

The Right to Self-Defence: Locke's Philosophical Approach and Islamic Law

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Abstract:

The right of self-defence is adopted in positive law. Self-defence in forced conditions due to aggression that threatens life, body, or property becomes the basis for exemption from punishment. This study uses the doctrinal type of legal research to justify the right of self-defence from the perspective of Locke's philosophy and Islamic law by collecting, analysing, and interpreting primary and secondary sources of law. In Locke's philosophy, the right to self-defence derives from the executive power of natural law that an individual has in a state of nature to be the judge and executor of natural law against all acts of violation of natural law that threaten their life, freedom, and property. In a political Society formed by mutual consensus to replace the natural state, individuals agree to relinquish the executive power of natural law to a civil government. In a political Society, the civil government is the judge and executor of the law for any dispute between individuals. However, the transfer of Natural Law executive power to the civil government is not absolute because, in certain circumstances that cause the civil government to be unable to protect life, freedom, and property, individuals can reuse their natural law executive power to safeguard themselves. The right of self-defence in a political society becomes a secondary means of self-protection only in circumstances where the civil government cannot protect individuals from threats to life, liberty, and property. Under Islamic law, defending one's own or others' life, honour, and property is the right of every Muslim without relying on a civilian government. Self-defence is carried out in proportion to acts of aggression. Based on Locke's

philosophy and Islamic law, adopting the right of self-defence in positive law must have its limits defined to prevent its arbitrary use in an anarchic society.

Keywords: state of nature; political society; right to self-defence; Islamic law

Introduction

Three cases of self-defence took place in 2018-2023. In the first case, Muhammad Irfan Bahri attacked two robbers to protect his property, leaving one robber dead and the other seriously injured. The investigation of Bahri's case was stopped on the grounds of self-defence.¹ In the second case, Murtede, aka Amaq Sinta, attacked four robbers in an effort to protect his property since he perceived it to be life-threatening. As a consequence, two robbers were killed, and the police arrested the other two. Murtede became a suspect in a murder case, but the investigation ceased on the grounds of self-defence.² Third, Muhyani attacked the thief with a pair of scissors who was about to steal his goat, resulting in the thief's death. Muhyani became a suspect in the murder case, but the prosecution was discontinued for the same reason.³ These three cases involve self-defence in an emergency of self-, life, or property protection. In such circumstances, Locke argued that the victim was allowed to kill his attacker in self-defence.⁴ The right to defend oneself is every person's natural or inherent right to protect themselves or their home. This condition is referred to as the law of self-protection.⁵ Locke believed that every individual has the right to defend themselves from attackers such as murderers, robbers, or thieves who endanger their life or property by wounding or killing them with weapons.⁶ Locke stated that the right of self-defence is conferred by natural law on every person to protect what they have, their property, and their body from the attack of others.⁷ The right of self-defence is inherent in every human being to defend themselves from all attacks that endanger their body, life, and property.

¹ Adi Warsono, 'Duel Lawan Begal di Jembatan Summarecon, Santri Dapat Penghargaan', *Tempo*, 31 May 2018, <https://www.tempo.co/arsip/duel-lawan-begal-di-jembatan-summarecon-santri-dapat-penghargaan-915983>.

² Anonymous, 'Dibebaskan, Tersangka Pembunuh Begal NTB Ucapkan Terima Kasih', 17 April 2022, <https://www.cnnindonesia.com/nasional/20220417164609-12-785787/dibebaskan-tersangka-pembunuh-begal-ntb-ucapkan-terima-kasih>.

³ Yandhi Delastama, 'Kejaksan hentikan kasus pria bunuh pencuri kambing di Banten, keluarga: "Harapan dibebaskan, dia tulang punggung kami"', *BBC News Indonesia*, 16 December 2023, <https://www.bbc.com/indonesia/articles/ce5jvzj0127o>.

⁴ Luciano Venezia, 'Locke on Conditional Threats', *The Southern Journal of Philosophy* 60, no. 4 (December 2022): 696–713, <https://doi.org/10.1111/sjp.12460>.

⁵ Whitley Kaufman, 'Is There a "Right" to Self-defense?', *Criminal Justice Ethics*, 1 January 2004, <https://www.tandfonline.com/doi/abs/10.1080/0731129X.2004.9992157>; David Little, 'The Right of Self-Defense and the Organic Unity of Human Rights', *Journal of Law and Religion* 36, no. 3 (December 2021): 459–94, <https://doi.org/10.1017/jlr.2021.59>.

⁶ Mark Tunick, 'John Locke and the Right to Bear Arms', *History of Political Thought* 35, no. 1 (2014): 50–69.

⁷ Elsa Dorlin, *Self-Defense: A Philosophy of Violence*, trans. Kieran Aarons, English-language edition (London: Verso, 2022).



