al-Nawawi*, v.2, p.163 (1984)

جاء رجل الى النبي (ص) فقال : "يا رسول الله
 أرأيت إن جاء رجل يريد أخذ مالي؟ قال : فلا تعطه .
 قال : فإن قاتلني قال : فقاتله . قال : أرأيت إن
 قتلني؟ قال : فانت شهيد . قال : أرأيت إن قتلته؟
 قال : هو في النار .

" A man came to the Prophet s.a.w and asked him: Dear Prophet, what is your opinion if a person wants to take away my property? He said: don't give it to him. If he attacks me? He answered: then attack him too. He asked: If he kills me?. The Prophet said: You are a martyr. He asked back: If I kill him?. He answered: He will go to hell."

The emphasis which is stressed by the Prophet s.a.w and the previous ayat is that one is not bound to surrender to or retreat from any aggression done and should always make an effort to avoid danger in any circumstances. Thus, one who defended himself or property in circumstances where such defences were permitted, and in that defence killed an attacker or inflicted grievous hurt to him was excused and pardoned.²³ Al-Syarbini added that when the victim is considered as a martyr when he died in his plight of exercising the right of private defence, it means that he can counter-attack and kill. This is because his intention is not to commit an offence but only to avoid danger in such a circumstance.²⁴

C. Legal Maxims

The right of private defence also has its basis in the legal maxims. Legal maxims are rules which apply to all its particulars.²⁵ The basis is primarily taken from a hadith:²⁶

لا ضرر ولا ضرار

"Do not cause harm or being harmful"

²³ Ibnu Muhammad Al-Syawkani, *Nail Al-Awtar*, v.7, p.173 (1973)

²⁴ Muhammad Al-Syarbini Al-Khatib, *op.cit.*, p.241

²⁵ S. Mahmasani, *The Philosophy Of Jurisprudence In Islam*, p.151 (1987)

²⁶ Al-Kahlanly, *Subul Al-Salam*, v.3, p.84 (1960)

From the hadith, come several maxims such as:

1. Injury is removed. (*al-darar yuzal*),²⁷
2. Injury is removed as far as it can be.²⁸ (*al-darar yadfa'u bi qadar al-imkan*)
3. That which become permissible by necessity is estimated by the extent thereof. (*al-darurat tuqaddaru biqadarilha*)²⁹
4. Necessity renders prohibited things permissible. (*al-darurat tubihu al-mahzurat*)³⁰

The principle of removing injuries is very wide, and yet it also extends to exercising the right of private defence. Islamic law is very considerate in matters pertaining to protecting lives, property, honour and etc. as well as preserving the five main interests of human being. The five which are not based on worldly interest are religion, life, sanity property and lineage.³¹ All these fives are considered as major things that should be undoubtedly protected. Whatever come in its way, must be avoided.

As far as private defence is concerned, it is a right that should be exercised whenever life, body, property and honour are threatened. Any harm which is likely to endanger one of the fives, must be prevented. Islam has with clarity conferred the right of security of all those things. The divine law declares that whatever possessed by others is totally prohibited and one should use his right to avoid all that danger. If taking another's possessions is strictly prohibited, then the victim is obliged to hinder any aggression which is going to threaten him. Allah has equally lays down in the Holy Quran:³²

ولا تأكلوا أموالكم بينكم بالباطل

" Do not devour one another's wealth by false and illegal means."

²⁷ Jalaluddin Al-Suyuti, *Al-Ashbah Wa Al-Naza'ir*, p.83 (1983)

²⁸ Muhammad Al-Sayid Amim Al-Ihsan, *Qawa'id Al-Fiqh*, p.88 (n.d)

²⁹ Jalaluddin Al-Suyuti, *op.cit* p.84

³⁰ *Ibid.*

³¹ Muhammad Abu Zuhrah, *Al-Jarimah Wa Al-Uqubah Fi Al-Fiqh Al-Islami*, pp.35-37 (n.d)

³² The Qur'an, Al-Baqarah: 188

So, we are bound to protect all our belongings by utilising any method capable of being adopted, provided that we do not exceed the limit. This is because any injury should be removed. The counter-attack inflicted must also be reasonable.

One thing which is clear from those maxims is that we are encouraged to free ourselves from any danger, threats, injuries and so on. There is nothing ever mentioned about exposing ourselves to any danger or threat. Therefore, it justifies the right of private defence.

