

EXAMINATION OF THE FOUNDATIONS OF SELF-DEFENSE IN THE CRIMINAL SYSTEM OF AFGHANISTAN**Mohammad Aref Sharifi**

Fourth-Year Bachelor Student, Faculty of Law and Political Science, Herat University.

arefisayedsharif@gmail.com**Abdul Qadeer Nadei****Senior Teaching Assistant:** Department of Criminal Law, Law and political Science Faculty, Herat University.abqadeernadei@gmail.com<https://doi.org/10.5281/zenodo.15398905>

Abstract. *Self-defense is an inseparable principle of any legal system in the modern era and is recognized as a general legal principle by civilized nations. The criminal system of Afghanistan recognizes self-defense as one of the justifications for lawful conduct, and its foundations reflect its basis within the criminal system. This research is conducted with the aim of examining the foundations of self-defense in the criminal system of Afghanistan, utilizing a library-based methodology and an analytical-descriptive approach. The main question of this research is: What are the foundations of self-defense in the criminal system of Afghanistan? An examination of the studies conducted by scholars and jurists, along with various jurisprudential and legal sources, leads to the conclusion that the criminal system of Afghanistan has established specific and defined foundations for self-defense. The findings suggest that attention to human dignity, protection of reputation and honor, safeguarding individuals' property, consideration for citizens' freedom, the duty theory and defense of interests, protection of human life, and the theory of moral coercion are among the foundations of self-defense in the criminal system of Afghanistan.*

Keywords: *Self-defense, foundations of self-defense, defender, aggressor.*

Introduction

Legal systems in general, and Islamic Sharia in particular, have established various deterrent measures to prevent aggression or its continuation and to restrain the aggressor. In Islamic law, one of these measures is the internal barrier created by faith and the commands and prohibitions of Sharia within an individual. Another measure is the collective vigilance exercised by certain members of the Islamic community, who act as enforcers of the principles of social solidarity and mutual support through the promotion of good and the prevention of wrongdoing.

Additionally, the punishments prescribed by Sharia that the Islamic government has the right to impose on offenders serve as another deterrent. However, these measures sometimes lack the ability to confront or prevent aggression in certain situations, and consequently, they may fail to protect the interests of society and the rights of individuals against the dangers posed by offenders. For this reason, legal systems, particularly the criminal law system of Afghanistan—which is derived from Islamic legal principles—do not leave individuals defenseless. Instead, they have provided for the right to self-defense as a fourth means of preventing aggression, deeming it obligatory in most cases and permissible in others. This allows individuals to utilize this effective means of defense when they perceive a real and imminent threat to their life, property, or honor, and when no other means of escape is available.

The foundations and principles of self-defense vary across different legal systems. Since Afghanistan's criminal law system is partly based on Islamic rules, it also has specific and

defined principles. The rules regarding self-defense are discussed in Articles 125 to 132 of the Afghan Penal Code. Numerous studies have been conducted on issues related to self-defense; however, little attention has been paid to the foundations of self-defense within Afghanistan's criminal law system. While this situation may have been acceptable in the past and discussions on self-defense were limited, today, with advancements in criminal law systems and the introduction of new rules and regulations regarding self-defense, new discussions have emerged for scholars and researchers in the field of criminal law. Thus, opening a new chapter for a precise and systematic presentation of these discussions and a review of the foundations of self-defense appears essential. Therefore, through such a study, one can achieve goals such as understanding the conditions and foundations of self-defense within Afghanistan's criminal law system. It is necessary to understand the foundations of self-defense in Afghanistan's criminal law system. The main question in this research is: What are the foundations of self-defense in Afghanistan's criminal law system? Additionally, other questions that arise include: What are the conditions for self-defense in Afghanistan's Penal Code? What is the legal nature of self-defense? Consequently, this work will briefly explain the foundations of self-defense along with its legitimacy, nature, and conditions.

Conceptual Clarification:

Defense: Defense, in its literal sense, means to support someone, to ward off harm and aggression from oneself or another, and to protect one's homeland, honor, and rights from the encroachment of enemies (Amid, 2003, 1132:2). Jafari Langarudi defines defense as follows: "Defense is the response that the parties to a dispute give to each other, and in a broader sense, defense also includes objections" (Jafari Langarudi, 1999, 303). This term has been used in various forms in some verses of the Holy Quran, such as in Surah Al-Hajj, verse 38, where Allah Almighty says: "Indeed, Allah defends those who have believed. Indeed, Allah does not like every treacherous disbeliever." This means that God defends those who have faith. God does not love any ungrateful traitor. Therefore, a better definition of defense could be that it is the act of repelling reciprocal actions to prevent imminent potential harm.