The right to self-defence is set out in the Criminal Code, Article 49 paragraph (1), stating that whoever makes a forced defence for himself or others, the honour of decency or his property or others by virtue of being attacked or threatened with an attack against the law will not be punished. This article was amended under Article 43 of Law No. 1 of 2023 concerning the Criminal Code, which states that the perpetrator of a criminal offence is not punished if the act is committed because it involves forces that cannot be restrained or forced by threats, pressure, or forces that cannot be avoided.⁸ The Criminal Code sees the right to self-defence—also called criminal defence—as part of the conditions that can be identified to prevent the imposition of a crime on the perpetrator.⁹ Self-defence allows a person to protect themselves, their life, and property by using violence against an attack seen as life-threatening on the condition that the state is unable to protect its security in the occurrence of the attack.¹⁰

In Islamic law, the use of force is permissible only in self-defence rather than the use of offensive force.¹¹ Self-defence in Islamic law is widely recognised, as it stipulates that Muslims must defend their own lives and the lives of others, and their property and the property of others from any aggressive behaviour.¹² Under Islamic law, the intent of self-defence is fundamental. Self-defence carried out with the intention of faith can be justified. However, when this act is intended for violence, it cannot be considered self-defence. Self-defence must also be carried out in proportion to aggressive acts.¹³ Self-defence based on Islamic law, the Quran, and other sources is a duty rather than a right.¹⁴ The existence of the duty of self-defence and the duty to retreat from aggression has created a contradiction in understanding self-defence under Islamic law. This study aims to justify the right of self-defence based on Locke's philosophy and Islamic law. It also seeks to provide a theoretical and philosophical framework for incorporating the right of self-defence into criminal law and case law.

⁸ Simon Butt, 'Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?', *Griffith Law Review* 32, no. 2 (3 April 2023): 190–214, <https://doi.org/10.1080/10383441.2023.2243772>; Haadi Arrosyiid and Ferry Irawan Febriansyah, 'Criminal Acts of Murder Committed in Forced Circumstances (Overmacht)', *International Journal of Law and Society* 2, no. 1 (30 March 2023): 52–67, <https://doi.org/10.59683/ijls.v2i1.29>.

⁹ Paul H. Robinson, 'Criminal Law Defenses: A Systematic Analysis', *Columbia Law Review* 82, no. 2 (March 1982): 199, <https://doi.org/10.2307/1122275>.

¹⁰ Jonathan Herring, *Criminal Law: The Basics*, Second edition (Abingdon, Oxon: Routledge, 2022), <https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=2970659>.

¹¹ N. A. Shah, 'The Use of Force under Islamic Law', *European Journal of International Law* 24, no. 1 (1 February 2013): 343–65, <https://doi.org/10.1093/ejil/cht013>.

¹² Md. Ahteshamul Haque, 'The Concept of Self-Defence in Islamic Criminal Law: A Study', *International Journal of Humanities, Social Sciences and Education* 11, no. 3 (2024): 1–14, <https://doi.org/10.20431/2349-0381.1103001>.

¹³ Amr Ibn Munir, 'The Law of Self-Defense under the Pakistani Criminal Justice System: A Critical Exposition', *SSRN Electronic Journal*, 2024, <https://doi.org/10.2139/ssrn.4676082>.

¹⁴ Khalid Owaydhah, 'The Legal Dimensions of Self Defence under Islamic Jurisprudence' (Doctor of Philosophy Thesis, South Australia, College of Business, Government and Law Flinder University, 2018), <https://theses.flinders.edu.au/view/5672f721-f390-48c3-bffa-3f64d5f383a5/1>.



This research presented relevant previous studies for justification. First, Jacob Charles's study entitled "Securing Gun Rights under the Law: The Right to Keep and Bear Arms beyond the Constitution" analyses the right to carry weapons for self-defence, arguing that it is not only legally permitted but also necessary in certain situations. Specifically, when law enforcement fails to act during riots and looting, individuals may take it upon themselves to enforce the law, effectively challenging the state's monopoly on violence.¹⁵ Second, an article by David H. Thompson, Peter A. Patterson, and Haley N. Proctor titled "Defend Your Basic Law and Retroactivity" analyses self-defence laws in Florida that do not require avoiding threats and grant immunity to those who use violence to defend others.¹⁶ This study has a different point of view from the four studies mentioned. This study investigates the adjudication of the right of self-defence in positive law from the standpoint of Locke's theory and Islamic law. This study justifies the application of the right of self-defence in positive law.

Methods

This research is doctrinal legal research that involves legal concepts and principles as well as a synthesis of principles or values.¹⁷ Legal doctrine works with value, as in legal argumentation, development, and reform.¹⁸ The legal doctrine establishes the conditions for establishing the qualification of resolving cases in a specific area of law.¹⁹ This study systematically investigates the concepts and principles of law as well as the legal values of the right of self-defence from the perspective of Locke's philosophy and Islamic law to justify its arrangement in positive law and its use in real life. This research was conducted in four stages: (1) determining legal issues, (2) collecting relevant legal materials, (3) analysing legal materials, and (4) applying the analysis results to answer research problems. The research problem justifies the right of self-defence based on Locke's theory and Islamic law. The primary materials include the Criminal Code and case law, while the secondary materials were garnered from publications of Locke theory and Islamic law regarding the right to self-defence. The collected legal materials were analysed to resolve the research problem. The research results are represented in an exposition of the right to self-defence according to Locke's theory and Islamic law.

Results And Discussion

¹⁵ Jacob Charles, 'Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution', *Michigan Law Review*, no. 120.4 (2022): 581, <https://doi.org/10.36644/mlr.120.4.securing>.

