



## THE CONCEPT OF SELF-DEFENCE IN ISLAMIC JURISPRUDENCE

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The purpose of this paper to delineate and explore the concept of self-defence in Islamic jurisprudence from various perspectives. That is, self-defence is to be scrutinised as both a general concept of Islamic jurisprudence and a specific idea of various schools of Islamic law, such as Sunni schools of Sahfii, Hanbali, Maliki, and Hanafi. Given this, the current study is purposed to provide comprehensive answers to a series of research questions. Thus, the primary question of research should be formulated as follows: What is the legal basis for self-defence under Islamic jurisprudence? To continue, the secondary question of research should be articulated as follows: What are the principles of self-defence under Islamic jurisprudence? The last but not least, the tertiary question of research should be stated as follows: What are the specificities of the practical application of the principles of self-defence by Islamic jurists, judges, lawyers and other participants of the legal process? After everything has been given due consideration, it is necessary to generalise that self-defence under Islamic jurisprudence has specific legal basis, specific principles, and peculiarities in their practical application of these principle 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 jurisprudence 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.

**Keywords:** Self-defence, Islamic jurisprudence, Principles, Legal basis.

### Introduction

The purpose of this paper to delineate and explore the concept of self-defence in Islamic jurisprudence from various perspectives. That is, self-defence is to be scrutinised as both a general concept of Islamic jurisprudence and a specific idea of various schools of Islamic law, such as Sunni schools of Sahfii, Hanbali, Maliki, and Hanafi. Given this, the current study is purposed to provide comprehensive answers to a series of research questions. Thus, the primary question of research should be formulated as follows: What is the legal basis for self-defence under Islamic jurisprudence? To continue, the secondary question of research should be articulated as follows: What are the principles of self-defence under Islamic jurisprudence? The last but not least, the tertiary question of research should be stated as follows: What

are the specificities of the practical application of the principles of self-defence by Islamic jurists, judges, lawyers and other participants of the legal process?

### **The Legal Basis for Self-defence under Islamic Jurisprudence**

After the purpose and research questions of this study have been delineated, it is mandatory to commence search for comprehensive answers to the questions of research.<sup>1</sup> The first research question pertains to the legal basis for self-defence under Islamic jurisprudence. To start with, it needs to be clarified that the term ‘legal basis’ denotes legal reasons for something.<sup>2</sup> Therefore, the phrase legal basis for self-defence under Islamic jurisprudence means legal reasons underlying the concept of self-defence as specified by Islamic jurisprudence.<sup>3</sup> On the other hand, the notion of jurisprudence encircles both practice and theory of law. In that vein, Islamic jurisprudence is viewed through the prism of an instrument which determines theoretical and practical dimensions of the concept of self-defence.<sup>4</sup>

To be more precise, Wasti writes that legal basis in terms of Islamic law consists of theoretical and legal foundations.<sup>5</sup> That is, theory and legal practice play equal roles in shaping the legal basis of every concept under Islamic law, including the notion of self-defence.<sup>6</sup> Besides, Wasti provides that every source of Islamic law can make a different impact on the administration of criminal justice, especially in terms of different concepts of criminal law, such as the concept of self-defence.<sup>7</sup> Following Wasti’s arguments and observations, it is possible to arrive at the conclusion that the legal basis of self-defence as a concept of Islamic law may involve diverse and even conflicting issues, taking into consideration that Islamic law, or, it is much better to say Islamic jurisprudence, is a very ‘parti-coloured’ and complex system which lacks uniformity and chronological immutability.<sup>8</sup>

As a matter of fact, Wasti’s research unveils a very important particularity of Islamic jurisprudence as a source of the legal basis of self-defence – its variability and evolutionary nature.<sup>9</sup> Thus, Wasti makes it clear that Islamic jurisprudence tend to evolve and metamorphose in different Islamic countries and under different historical circumstances.<sup>10</sup> Therefore, the legal basis of self-defence under Islamic jurisprudence is also subject to evolution and alteration.<sup>11</sup> In this connection, it is affordable to presuppose that the key driver of such evolution and transformation lies in the fusion or disintegration of the traditional law of Shari’a and non-Islamic legal tenets.<sup>12</sup>

For instance, Wasti writes that the legal basis of the new Pakistani law of murder and culpable homicide, presumably based on the principles of the law of Shari’a, such as *diyat* and *qisas*, did not underlie the Legislative Assembly of Pakistan.<sup>13</sup> Instead, the aforesaid law was carefully considered, thought over, debated, discussed, weighed, dissented and finally accepted by judges of the Shariat courts,

<sup>1</sup> AA Al-Alfi, Punishment in Islamic criminal law (1982) *Bassiouni MC The Islamic criminal justice system*, 17.

<sup>2</sup> Cambridge Dictionaries Online, ‘Basis’, <http://dictionary.cambridge.org/dictionary/learner-english/basis>.

<sup>3</sup> AA Al-Alfi, Punishment in Islamic criminal law (1982) *Bassiouni MC The Islamic criminal justice system*, 17.

<sup>4</sup> AA Al-Alfi, Punishment in Islamic criminal law (1982) *Bassiouni MC The Islamic criminal justice system*, 17.

<sup>5</sup> T Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (Brill, 2008), 57.

<sup>6</sup> T Mahmood, *Criminal law in Islam and the Muslim world: a comparative perspective* (Vol. 2) (Institute of Objective Studies, 1996), 47.

<sup>7</sup> T Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (Brill, 2008), 239.

<sup>8</sup> T Mahmood, *Criminal law in Islam and the Muslim world: a comparative perspective* (Vol. 2) (Institute of Objective Studies, 1996), 47.

<sup>9</sup> R D White, *No space of their own* (Cambridge University Press, 1991), 11-78.

<sup>10</sup> R D White, *No space of their own* (Cambridge University Press, 1991), 11-78.

<sup>11</sup> R Cryer, H Friman, D Robinson, & E Wilmschurst, *An introduction to international criminal law and procedure* (Cambridge University Press, 2014), 86.

<sup>12</sup> M Lippman, *Islamic criminal law and procedure: religious fundamentalism v. modern law* (1989) *BC Int'l & Comp. L. Rev.*, 12, 29.

<sup>13</sup> T Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (Brill, 2008), 57.

