

The Principles of the Law of Self Defence in Pakistan: A Critical Evaluation

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Abstract

Self defence is one of the oldest laws of nature which is based on the instinct of survival. A person has a natural right to protect himself from any aggression that may seriously injure or kill him to the extent of doing the same to the assailant. Under Anglo-American jurisprudence, self defence applies to both civil and criminal law, while in Pakistan it solely applies to criminal law. The primary principles of self defence postulate that self defence is a guaranteed right of a person. He may exercise it provided there is a reasonable foreboding of danger to not just his own and another person's body and property. However, there are limitations that imposed on this right under law. However, these are still highly circumstantial in nature. The law has specified certain circumstances in which self defence may be exercised to the extent of killing the assailant. Should those circumstances not occur, then the assailant may be seriously harmed only. Lastly, on a surface level examination, there seems to be certain similarities and differences of self defence between the Islamic law and Pakistani law respectively.

Keywords: Crimes, offense, criminal jurisprudence, law, Self defence

Introduction

One of the oldest if not the oldest laws of nature is self defence (Merriam, 2010). It is based on the primal instinct of self-preservation and survival. It is only natural that one who is suddenly attacked by someone with the malicious intention of causing the other person serious harm or death wishes to survive even to the extent of harming or killing the other if need be. The first person thus exercises his genuine right of defending himself as he has a genuine will/desire to live. In fact, it has been accepted as a conception of natural right in certain common law countries.

For example, in America, the right to bear arms is considered a part of a person's right of self-defence. This is incorporated within the 2nd Amendment. The courts there have ruled that the 2nd Amendment itself at the time of ratification was not establishing any new right. Rather, it codified a pre-existing nature right (Kopel, 2008). Hence, self defence has been recognised as a natural right in America. Indeed, one has a natural inherent right to defend himself against any aggression which is aimed at killing or injuring him.

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For example, Ahmad who is returning home is suddenly attacked by Ali. Ali has a weapon on his hands such as a knife and is trying to slash Ahmad with it. Should Ahmad not do anything and instead let Ali injure or kill him? Naturally, Ahmad shall defend himself to the best of his ability so as to preserve his life. This may even be done to the extent of injuring or killing Ali. Ahmad may be able to grab Ali's hand where he is holding the knife and attempt to take it from him. During the ongoing struggle, Ali may have been slashed by the knife and as a result dies. Ahmad of course is not an offender as he was simply protecting himself. He had no *mens rea* (guilty intention) like Ali. His only intention was to protect himself. In contrast, Ali's intention was definitely malafide as he actively made an attempt at an injure or murder. Every offence requires the essential element of *mens rea* (Ibn Munir, 2024). However, one may instead argue that there are some crimes that do not require the element of *mens rea* (Ibn Munir, 2024). And thus, Ahmad should be considered an offender under this principle. However, this principle also does not apply here as Ahmad had a lawful justification to even kill the assailant as the assailant was trying to murder him. Ultimately, the right of self-defence may even be considered an exception insofar as the commission of an offence is considered. A person's primary instinct is the right to live, to survive and prosper. Should another person attempt to end that life or fatally injure him, undoubtedly, the person has a right to protect and preserve his life and already mentioned hereinabove.

This article therefore deliberates upon the basic principles of the law of self-defence in Pakistan. It briefly discusses its possible origins and nature before deliberating upon its intricacies. The article then proceeds with a contemplation on the law regarding self-defence in Pakistan. It critically evaluates the jurisprudence surrounding the postulates of self-defence as expounded and enunciated by the Pakistani superior courts. It also briefly contemplates the similarities and differences between the Islamic and Pakistani law of self-defence respectively.

Research Objectives

The objectives of this research are to deliberate upon the principles of the law of self-defence as evinced within our legal system. This paper shall critically evaluate these principles and scrutinise their effectiveness in real life scenarios. Thus, this paper shall contemplate on whether our current legal framework regarding self-defence is sufficient or needs improvement.

Research Methodology

This article incorporates the doctrinal research methodology as it directly analyses the applicable statutory law and its interpretation and application as expounded by the Pakistani Superior Courts. This article also incorporates an

analytic approach as it critically analyses and scrutinises substantial judicial decisions relating to the proposition.

