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Where the attack is on one's honour the jurists are unanimous that the right to self defence is a duty. Thus where a man attacks a woman in order to rape her and the latter can only defend herself by killing the assailant, then it will be her duty to kill him if she can. Allowing the assailant, in this situation, to overcome her is unlawful for the woman since she has the ability to resist the attack.[6]

Where, however, the attack is on one's life, Imam Abu Hanifa and majority of the Shafi'i jurists are of the view that defence of life is a duty. On the other hand, Imam Malik, the majority of the Hambali jurists and some Shafi'i jurists hold a contrary view, according to which defence of life is a right and not a duty.[7] In other words, defence of life is only lawful but not obligatory. These jurists relied on the fact that when Uthman Ibn Affan was attacked by rebels he did not fight them even though he knew that they were determined to kill him and that he has the capacity to repel the attack.[8]

It is submitted that the view of Imam Abu Hanifa and some Shafi'i jurists is better in this respect. This is in view of the fact that the first law of nature is self survival. It will, therefore, be inappropriate for a person to allow himself to be killed when he has the capacity to defend himself.

Again, where the attack is on property, the jurists are unanimous that self defence is a right and not a duty. It is left to the person whose property is being forcefully taken away to defend it or otherwise. But where the property in question is animate or entrusted to the safe custody of the defender or belongs to the defender himself but is mortgaged, some jurists hold that self defence assumes the character of duty[9]

Similarly, where the attack or assault is by a minor, an insane or an animal, Imam Malik and Imam al-Shafi'i are of the view that a defender, who in the exercise of a legitimate right, causes the death of the minor, the insane or the animal will not be criminally or civilly liable.[10] But Imam Abu Hanifa

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[6] Ibid. See also Ibn Abidin (1979) Hashiyat Radd al-Mukhtar ala durr al-Mukhtar, Vol 6, Darul fikr, Beirut, p 560.
[7] Audah, A. (2001) op. cit. p 747
[8] Ibid, p. 475
[9] Ibid
[10] Al-Hattab (1978) Muwahib al-Jalil vol. 6, Darul fikr. Beirut, p 323

holds an opposite view, according to which the defender will, at least, be civilly liable to pay the diyah (compensation) for the minor, the insane or the animal killed by him. He argued that the rationale for allowing defence is primarily to prevent the commission of an offence. Therefore, the action of a minor, an insane or an animal cannot, legally speaking, be regarded as an offence. Consequently, the offender is liable to pay compensation (diyah) for preventing something which is not, by law, an offence.[11]

Imam Abu Yusuf, on the other hand, is of the view that the defender is only liable to pay the price of the animal killed by him. But as regards the minor or the insane, the defender is not criminally and civilly liable.[12]

Whatever the differences among the jurists, one thing is clear, and that is their recognition of self defence as lawful. In order, however, to justify homicide, the jurists have stipulated certain conditions which must be fulfilled.

1.3 CONDITIONS OF SELF DEFENCE

For a plea of self defence to succeed in Islamic law the following conditions must be satisfied.

1. That the act of the assailant must be a transgression;
2. That the transgression has been actually committed;
3. That there must be no other way to adequately ward off the attack; and
4. That the quantum of force used must be proportionate with the attack being so repelled.[13]

1.3.1 That the act of the assailant must be a transgression:

For a plea of self defence to succeed it must be shown that the assault being repelled is, in fact, a transgression. Thus where the act of the assailant is not a transgression, a plea of self defence will fail. For instance, the lawful punishment of a child by his parents or of a wife by her husband and the due execution of a judicial judgment are not considered as transgressions.

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[11] Audah, A (2001) op.cit.p.476.
[12] Ibn Nujaym (1938) Al-bahr al-ra'iq, vol. 8, Darul Ma'arifah, Beirut, p. 302.
[13] Audah, A (2001) op. cit. p. 479 See also Al-Dasuqi (n.d) op. cit. p. 324

These acts are not considered as transgression because they constitute either the exercise of a right or the discharge of a duty.[14]

According to Imam Malik, Imam Shafi'i and Imam Ahmad transgression may not necessarily be a punishable offence. It is enough that the act is illegal. It is also not necessary, according to these jurists, that the aggressor should possess full legal capacity, for he may be a minor or an insane person. But Imam Abu Hanifa holds a contrary view, according to which the act of transgression must be a punishable offence and that the aggressor should be one who is accountable on criminal ground.[15] The implication of this is that the transgression must not only be illegal but also criminal and the aggressor must not be a minor or an insane person. Imam Abu Yusuf, on his part, holds that the transgression must be a crime but the aggressor may not necessarily possess full legal capacity. He may be a minor or an insane person.[16]

It must be stressed that a plea of self defence may not be raised by the original aggressor when his victim defends himself against his assault.[17] It is however, permissible for the plea to be raised by one who does not wait for an attack actually to be launched but anticipates it, provided he has good cause to consider it imminent.[18]

1.3.2. That the transgression has been actually committed:

Another condition which must be satisfied in a plea of self defence is the commission of transgression at the material time. In other words, transgression must have actually been committed or is about to be committed. Thus, if transgression has not been committed or is not about to be committed then the act of the defender will not amount to self defence. It is, on the contrary, transgression itself.[19]

Self defence does not actually arise from the mere wish of the aggressor to transgress. It arises only when there is a possibility of transgression. Thus, a person who intends an assault but is incapable of doing so is not an

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[14] Ibid
[15] Ibn Qudamah (1972) Al-Mughni, vol. 7, Darul Kutub, Beirut, p. 264
[16] Audah, A (2001) op. cit. p. 480
[17] Ibid
[18] Al-Dasuqi (n.d) op.cit. p. 324
[19] Audah, A (2001) op.cit. p. 482

aggressor. Therefore, any transgression to be committed in future cannot give rise to self defence in the present. For this reason, mere intimidation to transgress is not enough to give rise to self defence because it does not pose an impending danger to be countered forthwith. In such a case, the offender has ample time to have recourse to the protection of public authorities. Whether or not such a person has reasonable time to have recourse to the protection of public authorities is a question of fact to be determined by the surrounding circumstances of each case.