‘on whose insistence it was ordained by the State in 1990.’<sup>14</sup> The aforementioned fact clearly exemplifies how complex and variable Islamic jurisprudence is.<sup>15</sup> Also, it is doable to infer from Wasti’s arguments that the legal basis of self-defence under Islamic jurisprudence must not be viewed merely through the prism of Islamic legal theory, taking into account that the Shariat courts may carve the legal basis of self-defence in conformity with practical challenges and expectations.<sup>16</sup>

Debating on the legal basis of self-defence under Islamic jurisprudence, it is suggested to consider Kamali’s arguments, who stresses on the critical role of principles of Islamic jurisprudence in defining and regulating various concepts of Islamic law.<sup>17</sup> Undoubtedly, it is imprudent to ignore the role of legal principles in shaping the legal basis of self-defence under Islamic jurisprudence.<sup>18</sup> Although the discussion of major principles of self-defence under Islamic jurisprudence is to be made in the next section of this study, it is deemed wise to pay heed to the relationship between the principles and legal basis of self-defence. In this light, Kamali writes that the principles of Islamic jurisprudence, also known as *Usul al-fiqh*, constitute the roots of Islamic law.<sup>19</sup>

In view of the above, it needs to be emphasised that the legal basis of self-defence under Islamic jurisprudence embraces fundamental reasons underlying self-defence as a legal concept.<sup>20</sup> Therefore, the principles of Islamic jurisprudence, as the roots of Islamic law, can be considered the first and foremost sources of Islamic jurisprudence which define the legal basis of self-defence.<sup>21</sup> To put it in other words, the principles of Islamic jurisprudence not only provide the most fundamental insights into the nature of self-defence as a concept of Islamic law, but also prescribe the methodology of law that help to deduce new reasons as the legal basis of self-defence.<sup>22</sup> Thus, according to Kamali, the methods of deduction and interpretation should be considered the primary methods of *Usul al-fiqh* which are not exclusively devoted to methodology. To put it in other words, Kamali defines *Usul al-fiqh* as ‘the science of sources and methodology of the law’ as well as ‘the subject matter to which the methodology of usul al-fiqh is applied.’<sup>23</sup>

In other words, the methodology of *Usul al-fiqh* refers to various methods of reasoning, including juristic preference (istihsan), analogy (qiyas), presumption of continuity (istishab) and the rules of interpretation and deduction.<sup>24</sup> Following Kamali’s arguments, it is possible to make inference that the legal basis of self-defence originates not only from well-known sources of Islamic jurisprudence, such as the Quran or Sunnah, but also from the methodology of *Usul al-fiqh*, which helps to extend the legal dimensions of the concept of self-defence by viewing the concept from the prism of continuity, analogy, juristic preference, deduction, and interpretation.<sup>25</sup>

In his other publication, Kamali points out that the legal basis of substantial legal concepts under Islamic jurisprudence is determined by salient features of Shariah.<sup>26</sup> To be more precise, Kamali writes

<sup>14</sup> T Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (Brill, 2008), 57.

<sup>15</sup> GJ Weimann, Judicial Practice in Islamic Criminal Law in Nigeria—A tentative overview (2007) *Islamic Law and Society*, 14(2), 240-286.

<sup>16</sup> GJ Weimann, Judicial Practice in Islamic Criminal Law in Nigeria—A tentative overview (2007) *Islamic Law and Society*, 14(2), 240-286.

<sup>17</sup> M H Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society, 1991), 3.

<sup>18</sup> GJ Weimann, Judicial Practice in Islamic Criminal Law in Nigeria—A tentative overview (2007) *Islamic Law and Society*, 14(2), 240-286.

<sup>19</sup> M H Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society, 1991), 12.

<sup>20</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>21</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>22</sup> R Peters, Islamic and secular criminal law in nineteenth century Egypt: The role and function of the Qadi, (1997) *Islamic Law and Society*, 4(1), 70-90.

<sup>23</sup> M H Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society, 1991), 12.

<sup>24</sup> M C Bassiouni, Sources of Islamic Law, and the protection of human rights in the Islamic criminal justice system (1982) *The Islamic Criminal Justice System*, 3, 23.

<sup>25</sup> M C Bassiouni, Sources of Islamic Law, and the protection of human rights in the Islamic criminal justice system (1982) *The Islamic Criminal Justice System*, 3, 23.

<sup>26</sup> M H Kamali, *Shari'ah law: an introduction* (Oneworld Publications, 2008), Chapter 3.

that the law of Shariah can easily be described as a ‘diversity within unity, diversity in detail and unity over essentials.’<sup>27</sup> To that end, the concept of self-defence can be analysed as diverse in legal details but united in terms of its essential elements.

As a matter of fact, the finality of the divine revelation of the Quran and its timeless validity is deemed by Kamali instrumental in making a unifying effect which guarantees that there is continuity in the comprehension of legal fundamentals.<sup>28</sup> That is, the legal basis of self-defence rests on the universal legal fundamentals of the Quran as the key source of law that makes a unifying influence on the understanding and application of the concept of self-defence in practice.<sup>29</sup> Following the reasoning of Kamali and other researchers, it is attainable to deduce that the Quran is the core of the legal basis of self-defence. Thus, Akhtar reveals that the Quran produces ‘an enthusiastic embrace of the divine will.’<sup>30</sup> The idea of enthusiasm is often correlates with the notion of zeal. According to the quranic verses, enthusiasm is imposed on all Muslims with the exception of the infirm and disabled.<sup>31</sup>

As far as the concept of self-defence is concerned, Akhtar unfolds that the early Muslims tended to refrain from fighting even in self-defence, whereas the Quran erodes their reluctance and inertia by stipulating them that it is incumbent on God to judge of what is bad or good for the Muslims.<sup>32</sup> As the core of the legal basis for self-defence, the Quran provides that violent fight against militant infidel opposition is divinely sanctioned. Furthermore, all violent struggles are sanctioned by the Quran if they are carried out in self-defence. To that end, it is achievable to discern spiritual nature of a violent struggle, especially in terms of self-defence.