Punishment: The term "punishment" has a similar meaning in both its literal and technical definitions. Literally, it refers to reward, penalty, recompense, reward for good deeds, compensation, retribution, and punishment (Dehkhoda, 1998, 7704:5). In legal terminology, it refers to something that compensates and makes amends for good deeds with kindness and for bad deeds with negativity (Raghib Isfahani Khosravi Hosseini, 2004, 397:1). Article 133 of the Afghan Penal Code defines punishment as: "Punishment is the sanction provided by law for criminal acts and is imposed by the court on the perpetrator in accordance with the principles of this law."

Sharia (Legitimacy, Law): The term "Sharia" is derived from the word "Shara" and literally means a place for drinking water, a place for drawing water, a path, a method, religion, and the teachings of the prophets (Mo'in, 2002, 939:1). The word "legitimate" also means correct and justifiable, lawful and permissible according to Sharia (Dehkhoda, 1998, 20949:13). In technical terms, Sharia refers to the collection of rules, laws, commandments, and regulations regarding moral, doctrinal, legal, social, and political aspects of Islam or other heavenly religions (Jafari Langarudi, 1999: 391).

System: The term "system" is plural and derived from the word "order." In its literal sense, order refers to stringing pearls together, composing poetry, arranging things side by side,

and organizing work (Masoud, 2004, 1755:2). In technical terms, a system refers to a set of rules and regulations that organize and regulate specific matters (Ibn Manzur, 1996, 578:12).

Justifiable Defense: Regarding justifiable defense in legal terminology, various opinions have been expressed across legal systems. In legal dictionaries, justifiable defense is defined as the right to use appropriate means to defend against any criminal act that poses a threat to life, property, or honor to the defender or another person in order to protect oneself or others (Ostankzai et al., 2008: 128). In other words, justifiable defense is the legitimate reaction of an individual against an aggressive act by the offender in a manner that is appropriate and in accordance with legal provisions. "In international law, justifiable defense refers to a situation that grants a state under armed aggression the right to immediately respond with armed force against the aggressor state or states by any means necessary to defend itself and suppress the invading enemy" (Ziaei Beigadli, 2019: 493). Based on these definitions, the difference between justifiable defense in domestic law and international law lies in the fact that justifiable defense in domestic law is an exception to the rule, while in international law—due to the lack of a supranational authority and enforcement power—justifiable defense is a rule that itself is an exception to the prohibition against the use of force and the prohibition of war (Ibid).

General Aspects of the Subject

The Nature of Justifiable Defense: Regarding whether justifiable defense is a right or an obligation, various views have been expressed by scholars and jurists. Among them, two significant theories are discussed here. Some believe that justifiable defense is a right and is considered a natural right of every human being. Proponents of this theory, who are followers of the natural law school and the social contract theory, argue that justifiable defense is part of the rights of individuals under threat (Attar, 1991: 265). Others believe that justifiable defense is an obligation, stating that when a person faces an attack from another, they enter a state of necessity; on one hand, they must preserve a particular value, and on the other hand, preserving this value depends on sacrificing or disregarding another value. In this situation, the individual is obliged to uphold the higher and more important value (Mansourabadi, 2017: 147). Therefore, justifiable defense is recognized as an obligation. However, according to the provisions of the Afghan Penal Code, justifiable defense is a right.

Conditions for Justifiable Defense: The Afghan Penal Code of 1396 (2017) outlines a series of conditions for the realization of justifiable defense in paragraph two of Article 127.

Therefore, it is necessary to briefly mention the conditions of justifiable defense before explaining its foundations:

Defense against Illegal and Unjust Acts: Self-defense and defense of others are justified when the attack and aggression are illegal and occur without any justification or evidence in an unjust manner. Thus, in cases where police or state inspectors act in accordance with the law, resisting a state official does not constitute justifiable defense and is not protected by law (Rezaei, 2018: 218). It is worth noting that the Afghan legislator has made an exception regarding defense against legal officials in Article 131 of the Penal Code, stating that if there is a reasonable fear of death or serious injury or fear of an assault on honor or freedom resulting from the actions of that official, then self-defense or defense of others is permissible.

Proportionality of Defense: The defense carried out by an individual against an aggressor must be proportional to the unlawful act and should not result in harm greater than that inflicted by the aggressor (Stefani et al., 1998: 502:1). Therefore, if the harm caused by the defense exceeds that inflicted by the aggressor, the defender will be punished according to the

extent of the excess action. This condition is also reflected in paragraph two of Article 789 of the Afghan Civil Code, which states: "A person who causes harm while in a state of justifiable defense regarding their own life or property or that of another shall not be held liable, provided they do not exceed what is necessary in their defense; otherwise, they shall be obliged to compensate for the damage."