¹⁶ Haley N. Proctor and David H. Thompson, 'Stand Your Ground Laws and Retroactivity', 29 April 2019, <https://fedsoc.org/scdw/docket-watch-love-v-state>.

¹⁷ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review* 17, no. 1 (1 October 2012): 83–119, <https://doi.org/10.21153/dlr2012vol17no1art70>.

¹⁸ Aleksander Peczenik, 'A Theory of Legal Doctrine', *Ratio Juris* 14, no. 1 (2001): 75–105, <https://doi.org/10.1111/1467-9337.00173>.

¹⁹ Emerson Tiller and Frank Cross, 'What Is Legal Doctrine', *Public Law and Legal Theory Papers*, 16 May 2005, <https://law.bepress.com/nwwps-plltp/art41>.



The right of the Executor of Natural Law in a State of Nature

In his philosophy, Locke believed that humans first lived in a state of nature devoid of civil government before living in civil society.²⁰ The state of nature is before humans joined to form a political society based on social agreement.²¹ The state of nature is the state of human beings living together based on natural laws, without anyone in a superior position having the power to judge between them.²² Civil society, unlike a natural state, has the government superior to others with the authority to make laws and force individuals to obey them and resolve disputes. The state of nature is a state of calm and peace, where individuals are subject to the laws of nature. In the state of nature, all human beings have natural rights, including the right to life, liberty, and possession of things inherent to them from birth.²³ The laws of nature oblige the individual not to interfere and harm the life, freedom, and property of others. Locke stated that in the state of nature, everyone obtains the guarantees of security, freedom, and equality from natural laws. The law of nature teaches humans not to interfere with the freedom, life, and property of others, considering that all humans are equal in their natural state.²⁴ Reasoning distinguishes humans from inanimate objects. With reasoning ability, humans can control their minds and direct their actions.²⁵ Individuals with their reasoning can prevent negative actions, such as harming themselves or others and encourage positive actions, such as protecting fellow individuals.

In the state of nature, the problem arises of who resolves disputes between individuals when disputes are caused by actions threatening other individuals. This is because, in nature, all men are equal, and no one has the superiority or authority to judge disputes. The state of nature is a society without a civil government to deal with disputes among individuals. Hobbes viewed that in a state of nature with the absence of government, no one is authorised to execute the law, but the law is obeyed. On the state of nature, in Hobbes' perspective, there is no law, law enforcers, or justice or injustice.²⁶ Hobbes argued that the state of nature is a state of war—every

²⁰ Javier Hernández and Santiago Dussan, 'Hobbes and the Economic, Social and Cultural Rights of the Universal Declaration of Human Rights', *The Age of Human Rights Journal*, no. 17 (17 December 2021): 173–95, <https://doi.org/10.17561/tahrj.v17.6572>.

²¹ Mark Cartwright, 'State of Nature', World History Encyclopedia, accessed 8 March 2025, https://www.worldhistory.org/State_of_Nature/.

²² John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (La Vergne: Neeland Media LLC, 2020), <http://public.eblib.com/choice/PublicFullRecord.aspx?p=6732400>.

²³ Justin P. Bruner, 'Locke, Nozick and the State of Nature', *Philosophical Studies* 177, no. 3 (1 March 2020): 705–26, <https://doi.org/10.1007/s11098-018-1201-9>.

²⁴ Aslıhan Çoban Balcı, 'A Review on Freedom and Authority in Theories of John Locke and Thomas Hobbes', *Fiscaoeconomia* 4, no. 1 (31 January 2020): 132–58, <https://doi.org/10.25295/fsecon.2020.01.007>.

²⁵ Steven Heyman, 'The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty', *Marquette Law Review* 101, no. 3 (1 March 2018): 705.

²⁶ Joshua Neoh, 'Kierkegaard and Hobbes on the State of Nature', *The American Journal of Jurisprudence* 68, no. 3 (1 December 2023): 211–28, <https://doi.org/10.1093/ajj/auae002>.



man against every man.²⁷ In the state of nature, free people are not bound by any law and have any rights, even the right to kill, for the sake of self- and life protection.²⁸ The state of nature recognises no wrong and right actions but sinful and sinless deeds.²⁹ A person who commits sins is punished with remorse by themselves. Hobbes said that life in a state of nature without government is a state of chaos.³⁰ The state of nature is the state of perfect freedom for individuals to do whatever they want without any superior power preventing and punishing them.

Opposing Hobbes, Locke argued that in the state of nature, there is no executor of the law to settle disputes. According to Locke, in the state of nature, each individual has the right to punish others for their wrongdoing that violate natural rights.³¹ Each individual in the state of nature is the executor of the laws of nature for their own benefit.³² In the state of nature, each individual is the enforcer of the law for themselves to protect their natural rights from the wrongdoing of others. For individuals, it is not only reasonable to protect themselves from anyone's attacks but it is their right.³³ Self-protection from all kinds of dangers is an obligation and a right of whoever receives a threat. In the state of nature, Locke states that each individual has the executive power of natural law by which each person is the judge of their own case. Each individual has the right to punish violators and be the executor of natural law. The right of individuals under the executive power of natural law not only to punish offenders but also includes the right to obtain remedies for damages suffered. Each violation will get the appropriate punishment according to the level of violation to make offenders deterrent and deter other offenders from committing violations.³⁴ The executive power of natural law belongs to each individual to protect one's interests in general.