To elaborate further on the fundamental essence of the Quran as the core of the legal basis of self-defence, it needs to be pointed out that the ninth Quranic chapter, being one of the two al-jihadan surahs, presents a unifying theme that any violent struggle against armed infidel adversity is sanctioned by God.<sup>33</sup> Therefore, self-defence as violence against an armed pagan hostile is clearly permitted under the Quranic law. The fact is that the Quran prescribes no geographical or political motives of self-defence. As the case stands, quranic verses focus merely on the religious/spiritual facets of violence that is committed in self-defence.<sup>34</sup>

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.<sup>35</sup> That is, self-defence is justifiable under Islamic jurisprudence as long as it is committed for the faithful cause.<sup>36</sup> 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.<sup>37</sup>

To continue the discussion of the legal basis of self-defence under Islamic jurisprudence, it is vital to reiterate that the Quran ensures the unity of the legal basis of self-defence, whereas the legal practice brings into light existent discrepancies in this field. Thus, for instance, Lippman, McConville, and Yerushalmi write that there are regional disparities in the local characteristics of the law of Shari’a, while the law of Shari’a denotes a progressive and straightforward step in the development of Islamic legal practice as it metamorphoses the Islamic customs of blood revenge and retaliation.<sup>38</sup> It is doable to infer from the aforementioned argument that there is no unified or codified legal basis of self-defence, because

<sup>27</sup> M H Kamali, *Shari’ah law: an introduction* (Oneworld Publications, 2008), Chapter 3.

<sup>28</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>29</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>30</sup> S Akhtar, *The Quran and the secular mind: A philosophy of Islam* (Routledge, 2007), 9.

<sup>31</sup> Quran:9:90-1; 48:17.

<sup>32</sup> Quran:2:216; 4:77.

<sup>33</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>34</sup> Quran:9:38-99.

<sup>35</sup> Quran:9:38-41

<sup>36</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>37</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>38</sup> M R Lippman, S McConville, and M Yerushalmi, *Islamic criminal law and procedure: An introduction* (New York: Praeger, 1988).

the Quran itself does not preclude a possibility of disparate interpretation of the concept of self-defence in Islamic legal practice.<sup>39</sup>

Besides, Weimann argues that divine law of the Quran may conflict with local customs in different Islamic cultures.<sup>40</sup> In other words, the fact that a violent act is considered self-defence under the quranic precepts does not automatically entail the recognition of the violent act as self-defence under customary law.<sup>41</sup> The problem is that every Islamic country makes personal decisions on how and to what extent Islamic law should be applied in the territory of the country. Hence, it follows that the concept of self-defence may be unequally understood, interpreted and applied in different Islamic states. Therefore, the legal basis of self-defence under Islamic jurisprudence is shaped not only by various sources of Islamic law and legal practice, but also by the will of Islamic statesmen who are entrusted to decide on the implementation of the law of Shari'a in practice.<sup>42</sup>

In addition to this, it needs to be pointed out that the process of re-islamification of certain territories, such as the northern states of Nigeria, affects the formation and practical utilisation of the legal basis of self-defence.<sup>43</sup> The fact is that the process of re-islamification may change the state of affairs in the affected states by way of developing new interpretations of self-defence based on classical Islamic texts.

Returning back to the issue of diverse sources of Islamic law and practice, it needs to be claimed that all these sources can be categorised into two major groups, taking into account their regulative effects on the concept of self-defence.<sup>44</sup> The first group can be described as Islamic positive law. The second group can be regarded as Islamic customary law. As far as the first group of sources is concerned, Islamic jurisprudence considers self-defence as a legitimate right of individuals, Islamic states, and nations to have recourse to violence under the conditions of absolute necessity.<sup>45</sup>

In this connection, it needs to be recapitulated that specific quranic verses prescribe the concept of self-defence as a significant element of Islamic positive law.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

Likewise, the concept of self-defence is addressed in the framework of Islamic customary law. The key role of customary law is to fill the gaps in the legal regulation of self-defence under Islamic positive law. To that end, Islamic customary law focuses on the principles of self-defence that can be deduced and extended from the Quran and other sources of Islamic positive law.<sup>49</sup> The fact is that Islamic customary law stresses on the significance of self-defence as an instrument for justice and not for violence.

<sup>39</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>40</sup> G J Weimann, *Islamic criminal law in northern Nigeria: politics, religion, judicial practice* (Amsterdam University Press, 2010), 55.

<sup>41</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>42</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>43</sup> R Peters, and M Barends, 'Islamic criminal law in Nigeria' (2003), 46.

<sup>44</sup> F Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 39.

<sup>45</sup> A prof M Yunus, *The Exercise of Self Defence to Cause Death; A Legal Analysis under the Malaysian Penal Code*, (Thomson Reuters Malaysia Sdn Bhd, 2016) 59.

<sup>46</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>47</sup> J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.

<sup>48</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>49</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.



### Critical Analysis of the Principles of Self-defence under Islamic Jurisprudence

After the key facts and arguments concerning the legal basis of self- have been provided, it is essential to get back to the issue of the principles of self-defence under Islamic jurisprudence.<sup>50</sup> As the foregoing discussion must suggest, the principles of self-defence are fundamental roots of Islamic law upon which all legal concepts, theories, and practices are based.<sup>51</sup> Therefore, the principles of self-defence define the basic nature of self-defence as an Islamic legal concept. In this connection, it is prudent to start with the principle of a twofold interpretation of self-defence.<sup>52</sup> This principle can be inferred from the Quran.<sup>53</sup>

The quranic verses convey rulings and precepts which may be either clear and unequivocal, or open to different interpretations due to the unclear language of the quranic texts. Thus, it is undisputed that self-defence is permitted by the Quran under the circumstances of violent aggression of unbelievers.<sup>54</sup> However, additional interpretations are needed with regard to the particularities of self-defence under other threats and circumstances.<sup>55</sup> The problem is that the Quran contains passages which are in the nature of probability (*zahir*) and ambiguity (*mujmal*).