Lack of Intent to Commit a Criminal Act by the Opponent: In other words, this condition states that the attack must be unilateral; that is, prior to the attack, there should not have been any specific behavior from the defender that contributed to the formation of the attack by the aggressor. It follows that the attack must be initiated solely by the aggressor's will and not influenced by any intention or action from the defender (Mansourabadi, 2017: 151). Therefore, if the defender played any role in provoking the aggressor prior to the attack, they should not expect legal protection. In such a case, the defender would have placed themselves in danger, and their reaction would not be justifiable as self-defense.

Simultaneity of Defense and Attack: The Afghan Penal Code in paragraph two of Article 127 considers simultaneity of defense and attack as a fundamental condition for justifiable defense; thus, a defender's actions are deemed justifiable only when they occur during the attack by the aggressor. Therefore, defending against any criminal act before or after the commission of an attack does not qualify as justifiable defense. This point is also evident from Article 128 of the Penal Code, which states regarding the timing of justifiable defense: "The right to justifiable defense continues as long as there is a threat and ceases upon its removal."

This means that as soon as the attack ends, justifiable defense is no longer permissible.

Defense against Actual and Imminent Attacks: For justifiable defense to be realized, the defense must occur simultaneously with the aggression. As explicitly stated in paragraph two of Article 127 of the Penal Code, the legislator refers to any form of actual aggression or imminent threat. Therefore, if the aggression occurred in the past and the attack has ended, and afterward, the person who was attacked attempts to defend themselves, recourse to justifiable defense is not permissible. This is because the legislator does not permit acts of revenge or retaliation and considers the investigation and application of penalties to be within the jurisdiction of judicial authorities (Goldouzian, 2009: 122).

Defense as the Only Means to Avert Danger: This condition clarifies that there must be no other means available to avert the danger apart from defense. Thus, if an individual can eliminate the threat without causing harm, then the defense lacks legitimacy. Additionally, if a person possesses superior mental, physical, or experiential advantages that allow them to manage or neutralize the crime scene, they are not permitted to resort to force in self-defense. Likewise, if they can refer to public authorities to prevent the danger, recourse to justifiable defense is not possible and is deemed impermissible. Consequently, it is understood that defense must be considered as the last resort for the defender (Commentary on the Penal Code, 2019: 362:1).

Research Findings:

Foundations of Self-Defense in the Criminal Justice System of Afghanistan: Regarding the reasons or foundations upon which the right to self-defense has emerged in the criminal justice system of Afghanistan, it can be derived from clause 2 of Article 125 of the Penal Code, which states: "Self-defense allows a threatened person to use necessary means to defend against any criminal act that poses a threat to life, honor, freedom, or financial loss to themselves or another person."

Based on this article, there are various opinions regarding the foundations of self-defense in the criminal justice system of Afghanistan. The most significant theories discussed in this work are as follows:

Attention to Human Dignity: The first foundation of self-defense in the criminal justice system of Afghanistan is the attention to human dignity. Respecting and honoring others is an undeniable principle that Islam places special emphasis on. The primary source for this assertion is found in Allah's statement in verse 70 of Surah Al-Isra, which says: "We have certainly honored the children of Adam." Therefore, by granting dignity to humanity, Allah has defined the value and greatness of human beings, indicating that humans hold a very high status in Islamic thought. Since the legal system of Afghanistan, in general, and the criminal justice system, in particular, is derived from Islam, this principle is also evident within Afghanistan's criminal justice framework. In light of this principle, it is understood that Afghan lawmakers permit individuals to engage in self-defense when necessary in order to protect themselves or others and uphold human dignity.

Protection of Honor and Dignity: The Islamic religion places significant importance on preserving the honor, dignity, sanctity, and personality of believers. As mentioned earlier, the penal system of Afghanistan is derived from Islamic law, which indicates that one of the foundations of the legitimacy of self-defense in the penal system is the protection of a person's honor and dignity. Of course, the principle is that the government and security forces of any country should guarantee the safety of all people; however, as previously stated, there are times when security forces are unable to respond immediately to such violations. Therefore, Afghan lawmakers, in order to protect a person's honor, dignity, chastity, and reputation—which have been likened to sacred boundaries—do not leave individuals defenseless and allow them to defend themselves in the event of an unlawful assault on their or someone else's honor. Thus, whenever someone attempts to commit an act that violates another's dignity, the other party is permitted to defend against this act. Therefore, whenever someone's honor and dignity are at risk, they may respond with proportional self-defense. (Mohseni, 1997, 223:3)

