Journal of Islamic Law Review, Vol. 17, No. 1, January 2021, pp. 77-98p

KILLING IN DEFENCE OF PROPERTY UNDER BRUNEI PENAL LAWS: A COMPARATIVE ANALYSIS

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Killing in defence of property is a legal issue as well as a practical problem. As the general public do not fully grasp the law of private defence, they are likely to have impromptu responses in situations where they are unlawfully attacked and their possessions unlawfully appropriated. Killing in defence of property is recognised both under the Brunei Penal Code (Cap.22) and the Brunei Shariah Penal Code Order, 2013. This is by virtue of section 103 and section 32 respectively. The paper aims to comparatively analyse the two sections in terms of the operation of the right of private defence of property justifying the killing of the aggressor. The paper concludes that the issue of whether the law should ever justify the killing in defence of property is a question which cannot be easily answered and recommends that the right to kill in defence of property must be carefully circumscribed.

INTRODUCTION

The right of private defence of property only comes into operation when certain specified offences against property are committed or attempted to be committed.[1] Hence, the right of a man to protect his person or property from injury is known as the right of private defence or self-defence. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that invididual is entitled to

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protect himself and his property. The right of private defence is absolutely necessary for the protection of ones life, liberty and property. The right of private defence is a defensive right circumscribed in the Brunei Penal Code (Cap.22) [hereinafter referred to as the 'Code'] and the Brunei Shariah Penal Code Order, 2013 [hereinafter referred to as the 'Order']. It is only available when the circumstances clearly justify it. Section 103 of the Code sets out the situations whereby the right of private defence of property extends to the voluntary causing of death or harm to the wrongdoer.[2]

On the other hand, section 32 of the Order indicates when a person can be killed in defence of property.[3] Hence, the right of private defence of property justifying even the killing of the aggressor in Brunei is governed by two sets of laws in relation to the application of the defence. In other words, the right of private defence of property is governed by both the Code and the Order. However, it is interesting to note that the Order applies to both Muslims and non-Muslims in relation to offences contained therein unless otherwise provided.[4] The paper submits that the right of private defence of property to the extent of causing death of the wrongdoer/agggressor requires an in-depth comparative analysis of both section 103 of the Code and section 32 of the Order.

The paper aims to comparatively analysis the operation of the right of private defence of property to the extent of causing death of the wrongdoer/aggressor by making reference to section 103 of the Code and section 32 of the Order. In analysing these two sections, the authors intend to evaluate the similarities and dissimilarities in terms of the operation of the sections. The paper argues that the enactment of the Shariah Penal Code Order, 2013 in Brunei is in reality the result of the process of harmonisation of civil law with Islamic law in relation to crime.

The paper is divided into four parts excluding the introduction. The first part addresses the right of private defence of property as stipulated under section 103 of the Code. Under this part, the paper intends to address the different situations whereby the right of private defence extends to the voluntary causing of death or

harm to the wrongdoer/aggressor. The second part addresses the right of private defence of property as stipulated under section 32 of the Order. In addressing the provisions of section 32, the paper intends to pay attention to the situations when a person can be killed in defence of property. The third part addresses the issue of comparative analysis in terms of the operation of the right of private defence of property justifying the killing of the aggressor/ wrongdoer as provided under both sections. The fourth part focuses on the conclusion. This part will embrace some recommendations in terms of the operation of the right of private defence of property in the context of section 103 Code and section 32 of the Order.

THE OPERATION OF THE RIGHT OF PRIVATE DEFENCE OF PROPERTY UNDER SECTION 103 OF THE BRUNEI PENAL CODE

Section 103 of the Code sets out the situations whereby the right of private defence of property extends to the voluntary causing of death or harm to the wrongdoer. The section reads: "The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death, or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right is an offence of any of the following descriptions-

(a) robbery;

(b) house-breaking by night;

(c) mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

(d) theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised".