With regard to self-defence, 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 man-kind.”<sup>56</sup> The aforesaid passage conveys both unequivocal and unclear characteristics of self-defence under Islamic jurisprudence.<sup>57</sup> To be more precise, the verse in question permits self-defence as an act of saving an individual’s life, and, on the other hand, prohibits any form of killing. Therefore, additional interpretations are required in order to ascertain whether killing in self-defence is allowed under Islamic jurisprudence in terms of saving another individual’s life.<sup>58</sup>

To elaborate further, the next passage also exemplifies how the twofold principle of self-defence is expressed in the Quranic verses: “do not kill any one whom Allah has forbidden, except for a just cause.”<sup>59</sup> Viewing the aforesaid passage through the prism of the twofold principle of self-defence, it is doable to deduce that, on the one hand, the Quran is silent with regard to the question of whether it is permissible to kill in self-defence, whereas, on the other hand, it clearly stipulates that the act of murder is prohibited unless it is carried out for a just cause.<sup>60</sup> Hence, it follows that killing in self-defence is allowed only if the act of self-defence is considered a just cause.

Elaborating on the discussion of other principles of self-defence, it is found necessary to highlight that the Islamic law often articulates the concept of self-defence in conjunction with the idea of proportionality.<sup>61</sup> Thus, it is affordable to consider proportionality a principle of self-defence, because self-defence is introduced in Islamic jurisprudence as a right (entitlement) and, therefore, it is not devoid of certain limitations or boundaries. The principle of proportionality is called to guarantee that the right to self-defence is not abused or misapplied under various conditions.<sup>62</sup>

As far as the principle of proportionality is concerned, it is possible to agree with Malekian that the key role of the aforesaid principle lies in the prevention of oppression and aggression in the case of self-

<sup>50</sup> J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.

<sup>51</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>52</sup> M H Kamali, *Principles of Islamic jurisprudence* (The Islamic Text Society, 1991), 45.

<sup>53</sup> J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.

<sup>54</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>55</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>56</sup> RD Yadav, *Law of crime and self-defence* (Mittal Publications, 1993), 93.

<sup>57</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>58</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>59</sup> RD Yadav, *Law of crime and self-defence* (Mittal Publications, 1993), 93.

<sup>60</sup> RD Yadav, ‘Right of self-defence in Islamic jurisprudence’, *Aspects of Islam and Muslim Societies* (2006), 315.

<sup>61</sup> F Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 38.

<sup>62</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

defence.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

To every intent and purpose, it is achievable to agree with Malekian that the principle of proportionality does not empower the act of self-defence as a permission to have recourse to violence and aggression.<sup>66</sup> Contrariwise, the principle of proportionality is conceived to function against any unsubstantiated and unrestricted act of violence for the benefit of its prevention.<sup>67</sup> It is extremely interesting to note that Malekian 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.<sup>68</sup> Second, the principle of proportionality is not tolerated under circumstances when there are non-violent alternatives which can be exhausted in practice.<sup>69</sup> 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 this principle 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

After supplementary principles of proportionality in terms of self-defence have been reviewed, it is important to emphasise that self-defence under Islamic jurisprudence has quite different meaning as compared to the concept of self-defence under international law or other legal systems.<sup>73</sup> 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.<sup>74</sup> In other words, only under Islamic jurisprudence the concept of self-defence in conjunction with the principle of proportionality is given the divine meaning: "Fight those in the way of God who fight you, but do not be aggressive."<sup>75</sup>

<sup>63</sup> J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.

<sup>64</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>65</sup> J Hussain, *Islam: Its law and society* (Vol. 3) (Federation Press, 2001), 38.

<sup>66</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>67</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>68</sup> A prof M Yunus, *The Exercise of Self Defence to Cause Death; A Legal Analysis under the Malaysian Penal Code*, (Thomson Reuters Malaysia Sdn Bhd, 2016) 60.

<sup>69</sup> R Peters, *The reintroduction of Islamic criminal law in Northern Nigeria: A study conducted on behalf of the European Commission* (2001).

<sup>70</sup> R Peters, *The reintroduction of Islamic criminal law in Northern Nigeria: A study conducted on behalf of the European Commission* (2001).

<sup>71</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>72</sup> A prof M Yunus, *The Exercise of Self Defence to Cause Death; A Legal Analysis under the Malaysian Penal Code*, (Thomson Reuters Malaysia Sdn Bhd, 2016) 60.

<sup>73</sup> DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

<sup>74</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>75</sup> F Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 39.

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.<sup>76</sup> In other words, self-defence can be considered as such under Islamic jurisprudence as long as it is not aggression, because aggression is crime. Besides, the Quran and other sources of Islamic jurisprudence make it absolutely clear that it is morally correct and legally permissible to fight against those who wage war or other forms of aggression. This doctrinal position implies that self-defence is not only a legal right, but also a moral obligation.<sup>77</sup>

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.<sup>78</sup> 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 jurisprudence.<sup>79</sup> 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.'<sup>80</sup> In this context, Malekian is prone to recognise another fundamental principle of self-defence under Islamic jurisprudence – the principle of judicial responsibility for 'the implementation of justice and the founding of the truth.'<sup>81</sup>

It is prudent to agree with Malekian that the principle of judicial responsibility plays crucial role in the recognition, implementation, and qualification of self-defence as a fundamental concept of Islamic criminal law.<sup>82</sup> As a matter of fact, the recognition of self-defence cannot be carried out automatically unless the court at issue decides that all requirements of self-defence have been properly fulfilled in the case at issue.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> That is, self-defence must not result in killing of the attacker.<sup>87</sup> The general rule is that nobody is permitted to kill another individual or bring end to another individual's life by claiming that the individual deserves death, judging by his or her own opinion and criteria.<sup>88</sup>

Islamic jurisprudence 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 the murder.<sup>89</sup> 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.<sup>90</sup> These situations correspond to the principles of innocence for killing in self-defence under Islamic jurisprudence.

<sup>76</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>77</sup> DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

<sup>78</sup> DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

<sup>79</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>80</sup> F Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 36.

<sup>81</sup> F Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Vol. 5. Brill, 2011), 36.

<sup>82</sup> DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

<sup>83</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>84</sup> DH Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990), 37.

<sup>85</sup> A Zeydan, *Hâletu'd-Darûra fi'ş-Şeriatil İslâmiyye* (Mecmûatu Buhûsil-Fikhiyye, along with his 8 articles) (Beirut, 1986), s. 184-195.

<sup>86</sup> R Vogler, *A world view of criminal justice* (Burlington: Ashgate, 2005), 97.

<sup>87</sup> R Vogler, *A world view of criminal justice* (Burlington: Ashgate, 2005), 97.