Locke stated that although the state of nature is a state of peace the individual wants to leave this state.³⁵ In the state of nature, the individual, being a law enforcer for their own interests, is incapable of continuously protecting themselves from every attack that can come at any time. In a state of nature in the absence of a majority

²⁷ Henrik Skaug Sætra, 'A Hobbesian Argument for World Government', *Philosophies* 7, no. 3 (June 2022): 66, <https://doi.org/10.3390/philosophies7030066>.

²⁸ Thomas Hobbes, *Leviathan* (United Kingdom: Oxford University Press, 2024).

²⁹ Lars Vinx, 'Personality, Authority, and Self-Esteem in Hobbes's Leviathan', *Intellectual History Review* 32, no. 1 (2 January 2022): 135–55, <https://doi.org/10.1080/17496977.2021.2003002>.

³⁰ Marcus P. Adams, 'Hobbes, Definitions, and Simplest Conceptions', *Hobbes Studies* 27, no. 1 (2014): 35–60, <https://doi.org/10.1163/18750257-02701001>.

³¹ Hun Chung, 'Locke's State of Nature and Its Epistemic Deficit: A Game-Theoretic Analysis', *Synthese* 200, no. 2 (15 April 2022): 147, <https://doi.org/10.1007/s11229-022-03582-5>.

³² Jamie Hardy, 'A Defense of Locke's Moral Epistemology', *Locke Studies* 20 (2020): 1–23, <https://doi.org/10.5206/ls.2020.8249>.

³³ Samuel Mansell, 'Hobbesian Resistance and the Law of Nature', *Intellectual History Review* 34, no. 2 (2 April 2024): 317–41, <https://doi.org/10.1080/17496977.2023.2170685>.

³⁴ Locke, *Two Treatises of Government and A Letter Concerning Toleration*.

³⁵ Celine Bouillot, 'THE CONFLICT IN THE LOCKEAN STATE OF NATURE', *Journal of the History of Economic Thought* 41, no. 4 (December 2019): 511–29, <https://doi.org/10.1017/S1053837218000585>.



with full power, there is no guarantee of protection from harmful interference. Individuals leave the state of nature and agree to jointly form a government and defer to the powers of the government.³⁶ The right of the executor of natural law becomes the forerunner and will transform into the right of self-defence in a political society formed by mutual agreement. In political societies, the right of self-defence is legitimised in positive law and used only under certain conditions to protect the safety of life, body, and property of individuals from threats such as murder, persecution, theft, or robbery, since the civil government performs the primary task of protecting individual rights.

The Right to Self-Defence in a Political Society

By mutual agreement, a man migrates from a state of natural life into a political or civil society. A political society is one in which a formal state regulates human life.³⁷ A distinctive feature of a political society that contrasts with society in its natural state is the existence of political power. Political power serves to make political decisions, including the right to make laws, implement them, and exert coercion to obey the law.³⁸ This political power is owned and exercised by individuals or institutions that can be called civil governments whose position is superior to other individuals in the life of political society. In political society, human beings are no longer in a position of equality. Individuals submit to and obey the laws made by the civil government. According to Locke, three conditions in the natural state cause humans to agree to establish a political society. The first is the will for the existence of a constant, formed, known, and mutually agreed law, which sets the rights and wrongs to resolve all disputes between members of society. Second, in a natural state, there is a will for the existence of a mutually recognised and impartial (neutral) judge with the authority to resolve all disputes on the basis of a constantly established and mutually agreed law. In the natural state that brings each individual as the executor of the law, settling disputes does not end immediately because it is too lustful and vindictive. Third, in a natural state, individuals tend to want more power and the right to punish and carry out executions. Those whose feelings are hurt by any form of injustice will recover their injustice even by force. In the natural state, the level of ability to carry out coercion will affect the restoration of injustice. Those three triggering conditions have caused humans to start a political society where they unite for goods.³⁹

Locke stated that political society was formed to protect the natural rights brought from life to the natural state.⁴⁰ Civil government defends the rights to life, liberty, and property of members of political society and prosecutes and punishes

³⁶ Samantha Fritz, 'Political Obligation and Lockean Contract Theory', *Acta Cogitata: An Undergraduate Journal in Philosophy* 7, no. 1 (25 November 2019), <https://commons.emich.edu/ac/vol7/iss1/6>.

³⁷ Jonathan Wolff, *An Introduction to Political Philosophy* (New York: Oxford University Press, 2006).

³⁸ Philipp Schönegger, 'The Lockean Prerogative, Natural Law, and Political Power', *Locke Studies* 20 (1 September 2020): 1–22, <https://doi.org/10.5206/ls.2020.8056>.

³⁹ Locke, *Two Treatises of Government and A Letter Concerning Toleration*.