This section indicates when a person can be killed in defence of property. But the section is subject to the provisions of section 99. In addressing the operation of the right of private defence of

property justifying the killing of the wrongdoer, it is important that section 103 must be read together with section 99. Section 99 limits the right of private defence. It is clear that from the provisions of section 103, a person exercising his right of private defence of his own property or the property of any other person, may cause the death of the wrongdoer if the offence against property is for the purpose of robbery, house-breaking by night, mischief by fire committed on any building, tent or vessel used as a human dwelling, theft or house-trespass which reasonably causes apprehension of death or grievous hurt.

The right subsumed in the section is an expansion of the right of private defence founded in section 97. When section 97 and section 103 are telescoped with each other the right of private defence can be stretched up to the extent of killing another person in defending the property of not only his own but even another person. Therefore, such right would be available to a public servant if the property sought to be protected is a public property.[5] But there is a condition for claiming such an extended right if the property sought to be protected is a building. It should be a building used for human dwelling or for custody of property.

In addition, if an offence committed by the wrongdoer is not one of the offences that is laid down in section 103 of the Code (for example, the wrongdoer merely commits theft, mischief, house-trespass or house-breaking in the day time), then the person defending the property can cause any harm other than death to the wrongdoer. This is provided for in section 104 of the Code. In other words, the building in question must be a building used for human dwelling or for custody of property to justify the killing. Therefore, if it is not a building of that type the person exercising right of private defence cannot go to the fartherest extent of killing another person unless the threatened mischief has caused a reasonable apprehension that death or grievous hurt would otherwise be the consequence.[6] In other words, the right extends not only when the offences enumerated in the section are committed, but also when an attempt to commit any such offence is made.[7]

Section 104 contains the bridle that the right of private defence shall not cross the limit of first degree as against acts which would remain as theft, mischief or criminal trespass. But section 103 recognises extension of the said right up to the full measure, even as against the aforesaid acts but only if such acts or their attempts are capable of inculcating reasonable apprehension in the mind that death or grievous hurt would be the consequence if the right is not exercised in such full measure.[8] Section 103 of the Brunei Penal Code corresponds with section 103 of the respective Malaysian, Singapore and Indian Penal Codes. Therefore, cases from these jurisdictions can be referred to in order to grasp the operation of the right of private defence as stipulated under section 103 of the Code. Section 103 provides four situations when a person can be killed in defence of property. The following are the four situations.

Robbery

Section 390 of the Code defines the offence of robbery. In all robbery there is either theft[9] or extortion.[10] Section 390 enumerates the various instances whereby theft or extortion constitute robbery. For example, theft amounts to robbery if in order to commit the theft, or whilst committing theft or in carrying away or attempting to carry away property obtained by theft, the offender for any of the above mentioned purposes voluntarily[11] causes or attempts to cause death,[12] hurt,[13] or wrongful restraint[14] or fear[15] of instant death or instant hurt or wronngful restraint. Robbery by violence may be resisted by violence sufficent to overcome the force employed by the attacker, and if, in the course of such resistance, death is caused, it may be justified if the right of self-defence was exercised reasonably and properly, but the measure of self-defence must always be proportionate to the *quantum* of force used by the attacker and which it is necessary to repel.[16]

In *Guru Charan Chang*,[17] the accused in resisting a sudden attack made upon them by other persons and they had no time to complain to the police, inflicted a wound on one of them with a bamboo, from which one man died. The court held that the force

used by the accused was not such as to exceed the right of private defence of property. The paper argues that since section 103 must be read together with section 99, it is important that there must be no more harm inflicted than is necessary for the purpose of the right of private defence. The amount of force necessary depends on the circumstances of the case.