1.3 THE POSITION OF PRIVATE DEFENCE: A RIGHT OR AN OBLIGATION.

Muslim jurists have different views regarding the injunction of private defence. There are two major views:³³

One: Private defence is compulsory. Any person is obliged to defend himself to the extent of killing the assailant, which is justified by the law. This is the opinion of jurists from Shafie, Maliki, Hanball, Zahiri school of laws³⁴ as well as Hanafi and Zaidiyah.³⁵

Shafie jurists added that it is so when the attacker is a non-Muslim. Al-Syarbini ³⁶ said that to surrender to a non-muslim would definitely degrade the religion of Islam. In fact, if the enemy transgresses a muslim, the latter is obliged to defend himself. However, if the transgressing party is a fellow muslim, he cannot exercise the defence eventhough the former is an insane or a mentally retarded person.³⁷

³³ Yusof Ali Mahmood Hasan, *op.cit.* p.126

³⁴ *Ibid.*

³⁵ Shihabuddin Al-Alusi, *Ruh Al-Ma'ani Fi Tafsir Al-Qur'an Al-'Azim Wa As-Sab'ie Al-Mathanl*, v.6, p.112 (n.d)

³⁶ see *Al-Iqna'*, *loc.cit.*

³⁷ *Ibid.*

Majority view held that if the attacker was killed, his blood was vulnerable (*mubah al-dam*) before the law i.e no indemnity was due on the aggressed, while the aggressed party when killed is regarded as a martyr. This prevalent view was based on several *ayat* and *hadith*:

فان طائفتان من المؤمنين اختلفتا فاصلحوا بينهما
فان بقت احدهما على الاخرى فقاتلوا التي تبتغي
حتى تفي الى امر الله .

" If two parties among the believers fall into a quarrel, make ye peace between them, but if one of them transgress beyond bounds against the other, then fight ye all against the one that transgresses until it complies with the command of Allah."³⁸

According to this *ayat*, Allah has ordered us to kill the transgressing party and no transgression is greater than an intention to kill without any lawful reason. So, the *ayat* indicates killing any person who wishes to unlawfully kill another person is allowed. The same can be understood from the following *ayat*:³⁹

وقاتلوهم حتى لا تكون فتنة

" And you should kill them till there is no more *fitnah*."

The Sunnah is not silent on this ruling as it can clearly be seen from a narration by Abu Dawud:⁴⁰

من قتل دون ماله فهو شهيد ومن قتل دون أهله
فهو شهيد ومن قتل دون دمه فهو شهيد .

" Whoever is killed because of his property, he dies as a martyr, whoever is killed in defending his family, he dies as a martyr and whoever is killed to protect his blood (life), he also dies as a martyr."

³⁸ The Qur'an, Al-Hujurat: 9

³⁹ The Qur'an, Al-Baqarah: 193

⁴⁰ see Muslim Ibnu Hajja, *op.cit.* p.164

Another prominent evidence is as narrated by Abdullah ibn Hussin from Abdul Rahman Al-Aaraj from Abu Hanifah:⁴¹

أَنَّ ابْنَ أَبِي حَنِيفَةَ قَالَ :
مَنْ أُرِيدَ مَالُهُ بَعْدَ حَقِّ قِتَالِهِ فَهُوَ شَهِيدٌ

" Those whose property is sought and attacked, should he die for it, he dies as a martyr."

The Prophet s.a.w enjoines all muslims to protect themselves from all danger and no word was mentioned about falling victim to any aggressor. Abu Said al-Khudri once narrated that the Prophet s.a.w used to say:⁴²

مَنْ رَأَى مِنْكُمْ مَنَكْرًا فَلْيُغَيِّرْهُ بِيَدِهِ . فَإِنْ لَمْ يَسْتَطِعْ
فَلْيَسَانِهِ فَإِنْ لَمْ يَسْتَطِعْ فَبِقَلْبِهِ وَذَلِكَ
أَضْعَفُ الْإِيمَانِ .

" Should anyone of you see any misdeeds, try to change it with the hands (power), if he fails, he should resort to his tongue (by giving advice), and if he fails again, use his heart and that is the weakest (sign) of faith."

Aishah r.a said:⁴³

سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ :
مَنْ أَسَارَ بِحَدِيدَةٍ إِلَى أَحَدٍ مِنَ الْمُسْلِمِينَ يَرِيدُ قَتْلَهُ فَقَدْ وَجِبَ دَمُهُ

" I used to hear the Prophet s.a.w saying: Whoever shows his (sword) to any muslim with the purpose of killing, his blood is allowed to be shed."