⁴⁰ Daniel Elof, 'The Nature of Rights and Access to the Internet', *Obiter* 44, no. 1 (17 April 2023), <https://doi.org/10.17159/obiter.v44i1.12594>.



individuals who violate the rights of others.⁴¹ From birth, a man has the right to property, life, and freedom. The laws of nature give every human being the power to protect their property, life, and liberty from harm from others and to judge and punish offenders in the way they see fit. At the time of forming a political society, the power of individuals derived from these natural laws by mutual agreement is given to the political community.⁴² Without being given power by mutual agreement, it is useless for a political society to be formed to replace the conditions of the natural state. In political societies, based on common consensus, there is a transfer of Natural Law Executive rights from individuals to the civil government. The individual is no longer the executor of the law against abuses that threaten their life, liberty, and property. In a political society, the civil government adjudicates disputes and imposes sanctions on violations based on established and mutually agreed laws. The transition from a state of nature to a political society means agreeing to a reduction in the right of the individual to protect and maximise other personal and collective rights, including the right to self-defence.⁴³

However, it must be understood that the renunciation of the executive right of natural law is not absolute without the right of the individual to reuse it. Political society does not fully take over the executive rights of natural law that individuals have carried over from the time of the natural state. Locke believed everyone has the right to defend themselves in a political society in difficult conditions. In political society, Locke said, a person has the right to defend themselves only in times of depressed conditions caused by the fact that in such circumstances, no others could protect themselves but themselves.⁴⁴ In a political society, the individual again becomes the executor of natural law to guarantee self-protection only under forced circumstances when the civil government cannot protect. This became an exception because, in principle, in a political society, the law enforcers and judges in disputes are the civil government. Why does the political Society not completely take over the right of the individual to be the executor of the law and the civil government to be the sole judge and executor of the law? First, the power of the civilian government is limited. The civil government is formed to protect the rights of individuals who are uncertain in times of natural circumstances, so it is impossible for political society to take absolute control of their rights.⁴⁵ Secondly, the right of self-defence is a natural

⁴¹ William Uzgalis, 'John Locke', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman, Winter 2024 (Metaphysics Research Lab, Stanford University, 2024), <https://plato.stanford.edu/archives/win2024/entries/locke/>.

⁴² John Locke, *The Second Treatise of Government: (An Essay Concerning the True Original, Extent and End of Civil Government), And, A Letter Concerning Toleration* (Library of Alexandria, 1966).

⁴³ William Merkel, 'Uncoupling the Constitutional Right to Self-Defense from the Second Amendment: Insights from the Law of War Commentary: Gun Control Policy and the Second Amendment: Responses', *Connecticut Law Review*, 1 January 2013, https://digitalcommons.lib.uconn.edu/law_review/212.

⁴⁴ Kerry L Hunter, 'Rights-Based Theory and Contemporary Political Challenges: A Fresh Reading of Locke in Light of Bentham and Burke', *New Zealand Journal of Public and International Law* 14, no. 2 (2016): 209–28.

⁴⁵ Jeffrey M. Gaba, 'John Locke and the Meaning of the Takings Clause', *Missouri Law Review* 72, no. 2 (2007), <https://scholarship.law.missouri.edu/mlr/vol72/iss2/>.



or inherent right of the individual; the civil government does not give it; it cannot deprive it but only protect it. In natural circumstances, the right becomes the main means of self-protection, but in civil society, it can only be used in certain circumstances.

Self-defence has its roots in the tradition of natural law being described as innate or inherent, individual, and inalienable.⁴⁶ The right to life, liberty, and property is an inherent or natural right given by God to each individual and cannot be revoked by anyone.⁴⁷ In the case of *District of Columbia v. Heller* (2008), The Supreme Court of the United States stated that the Constitution gave the right to individuals to obtain weapons and to use them for self-defence, meaning that the Constitution protects the basic right of individuals to defend themselves.⁴⁸ Two years later, in the case of *McDonald v. City of Chicago*, the United States Supreme Court held that the right of self-defence was a core element of the Second Amendment right of the Constitution. That is, citizens are granted the right to use weapons for the purposes of lawful self-defence, and this right can be applied to the fullest extent.⁴⁹ In the case of *The New York State Rifle and Pistol Association v. Bruen* (2021), the Supreme Court of the United States overturned a New York law requiring individuals seeking permission to carry concealed firearms in public to show "proper reason", ruling the law was contrary to the Second Amendment of the Constitution which grants the right to store and carry firearms in public.⁵⁰ New York State Rifle and Pistol Association. Bruen upheld the right of self-defence as a fundamental right that no one can interfere with.

The two case laws affirm the right of self-defence in American law. The right to self-defence comes from natural law and is integral to American law. The right to self-defence is a natural right that must be protected and cannot be removed. This contrasts with the Indonesian legal tradition, which places the law as the primary source. The right of self-defence is adopted in the Criminal Code and gives judges the power to interpret. However, from the cases of Bahri, Murtede, and Muhyani, the philosophical basis of the right to self-defence is undiscovered because it is enforced on investigation and prosecution, not on trial in court. The right to self-defence is the main natural right that allows every person to protect their life and all their body parts, with all the forces attached to it.⁵¹ The right to self-defence is the main

⁴⁶ Darrell Miller, 'Self-Defense, Defense of Others, and the State', *Law and Contemporary Problems* 80, no. 2 (12 May 2017): 85–102.

⁴⁷ Eugene Volokh, 'State Constitutional Rights of Self-Defense and Defense of Property', *Texas Review of Law & Politics* 11, no. 2 (2016).