In *Gurdatta Mal*,[18] the deceased was harvesting crop under the protection of police. The accused who claimed the crop did not approach the authorities for redress and attacked the deceased with guns and other dangerous weapons. It was held by the Supreme Court that the act of the deceased did not amount to robbery and that the accused had no right of private defence of property. Again, it is important to note that there is no right of private defence if there is time to have recourse to the protection of public authorities. No man has a right to take the law into his own hands for the protection of his person or property, if there is reasonable opportunity of redress by recourse to the public authorities.[19] The paper submits that if a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishaable.[20]

House-breaking

Section 445 of the Code sets out illustratively the various instances where house-breaking can occur. On the other hand, section 446 defines house-breaking by night. When house-breaking is aggravated by reason that it was committed during the hours of darkness it amounts to house-breaking by night.[21] In the context of this paper, it is important to point out that the right of private defence of property to the extent of causing death arises not only when the house is broken into but when an attempt is made to break into the house. It is not the intention of the law that the right to defend property is available only when the thief has already effected entry, for property may be protected by attacking the thief inside the house as much as by preventing his entry into it.[22]

In *Ali Mea v King Emperor*,[23] the accused was led honestly to

believe that a burglar was attempting to enter his house and thus caused the death of that person, who was his own nephew. The court held that he did not exceed the right of private defence of property and had not committed any offence. Thus, it would suffice to note that the force used by the accused here could be construed as necessary in order to protect his property. True the extent of harm is limited by the rule that it is unlawful to kill an attacker, but if the crime he is attempting is one described under section 100 or section 103, then such killing is justified.

In *Pelkoo Nushyo*,[24] the accused found two men close to an aperture made in his house for committing burglary. One of them made off but the other advanced to attack the accused, when the latter gave him a blow in the dark with a club, which killed him. It was held that the accused was justified in his act. Looking at the court's decision, it is vital to note that the right to private defence is available only to one who is suddenly confronted with immediate necessity of averting an impending danger not of his own creation. In addition, the right of private defence commences as soon as there is reasonable apprehension of danger to the property and this right continues so long as such apprehension of danger continues.[25]

Looking at the operation of clause (b) to section 103 above, the paper submits that the inmates of a house have the right, in the exercise of the right of private defence of property, of causing even death of an offender who commits burglary or house-breaking. However, this right of killing an offender is subject to provisions of section 99, which lay down very clearly that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. Based on this assertion, the right of private defence of property failed in the case of *Mahabir*,[26] where the owners of a house had the thief at their mercy as he was coming out of a hole in the wall and it was not necessary for them to beat him to death. The court held that they exceeded the right of private defence of property.

Mischief

Section 425 of the Code defines the offence of mischief. Section

425 corresponds with section 425 of the Malaysian, Singapore and Indian Penal Codes. In addressing the operation of clause (c) to section 103, it is of paramount importance to point out that there must be a wilful act of mischief. Explanation 1 also states that mischief will be proved as long as any wrongful loss or damage to any person is caused by injuring any property, regardless of whether the property belongs to that person. Explanation 2 further provides for the joint liability of a person who, either on his own, or together with others, commits an act of mischief to property belonging to himself. The illustrations to section 425 provide examples of situations where the act of mischief can occur. In analysing the operation of clause (c) to section 103, it is important to point out that if a person commits mischief by setting fire on any building, tent or vessel which is used for human dwelling, or as a place for the custody of property; another person has a right to cause death of that person under the right of private defence of property.

In *Mohinder Pal Jolly*,[27] the court rejected the appellant's claim of exercising the right of private defence when he killed the deceased. The deceased and his colleagues were workers in a factory belonging to the accused. On the day of the occurrence, some of the workers including the deceased assembled outside the boundary walls of the factory and started rasing provocative slogans in support of their demand for wages during the period of lay-off. They also hurled brickbats damaging some articles and endangering it to further damage. The appellant then came out of his office room and fired two shots at the workers. One shot hit the deceased on his forehead, killing him instantaneously. The right of private defence of property in the appellant's case extended only on the causing of any harm other than causing death. Hence, the appellant was held to have exceeded his right of private defence. It would suffice to note that the extent of the harm which is lawful to inflict in the exercise of private defence is limited. In other words, the infliction of more harm than is necessary for the purpose of private defence is prohibited.[28]