<sup>88</sup> R Vogler, *A world view of criminal justice* (Burlington: Ashgate, 2005), 97.

<sup>89</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>90</sup> Abdulkâdir Üdeh, et-Teşriû'l-Cinâi'l-İslâmî, Kâhire (1959), 1/473, 489.



The first and foremost principle stipulates that killing in self-defence is permissible under Islamic jurisprudence 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.<sup>91</sup> The key rationale underlying the above-captioned principle originates from the fact that such killing in self-defence is necessitated by the murdered individual's first action to kill the other and that there was no other alternatives to avoid the killing in response. Moreover, Udeh confirms that an obligation to act in self-defence arises under the aforementioned circumstances.<sup>92</sup> 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.

The second principle 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.<sup>93</sup> In this connection, Islamic jurisprudence regulates that the legal owner of the property who killed the burglar cannot be considered a murder, because he is entitled to enjoy a lawful defence of property.<sup>94</sup>

The third important principle 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 endeavouring to protect his or her honour.<sup>95</sup> Under such circumstance, Islamic jurisprudence requires no blood money or retribution, because the defence of one's honour is considered under Islamic jurisprudence a lawful defence.<sup>96</sup> 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.<sup>97</sup>

Not opposed to Udeh and other researchers of Islamic criminal law, Warren maintains that the killing in self-defence as the defence of dignity, life, freedom, family, and property, is often postulated as legitimate killing.<sup>98</sup> Warren points out that the principles of legitimate killing in self-defence are well-developed in many Islamic countries, such as Iran.<sup>99</sup> Thus, in Iran the principles of legitimate killing in self-defence are prescribed both under the law of Shariah and law of Iran. The key principles, which can also be viewed as the key prerequisites to legitimate killing in self-defence, include illegality of aggression and imminence of attack.

In like manner, the same principles of killing in self-defence under Islamic jurisprudence are confirmed in the publication by Mansoor.<sup>100</sup> The scholars argue that the issue of killing in self-defence is subject to judicial proceedings. However, there are numerous cases where the defender was found to have acted in self-defence resulting in the aggressor's death.<sup>101</sup> That is, the judiciary in Islamic countries is prone to recognise and apply the principles of killing in self-defence. Moreover, some Islamic countries

<sup>91</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>92</sup> Abdulkâdir Üdeh, *et-Teşrû'l-Cinâi'l-İslâmî*, Kâhire (1959), 1/473, 489.

<sup>93</sup> P L Reichel, *Comparative criminal justice systems: A topical approach* (Upper Saddle River, NJ: Prentice Hall, 2002), 67.

<sup>94</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>95</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>96</sup> P L Reichel, *Comparative criminal justice systems: A topical approach* (Upper Saddle River, NJ: Prentice Hall, 2002), 67.

<sup>97</sup> M C Bassiouni, & M C Bassiouni, *The Islamic criminal justice system* (New York: Oceana Publications, 1982), 18.

<sup>98</sup> C S Warren, *Islamic Criminal Law: Oxford Bibliographies Online Research Guide* (Oxford University Press, 2010), 31.

<sup>99</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>100</sup> F Z Mansoor, *Criminal law and the rights of the child in Muslim states: a comparative and analytical perspective* (BIICL, 2010), 142.

<sup>101</sup> S TELLENBACH, "ISLAMIC CRIMINAL LAW," *The Oxford Handbook of Criminal Law* (2014), 18.

have adopted legal statutes which contain articles on specific cases where international killing is recognised as self-defence.<sup>102</sup> That is, not only the traditional provisions of the law of Shariah, but also contemporary Islamic law statutes acknowledge the existence and practical application of various principles of self-defence, including the principles of killing in self-defence.<sup>103</sup>

### **The Practical Application of the Principles of Self-defence by Islamic Jurists, Judges, Lawyers and other Participants of the Legal Process**

As the foregoing discussion must suggest, the question of self-defence is regulated in Islamic jurisprudence under various perspectives and angles.<sup>104</sup> That is, the legal basis of self-defence is derived from the Quran and other primary sources of Islamic law.<sup>105</sup> Also, it has been ascertained that the Quran and other sources of Islamic jurisprudence defines the right to self-defence in a clear and affirmative matter.<sup>106</sup> There exist problems in the practical actualisation of the quranic verses, principles of Islamic jurisprudence and other sources of Islamic law in practice without deducing or referring to a practical rules and specific requirements of such actualisation. To that end, it is very urgent to explore how the principles and essential characteristics of self-defence are applied by Islamic judges, lawyers, jurists and other participants of the legal process.<sup>107</sup>

In this connection, Malekian writes that the principles of self-defence are often interpreted and applied by Islamic legal practitioners as principles of self-protection. That is, Malekian juxtapose the two legal concepts 'self-defence' and 'self-protection' in terms of the legal use of the concept of self-defence in practice. In this connection, it needs to be clarified that the term 'protection' means 'the act of protecting.'<sup>108</sup> That is, the concept of protection implies that certain protective actions are required against a real and actually occurring threat. On the other hand, the concept of defence denotes 'a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question.'<sup>109</sup>

In this light, it is extremely interesting to note that, while the common law differentiates between the concepts of protection and defence, Islamic lawyers tend to make parallels between them.<sup>110</sup> As a matter of fact, Islamic legal professionals do not recognise the difference between the concept of self-defence as an act of acting protectively against an actually threat and as a legal right which can be applied only under certain circumstances and states.<sup>111</sup> Thus, 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.<sup>112</sup> 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.<sup>113</sup> Also, 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. 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 Shariah (wajib), it is not

<sup>102</sup> S TELLENBACH, "ISLAMIC CRIMINAL LAW," *The Oxford Handbook of Criminal Law* (2014), 18.

<sup>103</sup> S TELLENBACH, "ISLAMIC CRIMINAL LAW," *The Oxford Handbook of Criminal Law* (2014), 18.

<sup>104</sup> M R Lippman, S McConville, & M Yerushalmi, *Islamic criminal law and procedure: An introduction* (New York: Praeger, 1988), 19.

<sup>105</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>106</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>107</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>108</sup> Black's Law Dictionary, n, 1343.

<sup>109</sup> Black's Law Dictionary, n, 1482.

