

## The Requisiteness of Revising and Altering Legitimate Defense Law

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**Abstract:** The legitimate defense law has been accepted by Iran's punishment rules as a legal constitution. The legitimate defense law is an intrinsic and acquired attribute addressed in punishment rules of 1925, 1972, 1977, 1982, 1991 and 2011. In this context as long as law books are concerned in order to exercise the legitimate defense law some conditions would be needed and setting for the usage of the legitimate law as one of justified causes of crime would be prepared, only if those conditions are fulfilled. This study taken advantage of library and the internet sources has the aim of along with making acquainted with this legal constitution, scrutinize ways to prove it and present facilities to make topics executable regarding its jurisprudential and juridical bases.

**Key words:** The legitimate defense, the principle, aggressor, Islamic Punishment Law, jurisprudence, legislator, urgency rule

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### INTRODUCTION

The legitimate defense is one of vindicator reasons in the Islamic punishment and retribution laws. The legitimate defense is the same as the reciprocity principle in Islam been recognized in multitude of exempla and words in so far as Allah in 194th Aye of Sura Baqhare in Quran says:

Everyone who encroached upon you oppressively and tyrannously, retaliate to the extent of injustice he/she brought on you

This principle not only is being investigated in Ira's punishment laws which is based on Islamic jurisprudence but also by turning to history we can also see footprints of this principle in the laws of other countries. Syron the renowned roman orator says: "the legitimate defense is considered as a principle of intrinsic rights, since man owing to his own temperament wouldn't hold still for an inequitable assault. The requisiteness of attention to the legitimate defense comes from the fact that there are referrals to it in the laws of most countries including Islamic Republic of Iran and in multiple books including books on general punishment laws, nevertheless juridical writers instead of considering how a defense should be affirmed, they are only interested in its fabric perspective.

### QUERIES

#### Main query:

- How is it possible to equalize the ratified laws of legitimate defense with juridical resolutions in legal hearings?

- To what extent is the practical validity of jurisprudential principles in the area of legitimate defense in the legal hearings? Secondary question: what is the nature of legitimate defense?

**The concept of legitimate defense:** Legitimate defense means: "offended person in the case of not having due time of recourse to authorities for the removal of an aggression is entitled to with his/her own power defend from his/her own life, property or honor (Jafarilangeroodi, 1984). Others express it in this way: "it is a situation by which an offense is prevented using the concept of legitimate defense deriving from power and force (Al Attar, 1966). Islamic laws put this concept in these words: "the legitimate defense is a preventive force thereby the right of doing action which is legitimately necessary-for a person against others will be preserved, in order to prevent an illegitimately potential danger which threatened respectable rights of a Muslim or unbeliever such as property, territory or honor" (Abu Ja'Far and Jarir, 1991).

**Approaches to ratify the legitimate defense:** Basically in the Islamic Punishment Laws the way of crime confirmation comprises testimony of witnesses, confession, knowledge of judge and oath. Now, it should be asked where is actually the position of these reasons in the case of legitimate defense? The reason from the ratification of legitimate defense would be to thereby the person accused of committing a crime admit to his/her own criminal act but in fact he wants to by grasping at this principle discharge conviction of his/her own. Does

the confession of criminal suffice exculpation of him from crime? No, because in a situation of legitimate defense, aggressor often do confesses to a crime but his/her actual purpose of this confession is not limited only to admit to his/her crime but he/she is seeking to get rid of responsibility for retribution in the case the legitimate defense is confirmed. Because of the fact that confession in retributive circumstances consists of self-confession of person for doing or abandoning an action which based on the punishment laws would be to the detriment of confessor and confession in retributive circumstances is objective not subjective and connected with life, honor and dignity of individuals and judge cannot upon the confession proceed for pronouncing a sentence, rather judge must consider situation and external facts. It can be construed that the sheer confession of accused for the exculpation of him/her from the crime or conviction is a prerequisite but not an adequate condition.