Theft, Mischief or House Tress-Pass with Reasonable Fear of Death or Grievous Hurt

The fourth clause to section 103 refers to three situations where the death of the aggressor is justified in the context of the right of private defence of property. The three situations are: theft, mischief and house-trespass. The paper intends to pay attention to the situation of theft and house-trespass since the situation of mischief has been highlighted above. However, where relevant reference will still be made to the situation of mischief in the context of the operation of clause (d) to section 103. This is because the operation of mischief under clause (c) to section 103 above is very specific in nature, i.e., causing mischief by fire.

As for theft, reference has to be made to section 378 of the Code. This section defines the offence of theft of movable property. It defines the circumstances when dishonest deprivation of possession of movable property amounts to the offence of theft.[29] Section 378 of the Code corresponds with section 378 of the Malaysian, Singapore and Indian Penal Codes. In the context of this paper, clause (d) to section 103 protects a person who has caused death, if the death has been caused in the exercise of the right of private defence in certain circumstances. The clause deals specifically with cases where the act which causes the exercise of the right of private defence amounts to theft, mischief or house-trespass.

The clause, however, does not justify the causing of death in all cases in which these offences are being committed. The clause means that when the act is such as *per se* to cause a reasonable apprehension that death or grievous hurt will be the result, then the causing of death in order to prevent the commission of such act is justified. In other words, if any offence of theft, mischief or house-trespassing is being committed on someone's property, a person generally cannot cause death of the offender. But if the person is under a reasonable fear that if he will not cause death of that person, the result will be his death or grievous hurt, he can cause death of the offender.

In addressing the operation of clause (d) to section 103, it is important to note that in *Kanchan v State*,[30] the court observed that just because mischief was committed by the victim and his companions on the property of the accused, the accused does not have a right to cause death. There must be reasonable apprehension that death or grievous hurt may otherwise be the consequence. The paper submits that it is important to fulfil the requirement of reasonable apprehension that death or grievous hurt would be the consequence if such right justifying the killing of the aggressor is not exercised. Therefore, it is important to consider whether the accused had any reasonable apprehension that death or grievous hurt may otherwise be the consequence in the absence of exercising the right of private defence of property under clause (d) to section 103.

Turning now to house-trespass, section 442 defines house-trespass. House-trespass is an aggravated form of criminal trespass due to the manner in which it is committed or for the purpose it is committed. It is vital to note that criminal trespass is not enumerated as one of the offences under section 103. Therefore, the right of private defence of property will not extend to the causing of death of the person who committed such acts, if the act of trespass is in respect of an open land.[31] However, in the context of a dwelling house, it stands on a different footing. The law has always looked with special indulgence on a man who is defending his dwelling against those who would unlawfully evict him; as for 'the house of everyone is to him as his castle and fortress'.[32] In the English case of *Hussey*,[33] it was stated it would be lawful for a man to kill one who would unlawfully dispossess him of his home.

In *Gurdev Singh*,[34] the deceased was suspected of carrying on an affair with the appellant's wife. He had committed lurking house-trespass by night into the residence of the appellant for committing adultery and the appellant killed him. It was held that the appellant had the right of private defence of property to the extent of causing the deceased's death. In another case of *Kyaw Zan Hla*,[35] a thief entered the sugar plantation of the deceased and began to cut sugarcanes. The accused on hearing the sound

aimed with a cross-bow in the direction of the sound and shot. The bow hit the thief in the side and caused his death. It was held that the accused was justified in defending his property by shooting an arrow at the thief.