<sup>110</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>111</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>112</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>113</sup> A prof M Yunus, 'The Right of Self Defence of A Person: A Comparative Legal Alignment' (2015) 11 *Journal of Islamic Law Review*.118.

dynamic.<sup>114</sup> Besides, self-defence as a legal right is not absolute but relative. Moreover, this right is not deprived of restrictions and limitations.

The problem is that the juxtaposition of self-defence as an act of protection and self-defence as a legal right is likely to remove the restrictions and limitations which are intrinsic to self-defence as a legal right.<sup>115</sup> The fact is that self-defence as self-protection empowers a defender to act as a judge on its own cause in any special sense.<sup>116</sup> Therefore, self-defence as self-protection makes any act of protection justifiable regardless of the consequences. In this connection, Islamic jurists are prone to justify the applicability of self-defence as self-protection in both personal and state levels.<sup>117</sup> To be more precise, self-defence as self-protection and right is regarded by Islamic jurists as an integral right in individual freedom of a person or independent sovereignty of states.<sup>118</sup> For these reasons, jihad, for instance, is considered by Islamic legal professionals as a defensive war and not an aggressive war. Hence, it follows that self-defence as self-protection justifies application of force and violence regardless of consequences.<sup>119</sup>

Important insights into the practical application of the principles of self-defence by Islamic lawyers can be made after a diligent review of how various Islamic legal schools interpret and utilise different principles and essential characteristics of the concept of self-defence.<sup>120</sup> In this sense, Peters writes that each major school of Islamic criminal law adopts its own approach to understanding and application of principles of self-defence.<sup>121</sup> As far as the issue of *mens rea* is concerned, all Islamic lawyers concede that there are three basic requirements for having legal punishment applied to a perpetrator of crime.<sup>122</sup> That is, it is essential that the offender have been empowered to commit or not commit the act (*qudra*), have been knowledgeable (*'ilm*) that the act in question has been an offence, and has been carried out with a specific intent in mind (*qasd*).<sup>123</sup>

To continue the discussion of the practical application of principles of self-defence by Islamic lawyers, it is deemed wise to pay attention to the fact that Islamic lawyers do not consider self-defence as an absolute right or legal doctrine; however, they are prone to believe that the same rules of self-defence are applicable to all individuals.<sup>124</sup> In this connection, it is extremely interesting to note that the concept of *mens rea* constitute the core of the concept of self-defence under Islamic jurisprudence.<sup>125</sup> Thus, Muslim lawyers are inclined to think that the theory of *mens rea* helps determine whether offences resulting from self-defence are punishable or not.<sup>126</sup>

Besides, by applying the concept of *mens rea*, Muslim lawyers verify whether the theoretical basis for the concept of uncertainty (*shubha*) can be viewed as a legal defence: 'actual or presumed ignorance of the unlawfulness of an act is a legal defence in cases of homicide and *hadd* offences.'<sup>127</sup> All things considered, it is deemed wise to compare how different schools of Islamic criminal law interpret and apply the concept of *mens rea* in relation to the category of self-defence.

As far as the issue of age is concerned, it needs to be pointed out that the schools of Hanafites, Malikites, Shafi'ites, and Hanbalites differ in their views on the age before which puberty cannot be

<sup>114</sup> A prof M Yunus, 'The Right of Self Defence of A Person: A Comparative Legal Alignment' (2015) 11 *Journal of Islamic Law Review*.129.

<sup>115</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>116</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>117</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>118</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>119</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>120</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>121</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>122</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

Ahmad b. Idri is Qari afii, Anwi ar al-buri uq fi 1 anwi al-al-furi uq, 4 vols. (Beirut: Alam al-Kutub, n.d.), vol. I, 162.

<sup>124</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>125</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>126</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>127</sup> Peters 20.

established.<sup>128</sup> Also, different schools of Islamic law demonstrate discrepancies in the interpretation of age after which absence of puberty cannot be established.<sup>129</sup> Thus, for instance, the school of Hanafites recognizes that the age after which absence of puberty cannot be established constitutes 15 years. From the contrasting point of view, Malikites contend that the age after which absence of puberty cannot be established constitutes 18.

By contrast, Hanafites, Shafi'ites, and Hanbalites are prone to believe that the age after which absence of puberty cannot be established is 15.<sup>130</sup> In this connection, it is possible to determine that different schools of Islamic law specify disparate age after which absence of puberty cannot be established. Hence, it follows that there is no a unanimous or standardised approach to the practical application of the principles of self-defence under Islamic jurisprudence.<sup>131</sup>

Nevertheless, different Islamic jurists, including representatives from various schools of Islamic law tend to concede that there is no *mens rea* in the situation when the perpetrator of a criminal offence is devoid of the intellectual capacity to realise completely the implications of his behaviour.<sup>132</sup> In other words, there is no dispute among Muslim lawyers over the fact that the phenomenon of minority ceases to exist with 'physical puberty'.<sup>133</sup> As the case stands, each school of Islamic law suggests that children are deprived of the possibility to reach puberty prior to a specific age and must have attained it after a specific age. This notwithstanding, the Shiite lawyers do not fix a minimum age.

Analysing the factor of age further, it is found necessary to point out that the factors of insanity and minority make the imputation of crimes to the offender impossible and illegalise his conviction.<sup>134</sup> In view of the above, it is doable to make inference that the factors of insanity and minority also make impossible the conviction of an individual who has found to apply excessive force in self-defence.<sup>135</sup> Nevertheless, some Islamic jurists are inclined to think that insanity and minority do not preclude financial liability.

Besides, it is also possible to agree with Peters and other researchers of Islamic criminal law that the state of unconsciousness removes criminal responsibility, unless the unconsciousness was the result of drunkenness.<sup>136</sup> To that end, it needs to be theorised that the factor of unconsciousness is also applicable to the concept of self-defence. The Islamic lawyers are disposed to think that unconsciousness removes criminal liability for the harm inflicted as a result of applying violence in self-defence, unless such unconsciousness was a result of drunkenness.<sup>137</sup> However, in practice, it may be difficult for Islamic lawyers to establish the linkage between unconsciousness and self-defence as a legal right and self-protection.<sup>138</sup> The paradox is that the right to apply force in self-defence requires conscious decision which is based on the necessity of bringing aggression to an end.<sup>139</sup> If a self-defender is unconscious with regard to the purpose and objectives of his or her actions, it will be questionable whether he has possessed sufficient capacity to act in self-defence.