Second reason is the testimony of witnesses. Testimony is one of the oldest methods in affirmation of punishment lawsuits. Testimony literary means presence, examination and cognizance and in legal terms it means awareness about occurrence of a sensible action with any of five faculties of perception to the detriment of his/her own and advantage of other (Jafarilangeroodi, 1984). There is two sets of conditions for the testimony, regarding Article 1313 of civil law and its first and second clauses, first set is related to witness and possessing conditions like puberty, mental powers, justice, faith, purity of begetter, not being beneficiary and not practicing pauperism, next set is concerning the method of testimony such as certitude and confidence, accordance with lawsuit and compatibility of witness's testimony content with each other. Discussing the legitimate defense there are two viewpoints about the testimony of witnesses.

**Quantity of witnesses and quality of testimony:** Regarding punishment laws about retribution, fine and penalty it can be easily recognized that where a crime is provable through testimony, there the quantity of testimony has been mentioned. For instance Article 74 of Islamic Punishment Law says: "whether adultery leads to punishments like lashing, it can be proved by the testimony of four righteous men or three righteous men and two righteous women and if the adultery just had caused lashing, it could also be proved through the testimony of two righteous men and four righteous women. But concerning the legitimate defense if there would be a witness for giving testimony as if aggressor for the sake of legitimate defense committed a crime, by what quantity he in going to prove his own testament?

Would one witness be enough? Taking into account legal constraints for women is the testimony of one women by herself adequate?

**Lack of witness:** Based on the statistics the legitimate defense often takes place to defend honor and territory from aggression and on this foundation the aggression to a territory and honor happen in solitude which is kept secret and concealed except for the judicious Allah, aggressor and sufferer. Now, how is it possible to invoke witness so that the sufferer will be able to make use of the legitimate defense law taking responsibility off his/her shoulder? As the third reason, what role will knowledge of this context? Knowledge means understanding and cognizance and in jurisprudential terms is defined as confidence and common knowledge (Jafarilangeroodi, 1984). According to Articles 102 and 105 in Islamic Punishment Laws, the knowledge of judge is one of reason for proving a criminal act, some of jurists have faith in issue that knowledge of judge doesn't pertain to a certain crime and even embraces government punishments too. Following before mentioned topics, the legitimate defense more embraces matters like honor and territory. What kind of insinuations and innuendos could assist the judge in his decision concerning the innocence of accused person? At the last resort, we can mention confession which has roots in our religious beliefs. If sufferer after confession swear under oath that he/she had not had any criminal intention and his only purpose had been to drive back an aggressor, would this confession have any effect on his innocence? Therefore, none of these reasons can certainly be utilized as a feasible approach to prove a legitimate defense. In case of a stillness in authorized laws, it is jurisprudential sources which will come on the scene so as to maybe discover some ways as a proof for the legitimate defense. Among jurisprudential laws is the "urgency principle", thereby legal challenge of legitimate defense could be solved. Urgency in the most juridical systems around the world accounted as a justifiable crime element (objective reasons for non-existence of retribution responsibility).

This principle "all unlawfulness would be legitimate in case of an urgency" jurisprudentially is one of the most renowned principles being invoked in various jurisprudential contexts and is helpful from the meditational, juridical and retributory aspects, it also plays an efficacious role in exoneration of charges and resolving individual and social problems. Using this principle, the reverence of illegal act would be eliminated and its fines repealed.

This preventive factor for retributive punishment is mentioned in the ratified laws by the term "urgency". Taking into account jurisprudential and juridical scripts reveals the fact that there is no substantial difference

between these two words and it sounds like that the urgency which is being discussed in the retributive laws is the same urgency as in jurisprudential literatures and the only difference here is that Juris consults extend it to meditational affairs which are not just related to law and regulations and they make a larger use of it. But whatever relates to the prevention from punishment is the same in jurisprudence and law.

In Jurisprudence terms, it is a situation in which perseverance of right or property leads to bring harm upon property of others and consequently committing crime and/or it is a situation in which a person is of necessity of choosing between two things that one of them would result in committing a crime.

Actually, "urgency" is a situation in which person find himself in a predicament and with its conquest he will be by necessity of doing something.

Legal experts consider it as one of the factors repealing punishment responsibility, they say: "urgency" is a situation therein the person with lack of any external aggression for the purpose of preserving his/her or others rights or properties at risk, by necessity has to commit a crime.

**According to the urgency principle:** In case of existing an urgency or necessity, the reverence of unlawful and incumbency of the necessary will be removed and it here forth would be admissible and lawful. Therefore, actions which have been prevented and prohibited by legislator or intellect such as prohibition against unauthorized possession of others property-providing the existence of such urgencies or necessities, those actions will be permissible.