THE OPERATION OF THE RIGHT OF PRIVATE DEFENCE OF PROPERTY UNDER SECTION 32 OF THE BRUNEI SHARIAH PENAL CODE ORDER, 2013

Section 32 of the Order provides for the circumstances when the right of private defence of property justifies the killing or causing any other harm to the wrongdoer. The section reads:

"The right of private defence of property extends, under the restrictions mentioned in section 28, to the voluntary causing the death, or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated-

(a) *hirabah*

(b) *sariqah*, under such circumstances as may reasonably cause apprehension that death or hurt will be the consequence, if such right of private defence is not exercised".

Before analysing the provisions of section 32 above, it is important to note that the right of private defence has been recognised in Islamic law. For example, if a person attacks another person with the intention of causing his death and the other in self-defence attacks him and causes his death, he will not be liable for intentional homicide. The Quran states: "Then if anyone takes aggressive against you, take the aggressive against him".[36] Based on this Quranic verse, the defence of one's life is a valid defence against allegations of criminal liability if an individual kills another person in order to prevent the threat of being killed by the assailant.[37] Thus, the act of a person in his self-defence is not an offence and is not subject to any civil or criminal liability. However, if he crosses the limits prescribed for such defence, his act becomes an offence liable to criminal and civil liabilities.[38]

According to the preferred opinion of Imam Abu Hanifah, Imam Malik and Imam Shafi'e, the right to kill a person in self-defence limits the case to an attack on the body of that person or the body of another person. However, some jurists extend the right of legal defence to the defence of property and allow a person to kill the person who takes away his property forcibly and such a person has no other means to prevent him except to kill him. This opinion is based on the hadith narrated on the authority of Abu Huraiyrah that a person came to the Prophet Muhammad (*s.a.w.*) and said: "Oh Prophet! What should I do when a person takes away my property?" The Prophet Muhammad (*s.a.w.*) said: "Don't give him your property". He said: "What should I do if he quarrels with me?" The Prophet Muhammad (*s.a.w.*) said: "Quarrel with him". He said: "If he kills me?" The Prophet Muhammad (*s.a.w.*) said: "You are then a martyr". He said: "If I kill him?" The Prophet Muhammad (*s.a.w.*) said: "He will be in hell".[39]

Turning back to section 32 of the Order, it would suffice to note that the section cannot be read in isolation without making reference to section 28. This is because section 28 sets out the limits within which the right of private defence should be exercised. For example, section 28(4) provides that the right of private defence in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of the defence. In other words, the defendant must act in defence with a force that commensurate with the indispensable need. If the force used exceeds the limit of need, it ceases to be defence and gains the status of aggression itself.[40] Having said that, section 32 provides two situations when a person can be killed in defence of property. The following are the two situations.

Hirabah

Section 62 of the Order defines the offence of "*hirabah*" as an act of taking another person's property by force or threat of the use of force done by a person or a group of persons armed with any person or a group of persons armed with any weapon or instrument capable of being used as weapon. By virtue of section 63 of the Order, the punishment for *hirabah* can take a form of "*hadd*"[41] or

"*ta'zir*".[42] In the context of this paper, it is important to point out that it is possible to justify the killing of an aggressor/wrongdoer in defence of one's property.

In other words, one is permitted to use force to defend his property provided certain conditions are fulfilled. Therefore, Muslims jurists have unanimously described the following conditions for the validity of legal defence whether of body or honour or property of one self or of another person:[43] (1) the act of the aggressor must be transgression; (2) transgression is actually committed; (3) it is not possible for the defender to defend himself otherwise; and (4) the quantum of force used to deter the wrong should be commensurate with the need to do so.

The paper submits that section 32 of the Order indicates when a person can be killed in defence of property involving a case of *hirabah*. It is equally important to point out that the right extends not only when the offence of *hirabah* is committed, but also when an attempt to commit it is made. However, as mentioned earlier, the exercise of the right of private defence of property is limited by section 28. For example, there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.[44] It is not permitted for the defendant to resort to violence, if he can get the help of the public authorities in time, or he can defend himself without adopting violent means.