In other words, it is not correct to consider the acts of self-defender not punishable by virtue of his or her unconsciousness.<sup>140</sup> As a matter of fact, Islamic lawyers are not disposed to characterise a self-defender as unconscious, because of the fact that the only requirement in respect of the perpetrator of violence, even if the perpetrator acts in self-defence, is the possession of reason ('*aqil*'), or, in other words,

<sup>128</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>129</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>130</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>131</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>132</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>133</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>134</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>135</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>136</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>137</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>138</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>139</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>140</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.



the capacity to understand that the perpetrator has applied violence correctly or wrongly.<sup>141</sup> Thus, according to Islamic lawyers, it is impossible to conduct the act of self-defence, or, in other words, it is unachievable to properly actualise the right of self-defence, without possessing a reasonable mind.

In like manner, the applicability of self-defence in practice under Islamic jurisprudence is tightly linked to the concept of uncertainty (*shubha*). The relationship between uncertainty and self-defence are viewed by Islamic lawyers quite differently.<sup>142</sup> The complexity of such relationship is dictated by the fact that the notion of *shubha* may be equally presented as a defence from criminal liability itself, as well as an essential element of the right to self-defence under Islamic criminal law.<sup>143</sup> For instance, the practical reflection of uncertainty may be derived from the situation when a defender is uncertain with regard to the unlawfulness of the offender's act. In other words, sometimes it is fairly difficult to determine whether it is the right time to apply force in self-defence.<sup>144</sup>

Notwithstanding the disparity of interpretations of uncertainty in the framework of Islamic legal scholarship and practice, the majority of Muslim jurists tend to concede that the concept of uncertainty is derivative from the Prophet Mohammed's saying that all fixed punishments need to be warded off from the Muslims on the influence of *shubha* as much as possible.<sup>145</sup> To that end, Islamic scholars explicate that the doctrine of uncertainty (*shubha*) have pertinence only in relation to *hadd* crimes and homicide.

Besides, the terminology and classification of the various types of uncertainty, as well as the examples of utilising the defence of uncertainty, especially in self-defence cases, vary among various schools of Islamic law.<sup>146</sup> However, Islamic lawyers have no dispute over the fact that there are two different types of uncertainty: uncertainty as to the facts and uncertainty as to the law.<sup>147</sup> As far as the first type of uncertainty is concerned, Islamic jurists point out that uncertainty as to the facts takes place if an individual believes that does not commit an offence because he has been justifiably mistaken in the identification of objects or persons.<sup>148</sup> On the other hand, uncertainty as to the law occurs if an individual believes that his conduct is permissible, because the permissibility of such conduct stems from an incorrect interpretation of the Islamic law.<sup>149</sup>

To put it briefly, Islamic jurists recognise the existence of uncertainty regarding the facts if an individual attacks what he believes to be an animal or a dead body, but factually murders a living individual.<sup>150</sup> In like manner, the existence of uncertainty may be proved in the situation when a blind man applies violence in self-defence by believing that the victim of his violence was about to attack him.<sup>151</sup> To proceed further, uncertainty concerning the law can be viewed as an outcome of ignorance of either the details of the law or the essentials of the law. Such ignorance may imply ignorance of rules which rest on clear texts from *habith* or Koran or on consensus (*ijma*).<sup>152</sup> In this connection, uncertainty, as a driver of self-defence should be recognized as excusable if the offender is a recent convert to Islam, and arrives from outside the Islamic world, or, otherwise if he recently arrived from a less civilized world.<sup>153</sup>

To continue the analysis of Peter's explanations of how various principles of self-defence are applied by Islamic jurists, it is fairly important to attract the readers' attention to the fact that one of the fundamental principles of self-defence as a legal category is the principle of proportionality.<sup>154</sup> According

<sup>141</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>142</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>143</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>144</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>145</sup> Peters 22.

<sup>146</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>147</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>148</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>149</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>150</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>151</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>152</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>153</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>154</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.



to Peter, all Muslim jurists consent that killing a perpetrator in defence of life, property or honour is legit and reasonable if the act of self-defence is proportional to the acts of the attacker, that is, if such an act does not exceed the level of violence sufficient for the prevention of the aggression.<sup>155</sup>

In perspective of the above, it is achievable to reach the conclusion that the rule of proportionality indicates that the mischief which is dispensed by method for self-protection must be relative to the damage which is counteracted as an aftereffect of self-preservation.<sup>156</sup> The larger part of lawful researchers have a tendency to trust that the estimation of mischief to be averted and control of a cautious activity constitute the system of self-protection.<sup>157</sup> For Muslim attorneys, the guideline of proportionality implies that there is a straightforwardly corresponding relationship between unlawful assault and the privilege to self-preservation. This implies that the start of the assault sanctions the privilege to self-protection.<sup>158</sup> On the other hand, it is conceivable to estimate that the privilege to self-protection does not come from the impression of a danger and it doesn't keep on existing after the discontinuance of the danger.

To that end, it should be called attention to that Muslim legal scholars likewise perceive another rule of self-protection under the Islamic law, for example, the standard of anticipation.<sup>159</sup> It has as of now been built up in the structure of past talks that the Quran as the principle wellspring of the Islamic law makes self-preservation obligatory in specific cases.<sup>160</sup> Point of fact, the Quran recommends that an individual is obliged to protect one's life against encroachments, even to the detriment of the assailant's life.<sup>161</sup> On the premise of the previously stated quranic verses, Islamic legal counselors perceive and apply the standard of avoidance as a crucial rule. This guideline can be seen as a commitment to turn away damage to one's life through the curse of mischief on the aggressor.<sup>162</sup>

In this association, Muslim attorneys are inclined to trust that the resistance of one's life is dependably a legitimate demonstration, even for the situation when an individual, while starving, murders the manager of sustenance keeping in mind the end goal to spare his life, after the last's dismissal to furnish him with this nourishment.<sup>163</sup> Additionally, the guideline of counteractive action keeps up that the damage to one's life as a consequence of starvation may be forestalled by method for taking the life of a man who blocks salvation.<sup>164</sup> In this association, the guard is legal just if the casualty led an unlawful demonstration against the executioner.