Based on this principle, necessities and urgencies would make any prohibited action admissible. In other words, being in urgency of something means that man finds himself in a predicament that for deliverance from it he would have to do something by necessity and for deliverance from that predicament, intellect and necessity requires to do so without any external force for doing this way. Thus, distressed person in choosing between two actions, out of necessity has to select one of them which is the criminal choice. However, he does this with his/her own will, due to existence of predicament and internal pressure imposing on him, he has to choose whether he wants to resist or in order to escape from the predicament threatening him commit a criminal action.

Urgency is of unquestionable rules which has been executed by sacred legislator in his own denomination and occurrence of second topic of urgency makes some of premier mandates noncompulsory. In this context, there is some sections in the Quran suggestive of repealing

duty in an urgency situation. These sections prescribe illegitimate things for a person in urgency and some of them appertain to certain cases and many of them have a general usage. These Ayahs consist of (Tabarsi, 1989):

God only forbidden (flesh of) carrion, blood and pork and everything which has been slaughtered uttering something except the God's name. But every righteous person who by necessity has to eat those things would not be castigated for his wrongdoing (Tabarsi, 1989)

According to this Ayah, committing an illegitimate act on urgency is permissible and in existence of a permission the unlawfulness rule would be revoked (he is innocent). Nevertheless, in order to the urgency could not be an excuse for overeating an unlawful food, this Ayah say that this permission is only for those who are not in pursuit of savoring these unlawful foods and it should not go beyond a life-saving amount.

Second Ayah (Ayah 3, Surah Meidah) after expressing some of illegitimate things says: "whichever person by necessity has to in starvation eat illegitimately aforementioned foods without having tendency for doing such sin-eating those foods is legitimate for him/her, since the God is compassionate and merciful. Underneath of this Ayah has been mentioned the rule and general principle of the urgency and that the urgency is the cause of their legitimacy; with this condition which the permission of doing such acts is limited to the removal of urgency and alleviation of pain raised through the starvation; and also the distressed ought not to be inclined for committing a sin.

Third Ayah useful for the implication of this principle is 119th Ayah of Surah Anam: "why don't you eat foods upon which the name of Allah been uttered while (Allah) illustrated whatever was illegitimate for you, unless by force of circumstances you have to do so."

This Ayah obviously implies that the illegitimates in case of urgency would be legitimate (Tabatabayi, 1995). There are copious exempla in support of the urgency principle authenticity, e.g. "MotabareSama'e Ibne Mehran of Moosa Ibne Jafar (May Peace Be Upon Him) and also in exempla from Imam Sadegh (May Peace Be upon Him)".

This exemple with its entire all-inclusiveness proves the aforementioned principle and in all cases there in rudimentary rules in some situations are necessitating the obliged, it will remove the premier rule and replace it with permissive rule. Besides that the object is indefinite in the mode of repudiation, it implies to the whole and includes all illegitimate things.

The most important reason for this permission about the urgency rule is the obviation exemplum. This exemplum has been iterated on characteristics of Sheik Sadoogh.

The interesting part in this exemplum is the word “everything you out of necessity have to do” which means there is no punishment regarding the urgency actions.

Imam Khomeini believed the obviation exemplum as one of reasons for the principle of exoneration: regarding specified cases in the obviation exemplum, the obliged is excusable in those from any punishments or fines.

Therefore, obviation here is as if the existing object on the outside considered as non-existent. It means that the distressed committing an illegitimate act has not committed a crime intentionally and would not be liable. Imam Khomeini also believed in obviation of claim.

This principle is one of incontrovertible principles which has been acknowledged and intellectually is reckoned as a self-evident rule; in the position of argumentation on this principle, we can make use of this rule for the necessity of eating from carrion; intellectually deterrence and obviation of harm and damage are necessary. Moreover, aside from in what religion they are practicing, they all accepted the need to obviate the urgency and in their legislations predicted exceptional occasions, i.e., urgency and in subclasses excluded the urgency occasions; should a person out of necessity, virtually renounce obeying a rule he will not be reprimanded and punished. The sacred legislator not only has not forbidden and disapproved of this approach but also he confirms it in multiple ayahs and exempla. However the rationality doesn't allow the necessity for obviation of detriment of any kind; in this way, intellectually it wouldn't be necessary to remove any detriment of low importance and endurable which it can be rationally tolerated but the endurance of a detriment will be rationally objectionable if it is considered irrational.