It should, however, be noted that where a person has good cause to consider an attack imminent, he can successfully raise the plea of self defence if he launch an assault to counter the anticipated attack before it is too late.[20]

1.3.3. That there must be no other way to adequately ward off the attack:
For a person to successfully raise the plea of self defence it must be shown that there is no other way to adequately repel the attack. In other words, it is not possible for the defender to defend himself otherwise. Thus if there is any other possible means to repel the attack without resorting to violence then it is mandatory on him to adopt it. If he does not do so but instead launches a counter attack on the aggressor, he shall himself be deemed a transgressor.[21] It is not permitted for a defender to resort to violence if he can get the help of the police or people in good time or if he can defend himself without adopting violent means.

It is, however, interesting to note that some jurists consider retreat as a sort of self defence. According to them, where it is possible for the defender to retreat, then it is mandatory on him to do so rather than resorting to violence. They argued that the defender is enjoined to adopt a simple possible method of defending himself and retreat is actually the simplest method of defence.[22] Other jurists, however, do not consider retreat as a mode of self defence. According to them, if the defender is faced with the option of retreating or repelling the attack, he should adopt the latter by countering the attack of the aggressor.[23]

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[20] Al-Dasuqi (n.d) op cit p. 324
[21] Audah, A (2001) op cit. p. 482
[22] Ibn Qudamah (1972) vol. 10 op, cit. p. 353
[23] Ibid

It is submitted the latter opinion is more sound and logical in view of the fact that the defender is not expected to retreat when he has the means to defend his property or the honour of his family which, in any event, he cannot take with him when he retreated.

1.3.4. The quantum of force used must be proportionate with the attack being repelled:

The force used in self defence must also be commensurate with the assault being repelled. Thus if the mode of repelling the attack is out of proportion with the assault offered then it ceases to be a defence and assumes the character of transgression. If the attack of the aggressor can be prevented by simple means, violence should not be resorted to. This is because the main aim of repelling the attack is defence and not transgression. For instance, an assault which can be repelled with a bare hand cannot justify homicide if the defender killed the aggressor with a gun.[24] Where the aggressor turns back or where he is injured and can no longer proceed with his transgression, the defender is not allowed to subject him to further violence. This is because the transgression has already ceased.[24] But if the aggressor cannot be deterred without being killed or if it is feared that he may kill the defender if he is not killed then the latter may kill the aggressor in defence.[26]

Again, where the aggressor unsheathes his sword to attack the defender the latter may kill him in self defence. The defender in this case is not expected to defend himself with his hands as the aggressor will automatically kill him. The same fate will befall him if he waits for help from people to come. Therefore, killing the aggressor becomes necessary and also justified.[27]

It is clear from the above that the yardstick for determining whether the force used in repelling an attack is excessive or otherwise is the weapon used by both the aggressor and the defender. If the aggressor uses a deadly weapon in his attack and the defender also uses a deadly weapon in repelling the attack then the latter's action will be deemed proportionate to

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[24] Audah, A (2001) op cit. p. 483
[24] Ibn Qudamah (1972) Op. Cit pp. 351-352
[26] Ibid
[27] Al-Kasani (1980) Bada'i Al-Sana'i, Sa'eed pub Co Karachi, p 93

the attack. Conversely, where the aggressor uses his bare hands to assault the defender and the latter uses a deadly weapon such as a sword to ward off the assault, then his action will not be deemed proportionate to the attack.

By and large, where the defender uses excessive force in repelling an attack, a plea of self defence will not avail him. In such a case, he will be fully liable for his action.

As regards the issue of expiation where death ensured as a result of self-defence thee seems to be no unanimity among the jurists. It is, however, interesting to note that in the case of mistaken homicide all the jurists agreed that the offender is liable to expiation.[28] It may, therefore, not be out of place to submit analogically that where death ensured in consequence of self defence, the defender may be liable to expiation. Allah knows best.

1.4 CONCLUSION

So far, we have been able to discuss the right of self defence as an extenuating circumstance to the offence of homicide in Islamic law.

It is however, interesting to note that any extenuating circumstance must be fully proved by the offender. Similarly, the decisive time as to the question of any defence to the offence of homicide is the time when the blow was struck.[29] Thus where the offender raises the plea of self defence, it must be established that the offence was really committed while he was acting in self defence at that material time. Where the blow was struck after the attack of the assailant the plea of self defence will fail. Allah Knows best.

[28] Al-Jaza'iri, A J. (1992) Minhajul Muslim, Darul Fikr, Beirut, Lebanon, p.505.
[29] Al-Dasuqi (n d) op. cit. p 321.