In this manner, another standard of self-protection under the Islamic law is the unlawful conduct of the casualty. As it were, the demonstration of self-preservation will be viewed as legal just if the casualty of the safeguard shows unlawful behavior. On account of starvation, the unlawful behavior of the casualty is his refusal to give the starving individual the sustenance fundamental for his survival.<sup>165</sup>

In addition, the demonstrations of roughness which are led as self-preservation ought to be regarded legal because of the way that the assaulter has lost his lawful insurance ('isma) right now of encroachment on the other singular's life, chasnity, or property.<sup>166</sup> In this sense, Oudah composes that disciplines by educators, folks or demonstrations of open obligation don't exact an unlawful assault under the Islamic law and along these lines there is no privilege to self-preservation against such directs.<sup>167</sup> In

<sup>155</sup> A prof M Yunus, 'The Right of Self Defence of A Person: A Comparative Legal Alignment' (2015) 11 *Journal of Islamic Law Review*.123-124.

<sup>156</sup> Quran 2:195.

<sup>157</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>158</sup> MY Al-Bahooti, *Sharah Muntahi Al-Iradat* (Matbah Ansar, 1947) 378.

<sup>159</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>160</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>161</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>162</sup> Peters, above n, 22.

<sup>163</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>164</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>165</sup> Peters, above n, 22.

<sup>166</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>167</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

any case, if the performer goes past his power and acts outside the power and reasons ridiculous damage, such on-screen character will be obligated for unlawful strike under the law of Shari'a.

Likewise, the Muslim legal counselors are inclined to trust that the standard of proportionality does not so much goad the shield to apply such measure of power which is proportionate to the measure of danger.<sup>168</sup> Along these lines, the Muslim legal scholars illuminate that a protector is somewhat obliged to apply the base conceivable measure of the power in unavoidable circumstances if other sensible courses for security are not accessible.<sup>169</sup> That is, if the attacker looks to execute the guard, the shield does not need to slaughter the aggressor consequently.<sup>170</sup> Contrariwise, it is occupant on the protector to stop the assailant through the least conceivable level of power.

To proceed with the exchange, a substantial number of Muslim legal advisors give extra translation and utility to the standards of self-preservation. In this way, Al-Bahooti, and Al-Shibramisi compose that the Muslim legal scholars have changed the regulation of self-protection into the principle of pre-emptive self-preservation.<sup>171</sup> The recent takes starting points from numerous hundreds of years back. The regulation keeps up that a guard is not obliged to sit tight for the attacker to assault first with a specific end goal to understand his entitlement to self-preservation.<sup>172</sup> That is, the protector is qualified for apply the pre-emptive power with all due respect with the reason to capture the foreseen assault.

The Muslim attorneys are slanted to feel that the pre-emptive self-preservation will be legitimate just if the guard has sensible grounds to trust that he is going to turn into the prompt casualty of an unlawful assault, if neglected to apply the pre-emptive power.<sup>173</sup> As indicated by the Muslim legal advisers, it is officeholder on a lawyer of protection to demonstrate the presence of sensible justification for the shield to trust in particular circumstances bringing forth right of self-preservation.<sup>174</sup> This implies that just suspicious grounds are not contemplated while demonstrating the presence of the privilege to pre-emptive self-protection. Taking after the contentions of the Muslim legal counselors, it is conceivable to gather that the privilege to pre-emptive self-preservation will be advocated under the Islamic law just if a lawyer of guard or a safeguard demonstrates the presence of specific causes, conditions and reasons which have made offered ascent to the conviction about the prompt assault of the shield.<sup>175</sup>

Another state of self-preservation which is not expressly got from the Islamic standards of self-protection, yet has been expounded through the lawful practice is the obligation of a safeguard to withdraw. This obligation is firmly connected with the prerequisite to apply the most reduced conceivable level of power.<sup>176</sup> The truth of the matter is that the obligation to withdraw is not likewise comprehended by diverse schools of the Muslim law specialists.<sup>177</sup> The dominant part sentiment is that the protector is under the commitment to direct any accessible conduct keeping in mind the end goal to spare his life by retreat.<sup>178</sup> As indicated by the larger part of legal counselors, the obligation of a shield is to spare his life, as opposed to incur hurt on the attacker. That is, it is occupant on the shield to utilize the mildest method for resistance which may not be joined with the power.

Notwithstanding this, the Shafite's school of Islamic law propounds that if the protector is mindful that he is fit to spare his life by retreat, the prerequisite of retreat turns into the safeguard's commitment. In any case, if the protector has questions, the Islamic law licenses him to stay and go up against the assault.<sup>179</sup> Then again, the Malkite's school of Islamic law proposes that a shield is obliged to have plan

<sup>168</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>169</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>170</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>171</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>172</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>173</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>174</sup> ZY Al-Novi, *Riyadh Al-Salheen* (Dar Al-Fiker, 1993), 251.

<sup>175</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>176</sup> T Wasti, *The application of Islamic criminal law in Pakistan: Sharia in practice* (BRILL, 2009) 80.

<sup>177</sup> R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

<sup>178</sup> Al-Qalubi, *Hashyat al-Qalubi ala Sharah Minhaj* (Maktaba Al-halbi, 1956) 206-07.

<sup>179</sup> I Farhoun, *Tabsarat al-Hukkam* (Maktba Mustafa Al-babi Al-halbi) 357.

of action to withdraw at whatever point such withdraw does not exact any damage on him. Aside from the material and physical harm, the Malkites consider that the mischief includes any social damage to the notoriety of the guard.<sup>180</sup>

By difference, the Shafites are slanted to imagine that the retreat is the safeguard's commitment just in the circumstance where the aggressor is a honest individual, though if the attacker is a backslider or an outsider foe, the retreat of the shield will be assessed as an unlawful direct and break of the obligation to stay and battle.<sup>181</sup>

## Conclusion

After everything has been given due consideration, it is necessary to generalise that self-defence under Islamic jurisprudence has specific legal basis, specific principles, and peculiarities in their practical application of these principle 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 jurisprudence 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.

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<sup>180</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

<sup>181</sup> R Peters, The Islamization of criminal law: A comparative analysis, (1994) *die Welt des Islams*, 246-274.

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