⁴⁸ David Williams, 'Death to Tyrants: District of Columbia v. Heller and the Uses of Guns', *69 Ohio State Law Journal* 641 (2008), 1 January 2008, <https://www.repository.law.indiana.edu/facpub/131>.

⁴⁹ Joseph Blocher, 'The Right Not to Keep or Bear Arms', *Stanford Law Review* 64 (1 January 2012): 1–54.

⁵⁰ Cynthia Lee, 'Strengthening the Law of Self-Defense After Bruen', *NYU Law Review* (blog), 28 December 2023, <https://nyulawreview.org/issues/volume-98-number-6/strengthening-the-law-of-self-defense-after-bruen/>.

⁵¹ Rafi Reznik, 'On the Place of Self-Defense in Public Life: A Hobbesian Critique of the Supreme Court's Second Amendment', *Brigham Young University Journal of Public Law* 37, no. 2 (10 October 2023): 317–84.



motivation for people entering political society.⁵² The natural right is inherent in the individual from the time of the natural state to punish violators of natural laws or those who cause chaos in the natural state.⁵³ The right of self-defence is a God-given right, not dependent on, given to, or revoked by man-made laws.⁵⁴ The right of self-defence is a God-given right, not dependent on, given to, or revoked by man-made laws. Self-defence is not even considered a right but a positive obligation. God gave man life and tools to defend him, so refusing to engage in self-defence is an insult to God's gift.⁵⁵ A person must perform a positive obligation to fulfil their duties under the law. The right to self-preservation is inherent in every person's life and cannot be deprived by political society. The civil government can only restrict and regulate the use of the right of self-defence, but it is unlikely to revoke a right that was never granted. The civil government is in charge of protecting the right of self-defence that individuals carry from the state of nature.

Requirements

In a state of nature, the right of self-defence is the main tool of the individual for self-protection from any attack or danger that threatens their natural rights. This state changes when the natural state is transformed into a political society. In a political society, the right of self-defence becomes a secondary tool for self-protection, and its use is regulated and severely restricted by the law of the civil government (positive law). The use of self-defence is only in emergencies where the devices of the political community cannot protect the individual. The use of self-defence is allowed to injure the attacker only if necessary.⁵⁶ The act of wounding or killing is committed only in a state of emergency because otherwise, the victim's possession, body, or life is threatened by the aggressor. Self-defence includes two senses. First, the defence means any action that (1) can be alleged to result in the risk of harm to one or more individuals and (2) intends to reduce (or eliminate) the risk of harm. Second, describing individuals as defending themselves against the threat of a significant risk of harm only confirms that such self-defence measures to reduce the threat of that risk of harm would be discriminatory.⁵⁷ The principle of self-defence involves physical force by individuals to protect themselves from someone threatening to use physical force or power.⁵⁸ Self-defence is the act of a person protecting their property, body, or life from a dangerous attack by which they are justified in injuring or even

⁵² Don Kates Jr., 'The Second Amendment and the Ideology of Self-Protection.', *Constitutional Commentary* 9 (1 January 1992), <https://scholarship.law.umn.edu/concomm/265>.

⁵³ Jennifer Kling, 'The State Right of Self-Defense: A Claim in Need of Justification' (Dissertation, North Carolina, University of North Carolina at Chapel Hill Graduate School, 2015), <https://doi.org/10.17615/HPHN-YB33>.

⁵⁴ Jonathan Ross, 'The Right of Self-Defence', *The Yale Law Journal* 11, no. 3 (January 1902): 127, <https://doi.org/10.2307/782992>.

⁵⁵ Kates Jr., 'The Second Amendment and the Ideology of Self-Protection.'

⁵⁶ Douglas Husak, 'The Vindication of Good Over Evil: "Futile" Self-Defense', *San Diego Law Review* 55, no. 2 (14 September 2018): 291.

⁵⁷ Kai Draper, 'Rights and Self-Defense', *Public Affairs Quarterly* 20, no. 2 (2006): 95–113.

⁵⁸ Daniel E. Hall, *Criminal Law and Procedure* (New York: Cengage Learning, 2015).



killing their attacker, and they cannot be blamed for their actions. In general, people agree that self-defence really exists.⁵⁹

In Anglo-American legal doctrine, self-defence must meet five basic requirements: (1) the defendant must reasonably and honestly believe that they are threatened by an attack that would injure or kill them; (2) The defendant honestly and reasonably believes that injuring or killing the attacker must happen to stop the threat; (3) the act of self-defence by; (4) the defendant must reasonably believe that the threat is unlawful or an unjustified act; and (5) the defendant was not the initial aggressor or the cause of the attack against him.⁶⁰ The provocateur is denied the use of self-defence under the legal principle of *actio libera in causa* which means that the accused cannot seek justification for the wrongful act if they ask for the justification.⁶¹ These five conditions are a combination, meaning that the defendant cannot be said to perform self-defence and be free from conviction unless they meet these five conditions.