Protection of People's Property: The Civil Code of Afghanistan defines property in Article 472 as follows: "Property is any tangible or intangible right that has material value to people." (Civil Code of Afghanistan/Article 472) Consequently, according to paragraph two of Article 125 of the Penal Code, a person's property is considered an important right that grants the owner the right to legitimate defense if it is subject to an unlawful assault. Therefore, another basis for self-defense in the Afghan penal system is the protection of people's property. This means that the Afghan penal system respects the financial rights and assets of citizens and grants them the right to engage in legitimate defense against any form of assault, misuse, or destruction of their property without facing responsibility for defending their own or another's property.

Duty Theory and Defense of Interests: Regarding the foundations of self-defense, some contemporary scholars hold the view that a person who defends themselves or another is not only not committing a reprehensible act but, on the contrary, is fulfilling their social and individual duty in the best possible manner. In this case, society has no interest in punishing such a person, and since fulfilling a duty should not lead to civil or criminal liability, therefore, the defender bears no responsibility. (Allameh, 2017, 172) From this theory, it can be inferred that defending against unlawful aggression is not only an exercise of a right but also a fulfillment of a duty; indeed, in some cases, defending someone in need against an aggressor is considered both a moral and legal obligation.

Furthermore, in Islam, defense in such situations is considered one of the forms of righteousness and piety according to God's statement in verse 2 of Surah Al-Ma'idah.

Safeguarding Human Life: Undoubtedly, the most important gift that God has bestowed upon humanity is the blessing of life. The priority of defending one's life over other matters such as property is clear; defense against aggression that threatens life, health, or physical integrity forms the fundamental basis of legitimate defense in legal terms. None of the contemporary penal laws have cast doubt on accepting and declaring this principle. In Islamic penal law, "life" refers to existence, vitality, physical integrity, and health; thus, assaults against life are limited to acts such as murder, assault, injury, amputation, physical abuse, torture, etc., as indicated by the legislator. (Sadeghi Jahani, 2014, 228) Therefore, this illustrates that human life and existence are among the most fundamental human rights. In Afghanistan's penal system, this right is recognized as an undeniable right that grants legitimate defense in cases where an individual is subject to assault. From this explanation, it can be understood that one of the foundations of self-defense in Afghanistan's penal system is safeguarding human life.

Attention to Citizens' Freedom: Attention to the freedom of citizens means supporting and respecting the fundamental rights and individual freedoms of each person in society. Freedom is an inherent right of every human being, and no one has the right to arbitrarily violate the freedom of others or cause harm to them. On the other hand, it is undeniable that living in a community and benefiting from social life requires some loss and sacrifice of individual freedoms. Generally, the unrestricted and unlimited exercise of freedom by one individual conflicts with the freedoms of other members of society. Therefore, the right to exercise freedom for individuals living in a community is limited to the boundaries set by law for individual freedoms. It is evident that if someone infringes upon the freedom of another within these legal limits, they will be considered a criminal and subject to punishment. (Shambayati, 2010, 337:1)

Thus, according to Article 125 of the Penal Code of Afghanistan, the right to legitimate defense arises when there is a threat not only to property, life, and honor but also to an individual's freedom. Therefore, it can be understood that one of the foundations of legitimate defense in Afghanistan's penal system is attention to the freedom of citizens.

Theory of Moral Coercion: Some legal scholars believe that the basis of legitimate defense lies in the absence of intent and moral element. They argue that a person who is threatened cannot control their actions due to excitement and disruption of will, which leads them to commit a crime involuntarily. In such cases, the criminal behavior during defense does not change its nature; rather, because the defender's will is taken away, it cannot be attributed to them, and their exemption from punishment is based on personal reasons rather than general principles. Therefore, defenders should be protected from prosecution and punishment, especially since such individuals do not pose a danger to society. (Ardebili, 2019, 121:1)

Conclusion:

One of the factors that absolves responsibility and serves as a mitigating factor in all penal systems is legitimate defense. Since defending individuals is not always possible through state mechanisms, most penal systems in general—and Afghanistan's penal system in particular—grant individuals the right to defend themselves or others against unlawful aggression under specific conditions. If this defense meets legal criteria, it is termed legitimate defense. Therefore, legitimate defense consists of a series of conditions that the legislator has outlined in Afghanistan's Penal Code, including: defense against unlawful and unjust actions, proportionality of defense, absence of intent in causing the criminal act by the opposing party,

simultaneity of defense and aggression, defense against actual and imminent attack, and that defense is the only means to avert danger. Regarding the nature of legitimate defense, some argue that it is a right, while others consider it an obligation; Afghanistan's penal system has accepted the theory of right. Furthermore, the legitimacy of legitimate defense is established based on explicit texts—namely divine scripture and prophetic tradition—in Afghanistan's penal system.