Literature Review

Self-defence is amongst the oldest rights in human history. By self-defence, we mean in very simple terms a person's inherent right to be able to defend himself or his property against any aggression which may potentially injure or even kill him. Hence, one may refer to it as protecting one's property or person against any sort of harm attempted by another person (West, 2005, p. 89; Black, 1910, p. 1069). Another definition provides that it is a reasonable excuse or justification for one person to use force for the sake of resisting an attack aimed at him to the extent of even killing a person if need be (Black, 1910, p. 1069). Hence, self-defence is a lawful excuse or justification against any sort of aggression on one's person or property from another person even if it means fatally wounding or killing the assailant. We can ultimately conclude that there are three essential elements when it comes to the right of self-defence: the protection of one's person or property, the danger of being fatally injured/wounded or killed and lastly, the lawful use of force to be able to protect oneself to the extent of injuring or killing the assailant if necessary.

This doctrine was conceived as a result of making sure that anyone who is able to survive and successfully defend himself against such an attempt on his person or property will not also be considered an offender when he is in fact a victim (Kahan and Braman, 2008). If one person is committing a crime against the victim such as attempting to kill or murder him, then why should he also be considered an offender when he is protecting himself from the offender? (Kahan and Braman, 2008). Hence, the person who is protecting himself is both morally and legally not liable compared to the offender who was committing the crime as one is actively trying to commit a crime while the other is only protecting himself (Kahan and Braman, 2008).

Many assert that this doctrine has its origins in common law when it comes to Anglo-Indian and Anglo-American jurisprudence (Kahan and Braman, 2008). However, this doctrine has its philosophical or foundational origins as a principle of natural law possibly before the time of the Roman jurists (Meriam, 2010) as mentioned hereinabove.

The right of self-defence does not solely apply to criminal law but also to civil law. In fact, under American law, it is most commonly asserted in cases of assault and battery alongside homicide (West, 2005, p. 89). However, there has been little to no development under tort law in Pakistan. And thus, this principle mainly exists under Pakistani criminal jurisprudence. Self-defence is incorporated within the

Pakistan Penal Code, 1860 (“PPC”) and is referred to as the “Right of Private Defence.”

Primary Principles of Private Defence

Self-defence is a legally guaranteed fundamental right (*Sarwar Khan v. Muhammad Ayub*, 2009, para 13). Section 96, PPC stipulates that anything which is done under the exercise of private defence is not an offence (*Allah Rakha v. The State*, 1973 para 12; *Riaz Ahmad v. The State*, 1988, p. 1758). Hence, no criminal liability shall be incurred even when a person is murdered in exercise of private defence (*Alamgir v. Mst. Bakhti Siraja*, 2020, para 11). In the case of “*Khalid Mehmood v. The State*”, the Court observed that recognising the right of private defence is basically recognising the important instinct of self-preservation of society’s well-being. Self-defence is the oldest law of nature. It is based on the necessity of self-preservation. It is conferred under Section 96, PPC to the effect that every person has a right to defend himself. The only consideration is that such right should be used reasonably and should not exceed the limits which have been fixed by the law. However, this is contingent upon whether a person has a reasonable foreboding of danger under the particular facts and circumstances of the case (*Khalid Mehmood v. The State*, 1975, para 14). This observation is laudable and has been relied upon in subsequent cases thereafter (*Lal Khan v. The State*, 1977, p. 185).

Section 97, PPC provides that

“Every person has a right, subject to the restrictions contained in section 99, to defend

— First. — His own body, and the body of any other person, against any offence affecting the human body;

Secondly. — The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.”

Hence, all persons have a right of self-defence to either protect his himself and his property or another person and their property from the offences specified within Section 97, PPC (*Ghulam Farid v. The State*, 2009, para 5; *Munawar Bacha v. Mst. Basraja Bibi*, 2016, para 15). This is however, subject to restrictions provided under Section 99, PPC (*Mohim Mondal v. The State*, 1964, paras 24, 27 and 29). We will deliberate upon the restrictions hereinbelow.

A person has the right to defend himself and his property against anyone who is a minor, immature, insane or even an intoxicated person even if such acts are not considered offences (Pakistan Penal Code, 1860).