Sariqah with Reasonable Fear of Death or Hurt

Section 53 of the Order defines the offence of "*sariqah*" as an act of removing by stealth a movable property from the *hirza* or possession of its owner without his consent and with the intention to deprive him thereof. On the other hand, the same section defines the term "*hirza*" as custody of a property according to its suitability based on *Hukum Syara*. Theft has been prohibited in Islam and has been declared punishable crime for which punishment has been fixed. The Quran says:[45] "And as for the male thief and the female thief, cut off their hands, as a recompense for what they have earned, (and) a warning from Allah (*s.w.t.*); and Allah (*s.w.t.*) is Mighty, Wise".

Based on the Quranic verse above, it is clear that theft is considered as a serious crime and subject to the *hadd* punishment. However, for the offence of theft liable to *hadd*, it is vital to fulfil certain requirements or conditions such as: (1) the offender must be an adult and sane at the time of the commission of the offence; (2) he must have committed theft intentionally; and (3) the stolen property must be movable property and is equal to the *nasib*.

In the context of this paper, what is important is to address the offence of *sariqah* in relation to the exercise of the right of private defence justifying the killing of the wrongdoer by the defendant. Clause (b) to section 32 of the Order deals with the situation of *sariqah* where the defendant is allowed to exercise his right of private defence of property to the extent of causing death of the wrongdoer. The clause means that when the act is such as *per se* to cause reasonable apprehension that death or hurt will be the result, then the causing of death in order to prevent the commission of such act is justified. In other words, the clause is only applicable in a situation where the defendant is under a reasonable fear that if he does not cause death of the wrongdoer, the result will be his own death or hurt.

Since section 32 of the Order sets out two situations (i.e., *hirabah* and *sariqah*) justifying the killing of a wrongdoer in defence of property, it is vital to address the difference between these two situations. The difference between *sariqah* and *hirabah* is that *sariqah* means to take away the property of another person surreptitiously while *hirabah* means to take away the property of another person by using force publicly. In other words, for the commission of the offence of *sariqah* the use of force is not necessary. For example, the movable property in question can be taken away by the wrongdoer secretly or stealthily without the knowledge and consent of the defendant. However, this is not the case with *hirabah* where the use of force must be present.

THE COMPARISON BETWEEN THE OPERATION OF THE RIGHT OF PRIVATE DEFENCE OF PROPERTY UNDER THE BRUNEI PENAL CODE AND THE BRUNEI SHARIAH PENAL CODE ORDER, 2013

As mentioned earlier, section 103 of the Code sets out the situations (subsections (a) to (d)) whereby the right of private defence of property extends to the voluntary causing of death or harm to the wrongdoer. Similarly, section 32 of the Order deals with the right of private defence of property to the extent of causing death of the wrongdoer. The section sets out two situations (subsections (a) and (b)) where the right of private defence of property extends to the voluntary causing of death or harm to the wrongdoer by the defendant. Based on these two sections, it is inevitable to point out that there are some similarities and dissimilarities as well in terms of the operation of the right of private defence of property under the Code and the Order. The following are the similarities and the dissimilarities.

Similarities

Firstly, the operation of the right of private defence of property under section 103 of the Code and section 32 of the Order justifying the killing of the wrongdoer in defence of property are both subject to some limitations. It is interesting to note that all the four limitations imposed by section 99 of the Code and section 28 of the Order are identical with no linguistic alterations at all. For example, section 99(3) provides that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. A similar and identical sentiment is echoed by section 28(3) of the Order. Furthermore, the two explanations to section 99 and section 28 are also identical in terms of linguistic usage. In other words, Explanations 1 and 2 to section 99 and section 28 are identical with no linguistic alterations. The paper argues that by adopting this kind of approach in terms of the limitations imposed on the exercise of the right of private defence both under the Code and the Order with no linguistic alterations, the drafters of the Order have

attempted to harmonise *Shari'ah* principles with contemporary criminal jurisprudence in relation to private defence.