Based on all these evidences, we can gather that priority should be given to protecting ourselves by resorting to any defensive action which is necessary to avoid any harm. For example, if someone believes that he is being attacked with a deadly weapon and he uses only such force as is reasonable to repel such attack, his action will be justified by the plea of self-defence.

⁴¹ Al-Suyuti, *Al-Jami' Al-Saghir Fi Ahadith Al-Basyir Wa Al-Nazir*, p.162, v.2, (4th ed.)

⁴² *Sahih Muslim Bi Sharh Al-Nawawi*, v.2, p.22 (n.d)

⁴³ Al-Suyuti, *op.cit.*, p. 164

Two: No act of self-defence is required but one should resort to fall victim and surrender.⁴⁴ In other words, private defence is only approved and recommended but not obligatory. This view was held by the majority of Maliki jurists, as well as Hanbali⁴⁵ and Zaidiyah⁴⁶. This is also the prevalent view of the Shafie jurists', adding that the surrender amounts to "istihbab" (recommended). Qadi Hussain is of the opinion that if one can avoid danger by adopting any other method other than killing, he is bound to do it, but if he cannot otherwise avoid it, he still cannot kill the attacker.⁴⁷

Al-Syarbini Al-Khatib elaborates further:

لا يجب الدفع اذا قصدتها مسلم ولو تخونا بل يجوز الإستسلام
 له بل يسن كما أفهمه كلام الروضة .

.... [a] muslim cannot defend himself if he is attacked by another muslim eventhough he (the attacker) is an insane. Infact, he should surrender as was made understood from Al-Nawawi In Rawdat Al-Talibin..... "48

This view tries to differentiate the injunctions pertaining to the right of self-defence by looking at the transgressing party. If they are non-muslims, the counter-attack is obligatory and allowed as a muslim cannot surrender to his enemy. On the other hand, if the attacker is a muslim, the transgressed party must surrender and cannot make any effort to transgress back.

The source of this principle's holders are as follow:⁴⁹

من قتل دون ماله فهو شهيد ومن قتل دون أهله
 فهو شهيد ومن قتل دون دمه فهو شهيد

" Whoever is killed in protecting his property , he dies as a martyr, whoever is killed in protecting his family, he dies as a martyr, and whoever is killed for saving his own blood (life), he dies as a martyr."

44 Yusof Ali Mahmood Hasan, *op.cit.*, p.129

45 see Ibnu Qudamah, *Al-Mughni*, v.8, p.463 (1972)

46 Yusof Ali Mahmood Hasan, *loc.cit.*

47 *Ibid.*

48 *supra* n.36

49 *supra* n. 40

From the above *hadith*, they deduced that the Prophet s.a.w rewarded the title of a martyr for those who were killed defencelessly. It indicates that a muslim, when aggressed should safely and instinctively surrender, eventhough he believed on reasonable grounds that the party was acting unlawfully.

Saidina Uthman r.a was reported to ignore those who rebelled upon him eventhough he had the power to attack them. In addition, he forbade others from doing so. He said:

من ألقى سلاحه فهو حر فصر على ذلك ولو لم يجز
لأنكر الصحابة عليه

" Those who take out their swords (to kill) is free and one should be patient over it. If it is not so, then the Companions would certainly express their objections." 50

The Prophet s.a.w went to the extent of instructing his followers:⁵¹

كن عبد الله المقتول ولا تكن عبد الله القاتل

" Let you be the slave of Allah who is killed rather than being the one who kills."

Assesing the opinions and sources of both principles, it is submitted that the jurists have unanimously disagreed on the matter of exercising private defence. While the differences remain, they however completely agreed that to defend honour is obligatory.⁵²

If any person's honour is affected, he should use any method capable of to prevent it. For instance, if a woman is being transgressed or somebody is trying to rape her, she is permitted to defend herself to the extent of killing

50 Mansur ibn Yunus Idris Al-Bahuti, *Kasshaf Al-Qina'* , as cited by Yusof Ali Mahmud Hasan, *op.cit.*, p.130

51 Al-Kahlanly, *op.cit.*, p.39

52 Ali Hasan Abdullah, *Al-Ba'ith Wa Atharuhu Fi Al-Mas'ullyyah Al-Jina'lyah*, p.257 (1982)

the aggressor. The same obligation applies to others. If in her plight to defend herself the aggressor dies, she is not liable to anything.⁵³

In the case of protecting the individual self, there are two views. One, if the transgressor is a non-muslim, the defence became obligatory as held by majority of the jurists. Two, if the attacker is a muslim, retreat and surrender is recommendable due to the *hadith* which indicated that being killed is far better than being a killer. If he is attacked by a muslim, he can exercise the defence but not to the extent of killing. In both cases, when death occurs, the aggressed party is labelled as a martyr.