Intricacies Involving Self-Defence of the Body and Property

As mentioned hereinabove, self-defence can be exercised for the protection of not just one person's own body and property but also another person's body and property. One may exercise his right of self-defence to the extent of causing serious harm or death to the assailant keeping in mind the limitations of its use as provided under Section 99, PPC in the following specified circumstances: against any assault that has a reasonable foreboding of a serious harm or death, against sexual assaults/rape or any other offence of a similar nature, against any attempt at a kidnapping or abduction, against any act of wrongful confinement which will hinder the victim from contacting the authorities (Pakistan Penal Code, 1860; *Munawar Bacha v. Mst. Basraja Bibi*, 2016; *Alamgir v. Mst. Bakhti Siraja*, 2020, para 10).

However, should the nature of the offence not fall under the categories specified hereinabove, then the victim may only exercise his right of self-defence to the extent of causing him serious harm only, keeping in mind the limitations/restrictions of self-defence (Pakistan Penal Code, 1860). In both cases, self-defence commences as soon as a reasonable foreboding to the body arises from a threat to commit the offence. (Pakistan Penal Code, 1860). It does not matter whether such act is actually committed or not (Pakistan Penal Code, 1860). It shall continue as long as such foreboding of danger to the body continues (Pakistan Penal Code, 1860; *Khalid Mehmood v. The State*, 1975, para 14; *Muhammad Ishaq v. The State*, 1964, para 22).

Hence, one becomes the sole judge of the potential danger to his body, in which case the law allows him to pursue his right of self-defence for the sole purpose of protecting himself even to the extent of causing the assailant serious harm or death. In fact, such right can be exercised to the extent of taking a risk of causing harm to a third party if the victim feels he is in a position in which he may not be able defend himself without causing harm to an innocent party (Pakistan Penal Code, 1860).

Similarly, just as there are specified circumstances in which one may seriously hurt or kill the assailant for the purpose of exercising his right of self-defence, there are also specified circumstances for the defence of property in this case as well. These circumstances include the following: robbery, house-breaking by night, arson or mischief by fire on any building, tent or vessel which is used for the sake of dwelling or is part of a custody of property and lastly, theft, breaking into a house/house-trespass or any sort of mischief under such circumstances which may cause reasonable foreboding that such aforementioned act may cause a severe harm if the right of self-defence is not exercised (Pakistan Penal Code, 1860; *Ghulam Qadir v. The State*, 1959, paras 11-12; *Mohim Mondal v. The State*, 1964, para 29).

However, just like in the case of self-defence of the body, should the nature of the offence not be amongst the categories specified hereinabove, then the victim may only exercise self-defence to the extent of causing the assailant serious harm and not death subject to the limitations imposed by law (Pakistan Penal Code, 1860; *Sher Muhammad v. The State*, 1987, para 14).

In this case, the right of self-defence commences as soon as a reasonable foreboding of danger to the property commences (Pakistan Penal Code, 1860; *Muhammad Sharif v. The State*, 1959, para 11). When it comes to the any attempt at theft, the right of self-defence continues until either the offender flees or when the authorities arrive to provide their assistance or when the property has been recovered (Pakistan Penal Code, 1860). The same right continues for the act of robbery when as long as the robber attempts to kill, hurt or restrain someone or when the fear of all three acts from the robber continues (Pakistan Penal Code, 1860). The same goes for criminal trespass and house-breaking respectively as long as in both cases, the offender continues in his acts (Pakistan Penal Code, 1860).

Hence, when it comes to the commencement of the right of self-defence for body and property, it is contingent upon on whether there is any reasonable foreboding of danger to both of them respectively. However, when it comes to the continuance of this right, the right carries on for the former until the foreboding of danger continues while it carries on for the latter until the acts stop completely or the other specified circumstances stipulated by the law occur.

Restrictions against the Right of Self-Defence

As already mentioned hereinabove, self-defence has restrictions/limitations imposed on it. These restrictions/limitations include the following: against acts of a public servant committed by himself or by someone else under his direction in good faith and such act does not cause any foreboding of death or severe harm, in cases where there is a lot of time to be able to contact and be under the protection of the authorities. Lastly, the extent of exercising the right of self-defence is only to the extent of causing harm for the sole purpose of defending oneself and not more (Pakistan Penal Code, 1860; *Muhammad Nawaz Khan v. The State*, 2015, para 13).