Secondly, both section 103 of the Code and section 32 of the Order mention "robbery" or "*hirabah*" and "theft" or "*sariqah*" as situations justifying the exercise of the right of private defence of property to the extent of killing the wrongdoer/aggressor. In other words, a defendant is protected if he has caused death in the exercise of the right of private defence involving the offence of robbery or theft. For example, robbery by violence may be resisted by violence sufficient enough to overcome the force employed by the attacker. Hence, in the course of such resistance, if death is caused, it may be justified provided the right of self-defence was exercised reasonably and properly. The measure of self-defence must always be proportionate to the *quantum* of force used by the wrongdoer/ aggressor and which is necessary to repel. As for theft, there is no doubt that it operates as one of the situations justifying the killing of a wrongdoer both under section 103 and section 32 as mentioned earlier in terms of the exercise of the right of private defence of property. However, in relation to theft, there is a dissimilarity between the two sections. The authors intend to address this issue in the preceding part of this paper dealing with the dissimilarities.

Thirdly, the right of private defence of property under section 103 of the Code and section 32 of the Order extend not only when the offences enumerated in the sections are committed, but also when an attempt to commit any such offence is made. Hence, the right of private defence of property to the extent of causing death arises not only when "theft" is committed but when an attempt is made to commit "theft". It is not the intention of the law that the right to defend property is available only when the thief has already carried out the act in question. Thus, the property may be protected by attacking the thief inside the house as much as by preventing his entry into it. The same approach also applies to the offence of "robbery" or "*hirabah*".

Dissimilarities

Although both section 103 of the Code and section 32 of the

Order allow the right of private defence of property to the extent of the voluntary causing of death or any other harm to the wrongdoer, it is inevitable to point out that there are some dissimilarities in terms of the operation of both sections. Section 103 of the Code allows the right of private defence of property to the extent of the voluntary causing of death, if the offence involved is any of the following descriptions: (a) robbery; (b) house-breaking by night; (c) mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property; (d) theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

On the other hand, section 32 of the Order allows the right of private defence of property to the extent of the voluntary causing of death or any harm to the wrongdoer, if the offence involved is any of the following descriptions: (a) *hirabah*; (b) *sariqah*, under such circumstances as may reasonably cause apprehension that death or hurt will be the consequence, if such right of private defence is not exercised. In short, section 103 of the Code sets four situations (subsections (a) to (d)) whereby the right of private defence of property extends to the voluntary causing of death or harm to the wrongdoer. This is not the case with section 32 of the Order, which mentions only two situations (subsections (a) to (b)) indicating when a person can be killed in defence of property.

In addition, section 32 of the Order provides only two situations when a person can be killed in defence of property i.e., in case of *hirabah* or *sariqah*. The Order fails to provide any defence in case there is mischief or house-breaking in terms of the exercise of the right of private defence. The paper submits that the mention of *sariqah* must be taken to include all offences *ejusdem generis*. The same consideration applies to the mention of *hirabah*. As for section 103 of the Code, it sets out four situations justifying the killing of the wrongdoer in defence of property i.e., robbery; house-breaking by night; mischief by fire; and theft, mischief or house-trespass.

Another dissimilarity between section 103 of the Code and section 32 of the Order can be seen from the offence of theft as one of the situations indicating when a person can be killed in defence of property. Section 103(d) deals specifically with cases where the act which causes the exercise of the right of private defence amounts to theft. The clause, however, does not justify the causing of death in all cases in which the offence of theft is being committed. The clause means that when the act is such as *per se* to cause a reasonable apprehension that death or grievous hurt will be the result, then the causing of death in order to prevent the commission of such act is justified.