From the above discussion, it is generally submitted that private defence is a right granted by Allah and should be exercised where necessary. To retreat before using any fatal force is only applicable when the attacker is a fellow muslim. However, the jurists who viewed that exercising the right of private defence is compulsory did not distinguish between the muslim or non-muslim attacker. As long as the aggression is done, one has every right to defend himself. If he has to kill the aggressor, according to some jurists, he must not intend the killing, instead his intention should be restricted to self-protection *per se*.⁵⁴ Some jurists said that:

لا يصح أن يقصد المصول عليه القتل وإنما ينبغي أن
يقصد الدفع فإن أدى إلى القتل فذلك إلا أن يعلم أنه
لا يندفع إلا بالقتل فجائز قصد قتله ابتداءً.

" It is unlawful if the aggressed party has an intention to kill the aggressor, but he should only intend to defend himself. However, if death resulted out of self-defence, he will not be liable. If he knew that the aggression can only be stopped by killing, then it is permissible to have an intention to kill from the beginning."⁵⁵

⁵³ Ibnu Shihabuddin Al-Ramli, *Nihayat Al-Muhtaj*, v.8, p.24 (1967). This issue will be discussed further in Chapter 2.

⁵⁴ Ali Hassan Abdullah, *op.cit.*, p.260

⁵⁵ *Ibid.*

Awdah is simply of the opinion that private defence, if exercised, does not make the person liable.⁵⁶ In most of the circumstances, Islam treats private defence as a duty while in some cases as a right.

1.4 PRIVATE DEFENCE AS A DEFENCE FROM CRIMINAL LIABILITY.

The general rule of criminal responsibility is that a person will be liable if the following requirements are fulfilled:⁵⁷

1. committing an unlawful act.
2. with his own free will (*ikhtiyar*)
3. with his knowledge. (*idrak*) and intention.

All these three elements are essential for criminal accountability. If any of them is absent, the person will not be liable to any punishment. However, there are certain exceptions⁵⁸ where a person shall be exempted from any criminal liability:

First: The *syariah* legitimatizes an unlawful act by various causes., and all such causes pertain to the exercise of a right or performance of a duty. In other words, exercise of rights and performances of duties make certain acts lawful and absolve the person committing it of accountability, while they remain unlawful for other people.

Murder for instance, is unlawful for all people and those who wilfully commit homicide is liable to the penalty of *qisas*., But, if a patient's life and relief depends upon a surgical operation, then it is lawful for the doctor to perform surgery and inflict wound on him.

Beating is an act forbidden for all the people. But to bring up children properly and inculcate discipline in them, it is necessary to beat them. The *syariah* enjoins to bring up children by providing them good training and

⁵⁶ Abdul Kadir Awdah, *op.cit.* p.437

⁵⁷ *Id.* at 392

⁵⁸ Abdul Kadir Oudah, *Criminal Law Of Islam*, v.2, pp.177-183 (1987)

education. It also allows those responsible for their upbringing to beat them for the achievement of that purpose.

In short, the nature of certain matters, the social and individual interests and the realisation of the ends of *Syariah* demand that some individuals should be occasionally allowed to do those acts which are unlawful for the people in general.

As far as right is concerned, the person is free either to exercise it or not. If he chooses not to exercise it, he will be at no fault and if otherwise, he will be committing no sin. In other words, a right is that whose exercise is lawful and whose relinquishment incurs no penalty.⁵⁹ Whereas duty, if a person on whom a duty is imposed abandons his duty, he will be a sinner and will have to undergo the prescribed punishment for it.⁶⁰

In order to ascertain whether an act is a right or duty, we have to ascertain whether or not doing such an act is obligatory under the *syariah* and whether or not the omission thereof is sinful and punishable. Among the acts which included under this category are:⁶¹

1. Private defence
2. inculcating discipline
3. medical treatment
4. sports
5. deprivation of personal security
6. rights and duties of authorities.

Thus, what are permissible by the *Syariah* including the above-mentioned subjects enjoy the unliabilities, as proved by a legal maxim: A Permissible Thing Negates compensation. (*al-jawaz al-syarie yunafi al-daman*)⁶²

⁵⁹ *Id.* at 181

⁶⁰ *Ibid.*

⁶¹ *supra* n. 56, p.472

⁶² Muhammad Al-Said Amlm Al-Ihsan, *op.cit.*, p.75