Hence, we can understand that the right of self-defence has three basic limitations/restrictions as specified hereinabove. However, one does feel concern on the level of leeway granted to the public servant and anyone who has been authorised to act on his behalf. Trying to prove whether said act committed by the public servant or his authorised person was truly in good faith or not seems to be a herculean task in nature. Although, should said act have any foreboding of death or harm, then the public servant and his authorised person may be held liable.

The second limitation is a reasonable one. Should a person have enough time to call the public authorities, then he need not defend himself at all as the government authorities will be able to protect the person and even take care of the assailant. However, this is contingent upon whether the authorities will be able to reach in time in the first place. In case a person has called the authorities and they are not able to reach in time, does that mean that in such circumstances, the person who called them may be able to exercise their right of self-defence? Indeed, he should be able to do defend himself if the authorities are unable to reach in time.

Lastly, the third limitation is the most important one. While exercising self-defence, a person may be able to cause harm to the assailant only to the extent of defending himself and not more. That is to say, the right of self-defence may not be exercised purely for the sake of causing harm as much as one wants to but should only be exercised for causing harm as much as one needs to. Should the assailant be reasonably taken care of or has been disarmed for example. Then any harm caused beyond that will no longer be considered self-defence but will instead be considered an offence.

However, who will determine how much harm is needed to be caused for the sake of self-defence? How much harm will be considered too much or beyond what is needed? This was deliberated upon in "*Muhammad Hanif v. The State*." The Court ruled that the right of self-defence is a sacrosanct fundamental guarantee granted to the citizens against any unlawful aggression. Therefore, if one is faced with a dangerous adversary and in the process of defending himself, the person goes a little beyond the limit, he is still protected by the law. Hence, the courts should not place more restrictions on him than what is demanded by the law (*Muhammad Hanif v. The State*, 1991, para 19).

Hence, it is not completely expected of one person to reasonably calculate how much potential damage he may cause to the assailant. Such actions cannot be possibly measured in golden scales (*Muhammad Hanif v. The State*, 1991, para 20). The Court further ruled that "a person under strong feeling of self-preservation pursuing his defence a little further than absolutely necessary was entitled to the indulgence of the Court" (*Muhammad Hanif v. The State*, 1991, para 20). This proposition is enunciated even further by the Peshawar High Court in "*Ghulam Farid v. The State*", where the Court held that the law makes the law allows certain leeway for the sentiments of a person placed in the situation of a peril who has no time to think. Therefore, in the chaos that ensues, one cannot be expected to weigh in golden scales the force he exercises when the instinct of self-preservation is strong upon him (*Ghulam Farid v. The State*, 1964, para 21). Should he use a bit more force further than necessary in exercising his right of self-defence, then the law affords him some just allowance.

In such cases, in order to answer to determine whether the force used was more than what was necessary, the court must place itself in the place of the victim in those particular circumstances and endeavour to reasonably ascertain whether he had a reasonable foreboding of a severe harm or death and whether he inflicted more harm than what was necessary for the purpose of self-defence (*Ghulam Farid v. The State*, 1964, para 21)

In the case of “*Muhammad Shafique v. The State*”, where the accused were convicted of *Qatl-e-Amd*. The accused pleaded self-defence. We will concern ourselves with the Court’s observation on the law of self-defence. The Court held that the law of self-defence is multi-dimensional. Determining whether the right of self-defence can be exercised or not is contingent upon the nature of the offence and the sequence of events. Ultimately, the right of self-defence does not provide a license for an unlimited description of harm to be caused to the assailant. The right only commences when reasonable foreboding arises from an attempt or threat to commit an offence. It may continue as long as such danger or foreboding to the body continues (*Muhammad Shafique v. The State*, 2008, para 20)

This is laudable. Additionally, it is not necessary that one person should wait to be attacked by the assailant in order to exercise his right of self-defence (*Muhammad Shafique v. The State*, 2008, para 20; *Shamus Gul v. The State*, 1983, p. 329). Such right may also be exercised by not just the person himself but also by another person on his behalf, provided that the victim apprehends danger that is at the level of a severe hurt or death (*Fayyaz Akbar v. The State*, 2000, at para 20).