To prove that the defendant's action was an act of self-defence, it must be proven that the defendant (1) was confronted with an unwarranted or justifiable threat; (2) the threat posed a risk of harm to the safety of the defendant's body or life; (3) physical violence was used to prevent harm to the defendant; and (4) the use of physical violence was reasonably carried out not to exceed the actions of the attacker. The general premise in self-defence is that a person who takes the initiative to attack cannot claim to be an act of self-defence except in two respects: (1) if the attacker gets an excessive counterattack; and (2) the attacker stops their attack and is pursued by the target victim of the attack. Self-defence using acts of physical violence is used only for imminent harm, not for potential harm. Physical violence in self-defence is used reasonably and does not exceed that of assault.⁶² For example, it is beyond reason to shoot someone who is trying to slap the target victim on the cheek. Physical violence is justified as long as it is used reasonably to protect oneself from imminent and unlawful dangerous attacks.⁶³ Even under the generally accepted doctrine of retreat, if circumstances permit, one must retreat from the attack before resorting to deadly physical violence.⁶⁴ This doctrine teaches that self-defence is used only in desperate and forced circumstances.

Self-defence includes both subjective and objective aspects. The act of self-defence should only be carried out when the aggressor carries out the desired attack against the defending person. Successful self-defence precludes an attack. The laws focus on the subjective belief of the victim that harm will be highly likely to occur if

⁵⁹ Susanne Sreedhar, 'Defending the Hobbesian Right of Self-Defense', *Political Theory* 36, no. 6 (December 2008): 781–802, <https://doi.org/10.1177/0090591708323366>.

⁶⁰ Reid Griffith Fontaine, 'An Attack on Self-Defense', *American Criminal Law Review* 47, no. 1 (2010), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/attack-self-defense>.

⁶¹ Lisa Hecht, 'Provocateurs and Their Rights to Self-Defence', *Criminal Law and Philosophy* 13, no. 1 (March 2019): 165–85, <https://doi.org/10.1007/s11572-018-9464-y>.

⁶² Hall, *Criminal Law and Procedure*.

⁶³ Fritz Alhoff, 'Self-Defense Without Imminence', *American Criminal Law Review* 56, no. 4 (n.d.): 2019.

⁶⁴ Christy S. Etheredge, 'The Castle Doctrine: Extension of the Rule to Co-Occupants', *Florida Law Review* 52, no. 3 (1 July 2000): 695.



he does not perform an act of self-defence. The subjective belief must be objectively reasonable by meeting these two conditions: (1) there is an objective triggering state of the attack and (2) the belief that harm will occur from the attack.⁶⁵ In the case of self-defence, the defendant must provide the judge with sufficient evidence to decide that the self-defence is worthy of consideration. The burden of legal proof falls on the public prosecutor, who must prove beyond doubt that the defence was negated.⁶⁶ If the public prosecutor succeeds in proving the defendant's actions are not self-defence, the defendant can be punished in the case of persecution or murder if it results in the death of the victim.

The Right to Self-defence from an Islamic Perspective

The purpose of Islamic Sharia is to protect people from attacks that may befall them, be it attacks on personal, honour, or property. The legitimacy of the right of self-defence in Islamic law comes from the Qur'an, Sunnah and the consensus of Islamic jurists (*ijma*).⁶⁷ In Islamic law, self-defence is a minor jihad that signifies a struggle for self-defence carried out with the tongue (speech), pen (writing), or sword (using force). On the other hand, a major jihad involves self-purification.⁶⁸ Based on the views of modern Islamic scholars, the core idea of jihad is self-defence and the Prohibition of aggressive warfare.⁶⁹ In the holy Qur'an, surah Al-Baqarah verse 194, Allah Almighty says, "Therefore, whoever attacks you, attack him in proportion to his attack on you." This verse allows a person to retaliate against themselves as long as his retaliation is commensurate with his attack or is not brutal (beyond the limits of reasonableness). The right to self-defence is also based on Surah An-Nahl verse 126, in which Allah Almighty says, "If you retaliate, retaliate with the same (reply) as the torment inflicted on you." Allah Almighty allows the attacker to be punished in the same way he did.⁷⁰

Self-defense in Islamic law is closely related to Maqashid al-Shariah. Islamic law permits physical resistance to protect religion, preserve life, and safeguard property.⁷¹ Self-defense is employed as a means to uphold justice. According to the

⁶⁵ Geoffrey Rapp, 'Defense Against Outrage and the Perils of Parasitic Torts', *Georgia Law Review* 45, no. 1 (1 January 2010), <https://digitalcommons.law.uga.edu/glr/vol45/iss1/3>.

⁶⁶ Mike Molan, *Cases & Materials on Criminal Law: Fourth Edition* (United Kingdom: Routledge, 2009).

⁶⁷ Dr Mohammad Ahmad Abdelraziq Al-Jabali and Prof Hasan Taisir Abdelrahim Shammout, 'Self-Defence In Islamic Law', *Journal of Positive School Psychology* 6, no. 8 (8 September 2022): 9821–40.

⁶⁸ Shah, 'The Use of Force under Islamic Law'.

⁶⁹ Abdul Ghafur Hamid and Khin Maung Sein, 'Islamic International Law and the Right of Self-Defense of States', *Journal of East Asia and Internaional Law* 2, no. 1 (2009): 67–101.

⁷⁰ Hamid and Sein.