For that matter, although in general section of Islamic Punishment Laws there is no mention of the word “Urgency”, in Iran's former punishment laws there isn't any definition of a urgency or necessity situation but there as example exists instances and occasions and has been accepted as an incontrovertible rule by jurists, e.g., Article 40 of General Punishment Law approved in 1975 and so on. The most important rules in ratified laws concerning the urgency definitely is Article 55 of the Former Punishment Law introduced as one of obviating factors of the retributive responsibility. Through this article which is a portrait of Article 40 of Former Punishment Law “every person who during the occurrence of a drastic disaster such as conflagration,

hurricane and flood commits a crime so that he/she could save his/her life or property or those of others, would not be guilty of any crime, provided that he/she had not made the danger intentionally and his/her criminal act would be in accordance with that danger and done out of necessity.” This study is the cornerstone of all ratified laws concerning the urgency rule.

This legal article which has determined the (necessity) factor is in fact expressing the same urgency factor, because unlike the perspective holding a group of jurists, the legislator in Iran assumes necessity and urgency the same. In the ratified laws, this preventive factor for retributive responsibility is often indicated with the word “necessity” where as in jurisprudence it is referred to as “urgency”. Considering in jurisprudential and juridical writings shows that there is no difference between these two words. Besides that we can see the word “urgency” in some of retributive crimes and in this cases, judge adjudicated to prevention from retributive responsibility and shows that legislator considered the necessity factor and implicated instances in the law don't have restrictive aspect, rather their criterion is the very urgency and in case of existence urgency rules will be imposed on that.

Examining the discussed conditions in Article 55 of Islamic Punishment Law which is in conformity with basic pillars of performing the urgency rule and also based on discussed documentations to show proof of this jurisprudential rule, this principle is of secondary rules and is considered as a fundamental and accepted rule in the jurisprudence and ratified laws, it has dominance over other laws and with appearance of its conditions such as indispensability of a danger, its intensiveness, intolerability of danger based on law and religion, execution of crime as the solely means of defense proportionately and to the extent of overcoming a necessity (Khomeini, 2006) and lack of a legal, material and spiritual element is viewed as one of justifiable factors of crime and based on that the action of the distressed would be considered acceptable. In other words, legal element of the urgency crime has been refuted by the legislator himself and the distressed person would not be retributively liable as primarily action of the distressed is not a crime in order that he could be kept responsible.

Therefore, legal element in the urgency crime doesn't exist, based on Ayah 173 of Surah Baghare as well as Ayah 3 of Surah Maeide and also the “obviation” exemplum. In the Iran's ratified law regarding Article 55 of the aforementioned law the legal law has been refuted and cases which have been recognized by legislator as a crime now is justifiable with the sanction of this study.

It goes without saying that this acceptable and incontestable principle based on the implementation of its conditions has the capability of adaptation and application in the entire legal laws including the juridical principle of legitimate defense. Hence, regarding implementing all of its conditions in the context of legitimate defense, it is possible that based on this jurisprudentially significant rule and also on the basis of exoneration law which have a consequential place in the retributive legal procedures and are also of accepted principles in the Islamic laws and regarding tendency of the sacred legislator in Islam for the avoidance from retribution and absence of his persistence on imposing punishment on criminals, he pays special attention to this legal principle in legal hearings and on the discretion of himself conveys this legal principle to its basic position in the jurisprudence and Islamic laws.

### CONCLUSION

The principle of legitimate defense as one of ways for obviation of retributive responsibility has not earned its actual position in the ratified laws, just because of the fact that the legislator by not paying adequate attention to the crucial issue of proving the legitimate defense, paves the way for aggressors of honor, territory, property and freedom of persons. Nonetheless, the constitution in its

176th principle says on the condition that the thematic sentence in its ratified laws has a vacuity, there should be referred to jurisprudential resources or authentic indults; by deriving benefit from these two jurisprudential principles, the distressed can remove responsibility from himself and based on these two principles the legitimate defense has a meritorious authenticity in the legal hearings.

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