Self-Defence under Islamic Law

When it comes to the concept of self-defence under Islamic law, the underlying intention behind it matters (Owaydah & Yunnis, 2017). If it is committed with a faithful cause in mind, then it is considered justifiable (Owaydah & Yunnis, 2017). However, should it be committed with an intention to cause senseless violence, then it shall not be considered self-defense (Owaydah & Yunnis, 2017). Additionally, the principle of proportionality also applies here. Self-defence must be committed proportionate to the aggression aimed at the victim (Owaydah & Yunnis, 2017).

However, the principle of proportionality shall not apply unless and until there is a definite act of violence or aggression which constitutes as a substantial wrongful conduct against a person’s life and property (Owaydah & Yunnis, 2017). Additionally, it cannot be applied when there are non-violent alternatives which can be used instead (Owaydah & Yunnis, 2017).

Coming back to the question of intention, this also falls under the stem of self-defence under Pakistani law. Under Pakistani law, a person may not exercise self-

defence as much as he wants to, only as much as he needs to. This is in line with the notion of faithful causes and senseless violence under self-defence in Islamic law. However, while there is leeway granted to someone who has crossed the line with the former, such leeway does not exist in the latter. Unnecessary violence is completely prohibited under Islamic law.

Hence, this seems to be in line with the principles of self-defence under Pakistani criminal jurisprudence discussed hereinabove. A full examination of these principles under the lens of Islamic law is beyond the scope of this paper however.

Conclusion

Self-defence is one of the oldest if not the oldest laws of nature. It is based on the primal instincts of survival and self-preservation. It refers to a person's fundamental right to protect themselves from any sort of assault which could cause serious harm or death to them if there is any reasonable foreboding of danger to a person's body or property. Under Anglo-American jurisprudence, self-defence applies to both criminal and civil law. Whereas, in Pakistan as there is a lack of development in the law of tort, self-defence is incorporated solely within the criminal law.

There are many principles that regulate the law of self-defence in Pakistan. First, it is a guaranteed right for each and every individual. Secondly, anything that is done as a result of exercising self-defence is not considered an offense at all. Thirdly, a person has the right to exercise his right of self-defence for not just themselves and their property but also for another person and their property. Fourthly, a person also has a right to exercise self-defence against those acts committed by someone who is legally disqualified either permanently or temporarily such as a minor, immature, insane or intoxicated person despite the facts that in such cases, such acts are not considered as offenses.

Insofar as the limitations are concerned, the notion of determining whether the act committed by a public servant or his authorised person being in good faith or not seems to be a herculean task. Additionally, the calling of authorities is highly contingent on whether they are able to arrive on time or not. It is presumed that in such a case, a person may resort to self-defence for the sake of necessity. Lastly, the most important limitation is that self-defence may not be exercised purely for the sake of causing harm as much as one wants to but should only be exercised for causing harm as much as one needs to. However, the superior courts have ruled that in such cases, even if the victim goes a little beyond what was needed for the sake of self-defence, the law allows him leeway as one is unable to reasonably ascertain what level of damage he should or should not cause.

Furthermore, the court must place itself in the place of the victim in those particular circumstances and endeavour to reasonably ascertain whether he had a reasonable foreboding of a severe harm or death and whether he inflicted more harm than what was necessary for the purpose of self-defence in order to answer to determine whether the force used was more than what was necessary. Lastly, there are certain similarities and differences between the Islamic law of self-defence and self-defence in our legal system. However, a full examination of these self-defence principles from the lens of Islamic law is beyond the scope of this paper.

Recommendations

From the detailed deliberation hereinabove, we make the following recommendations:

- The law should be amended to include giving proper compensation to innocent third parties who were injured/harmed while the victim was exercising self-defence.
- The law should also be amended in order to clear the ambiguities concerning the limitations of self-defence. This should be done especially in the case of the public officer and his delegated agent so as to prevent potential abuses of power.
- The law should also be amended in order to clear the ambiguity regarding a person crossing the line while exercising his right of self-defence although the courts have already ruled that they will deal with it.
- An appraisal of this law should be conducted from the lens of Islamic law so as to ensure that it is conformity with Islamic law.
- The application of the principles of self-defence under Islamic law by the courts so as to ensure an enrichment of the criminal jurisprudence in this regard.

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