⁷¹ Sholahuddin Al-Fatih et al., 'Academic Freedom of Expression in Indonesia: A Maqashid Sharia Notes', *El-Mashlahah* 13, no. 2 (31 December 2023): 203–24, <https://doi.org/10.23971/el-mashlahah.v13i2.7573>; Abbas Arfan et al., 'The Implementation of Maqashid Sharia: Heterogeneity of Scholars' Fatwas towards Islamic Banking Contracts', *Legality : Jurnal Ilmiah Hukum* 32, no. 1 (14 March 2024): 105–28, <https://doi.org/10.22219/ljh.v32i1.32170>; Danil Putra Arisandy, Asmuni Asmuni, and Muhammad Syukri Albani Nasution, 'The Majelis Ulama's Fatwa on Freedom of Expression On Social Media: The Perspective of Maqashid Sharia', *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 November (1 December 2022): 467–86, <https://doi.org/10.29240/jhi.v7i2.5235>; Asrul



Sunnah, Abdullah bin Amr said to hear the messenger of Allah, "The one who is killed for protecting his property is a (*shaheed*) martyr."⁷² According to this hadith, the one who defends their property from the one who would seize it without right and is killed, they are a *shaheed*, as long as they have the right to kill and fight. In another hadith, Abu Huraira said that the messenger of Allah said, "If someone peeps on you without right and you stab him with a stick and injure his eyes, you will not be blamed." Islamic jurists unanimously agree that defending oneself and resisting an attacker is permissible and lawful. Ibn Taymiyyah said, "The Sunnah and Ijma agree that an attack on a Muslim cannot be prevented unless the attacker is killed, then it is lawful to kill the attacker, even if the money taken is a carat dinar," and Ibn Taymiyyah also said, "against the attacker who violates the rights of others according to the Sunnah and ijma."⁷³ The concept of defending in Islamic law is not only related to the relationship of individuals with other individuals but also related to common interests. A group can defend itself against aggressions interfering with its exclusive control over a particular territory, giving rise to a government.⁷⁴ A government protects the security of goods and of itself through the legal order it creates. Persons and property are protected by the combined effective powers and norms of the legal order. Protection by the government does not negate the right of every person to protect life, honour, and property from any aggression that threatens his safety. Islamic law places the self-defence of every Muslim carried out with particular boundaries.

Conclusion

In Locke's philosophy, the right of self-defence is a natural right that natural law has conferred on all human beings since life in the natural state. Natural rights do not disappear and cannot be eliminated when the natural state becomes a political society. In its natural state, the right of self-defence is the primary means of protection for the individual from acts of violation that threaten their life, liberty, and property

Hamid and Dedisyah Putra, 'The Practice of Buying and Selling During Friday Prayer in Mandailing District Natal: A Study With A Maqashid Al-Syari'ah Approach', *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (25 December 2021): 1021–43, <https://doi.org/10.22373/sjhk.v5i2.7575>; Noer Yasin, 'The Authority Rationalization Philosophy of the Indonesia Competition Commission: The Due Process of Law and Maqashid Sharia Perspectives', *Jurisdictie: Jurnal Hukum Dan Syariah* 13, no. 1 (27 July 2022): 63–89, <https://doi.org/10.18860/j.v13i1.15873>; Muhammad Aziz et al., 'Reconstruction of Maqashid Shari'ah Perspective Muhammad Thahir Ibn 'Assyria: Efforts to Re-Discuss Sharia with Reality', *Jurnal Hukum Islam* 17, no. 2 (2 December 2019): 231–49, <https://doi.org/10.28918/jhi.v17i2.2396>; Kutbuddin Aibak, 'Medical Assistance in Dying (MAiD): Human and Humanity in the Study of Fiqh MaqaÈ™id', *Justicia Islamica* 20, no. 1 (25 June 2023): 79–98, <https://doi.org/10.21154/justicia.v20i1.5756>; Ramadhita Ramadhita, Sudirman Sudirman, and Syabbul Bachri, 'Model of Zakat Utilization in the Covid-19 Pandemic Era: Perspective of Maqashid Sharia', *Al-Istibath: Jurnal Hukum Islam* 7, no. 1 (30 May 2022): 245, <https://doi.org/10.29240/jhi.v7i1.4462>.

⁷² Naveeda Khan, 'The Martyrdom of Mosques: Imagery and Iconoclasm in Modern Pakistan', in *Enchantments of Modernity* (Routledge India, 2011).

⁷³ Hamid and Sein, 'Islamic International Law and the Right of Self-Defense of States'.

⁷⁴ M. Junaidi, 'Perang Dan Jihad Dalam Perspektif Fiqh Siyasah Dauliyah (Telaah Historis Berbasis Teks Suci)', *Law and Justice* 1, no. 1 (31 October 2016): 65–73, <https://doi.org/10.23917/laj.v1i1.2861>.



but turns into a secondary means of protection for life in political society because the protection of the individual is carried out by the civil government. The right of self-defence can be used only in an emergency and is exercised based on positive law. Islamic law views the right of self-defence as the right of every Muslim regardless of the presence or absence of a government. Every Muslim must carry out self-defence from aggression that threatens the safety of their life, honour, and property, as well as that of others. Adopting the right of self-defence in positive law must be equipped with limits to prevent the error of using it, which can result in a society of Anarchy. Judges must carefully interpret an act claimed to be an act of self-defence to determine whether, under the law, it is an act of self-defence or an act that goes beyond the limits, or even intentional persecution or murder.

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