The foundations of legitimate defense vary from one penal system to another. According to Afghanistan's Penal Code, the foundations of legitimate defense in this system include: attention to human dignity, protection of honor and reputation, safeguarding individuals' property, duty theory and defense of interests, protection of human life, attention to citizens' freedom, and the theory of moral coercion. It should be noted that the foundations of legitimate defense have been briefly discussed in this work; therefore, it is expected that young researchers will delve deeper into each of these foundations in order to advance understanding and facilitate further research for future scholars.

REFERENCES

1. A group of authors, (2019), Commentary on the Penal Code, Kabul, Asia Foundation, 1st Print.
2. Allameh, Gholam Haidar, (2017), General Criminal Law of Afghanistan, Kabul, Ibn Sina University Publications, 3rd Print.
3. Ardabili, Mohammad Ali, (2019), General Criminal Law, 4th Edition, Tehran, Mizan, Volume One, 58th Print.
4. Attar, Davood, (1991), Self-Defense in Islamic Criminal Law, Translation: Akbar Ghafouri, Mashhad, Satan Quds Rizvi.
5. Dehkhoda, Ali Akbar, (1998), Dictionary, Tehran, Rezone, Volume Five and Thirteen, 2nd Print.
6. Estankzai, Nasrollah and colleagues, (2008), Dictionary of Legal Terms, Kabul, Judicial and Legal Affairs Project of Afghanistan, 1st Print.
7. Goldoozian, Iran, (2009), Fundamentals of General Criminal Law (1-2-3), Tehran, Mizan Publishing House, 2nd Edition, 18th Print.
8. Ibn Manzoor Ansari, Muhammad bin Makram, (1996), Lisan al-Arab, Beirut, Dar Beirut, Volume Twelve.
9. Jafari Langroudi, Mohammad Jafar, (1999), Legal Terminology, Tehran, Ganj-e Danish, 10th Print.
10. Mansour Abadi, Abbas, (2017), General Criminal Law 1, Tehran, Mizan Publishing House, 1st Print.
11. Masoud, Jibran, (2004), Al-Ra'id: Arabic-Persian Alphabetical Dictionary, Translation: Reza Enzai Nejad, Mashhad, Astan Quds Razavi Publications, and Volume Two, 4th Print.
12. Mo'in, Mohammad, (2007), Dictionary, Tehran, Edna Publishing House, Volume Two.
13. Mohseni, Morteza, (1997), Course of General Criminal Law, Tehran, Ganj-e Danesh Publishing House, Volume Three, 1st Print.
14. Motaghi Hindi, (n.d.), Kanz al-Ummal, N.P., N.P., Volume Eleven.
15. Omid, Hassan, (2003), Omid's Three-Volume Dictionary, Tehran, Amir Kabir Publishing House, Volume Two, 9th Print.

16. Raghb-i Isfahani, Hussein bin Mohammad, (2004), Translation and Research of Quranic Vocabulary, Translation: Gholam-Reza Khosravi Hosseini, Tehran, Al-Maktabah Al-Murtazaviya for the Revival of Jafri Works, Volume 1.
17. Rasmi, Jareeda, (1976), Civil Law of Afghanistan, Kabul, Ministry of Justice Publication.
18. Rasmi, Jareeda, (2017), Penal Code of Afghanistan, Kabul, Ministry of Justice Publication.
19. Rezaii, Mohammad Aref, (2018), General Criminal Law of Afghanistan, Kabul, Saeed, 4th Print.
20. Siddiqi, Hussein Mir Mohammad, Jahani, Behzad, (2014), Limitations of Self-Defense Against Police in Iranian Law "With a Look at French Law," in: Journal of Criminal Law Research Year Five, Issue 228.
21. Shambiyati, Hoshang, (2010), General Criminal Law, Tehran, Majd, Volume One, 16th Print.
22. Stephanie, Gaston and colleagues, (1998), General Criminal Law, Translation: Hassan Dadban, Tehran, Allameh Tabatabai University, Volume One, 1st Print.
23. Ziaei Bigdeli, Mohammad Reza, (2019), Public International Law, Tehran, Ganj-e Danesh Publication, New Edition, 63rd Print