As for *sariqah* under section 32, the circumstances are such as may reasonably cause apprehension that death or hurt will be the consequence, if such right of private defence is not exercised. Section 32 of the Order uses the word "hurt" as opposed to "grievous hurt" used in section 103 of the Code. In the context of this paper, what is important to address is the issue of whether there is a difference between "hurt" and "grievous hurt" under *Shari`ah* law. It would suffice to note that the Brunei Penal Code specifically addresses the difference between "hurt"[46] and "grievous hurt".[47] The paper argues that though section 32 of the Order uses the word "hurt" instead of "grievous hurt" in defence of property involving *sariqah* justifying the killing of the wrongdoer, it is important to note that the concept of hurt is given a wider meaning under the Order. This can be seen from section 168, which lists down the kinds of hurt. Hence, the paper submits that the kinds of hurt enumerated in the section cover cases of grievous hurt as well. For example, section 168(b) provides a kind of hurt known as "*itlaf-salahiyyat-al-udhw*" that is the destruction or permanent impairment of the function or use of any part of the body, or permanently disfiguring such part.

Furthermore, dissimilarity also exits in terms of the operation of the right of private defence of property by virtue of section 97 of the Code and section 26 of the Order. This is because section103 of the Code and section 32 of the Order cannot be understood in isolation without making reference to section 97 and section 26

respectively. By virtue of section 97(b), a person has a right to defend his own and another person's property against any offences or attempts to commit any offences to property. In other words, the right of defence of property extends to one's own property or another person's property. On the other hand, section 26(b) allows the owner to exercise his right of private defence of property regarding his own property, the property of his wife or descendant. The implication of section 26(b) is that the right of private defence of property cannot be extended to another person's property except, if the person is his wife or descendant.

CONCLUSION

The right of private defence of property only comes into operation when certain specified offences against property are committed or attempted to be committed. It is not necessary that one of the offences enumerated under the sections (i.e., section 103 of the Code or section 32 of the Order) should have been actually committed; it is enough if there is an attempt to commit any of those offences. If a man's property is in imminent danger of being impaired or attacked, he has the right to resort to such measures as would be reasonably necessary to thwart the attempt to protect his property. As mentioned above, both section 103 of the Code and section 32 of the Order set out the situations whereby the right of private defence of property extend to the voluntary causing of death or harm to the wrongdoer. However, the operation of the right of private defence justifying the killing of the wrongdoer is limited by both section 99 of the Code and section 28 of the Order which are identical with no linguistic alterations. Accordingly, the paper recommends the following.

Firstly, the term "*sariqah*" under section 32(b) of the Order should be interpreted by the Shariah courts to include all offences *ejusdem generis*. A similar approach should also be taken by the courts in addressing the offence of *hirabah*. It is important to note that so far as the defence of one's right to property is concerned, section 32(b) mentions only two offences (*sariqah* and *hirabah*) against which the right is said to exist. The paper submits that the

right being declared to exist against *sariqah* must be deemed to exist against all offences *ejusdem generis*.

Secondly, the term "hurt" should be interpreted in line with the spirit of section 168 of the Order. By doing so, it would make no difference that section 32 uses the word "hurt" instead of "grievous hurt" as can be seen in section 103(d) of the Code. Thus, the question of saying that how come can someone be allowed to kill a thief when there is danger of simple hurt to his body would not stand to hinder the operation of the right of private defence of property.

Thirdly, the right of private defence of property under the Order should be extended to cover another person's property instead of limiting its operation to the owner's property, the property of his wife or descendant. This limitation is brought about by section 26(b) of the Order. Therefore, for the sake of uniformity, section 26(b) should embrace the language of section 97(b) of the Code. In other words, there is a need to harmonise the operation of the two sections in terms of the operation of the right of private defence of property.

Notes

1 Section 97(b), the Brunei Penal Code. See also section 26, the Brunei Shariah Penal Code Order, 2013.

2 See the restrictions imposed by section 99, the Brunei Penal Code.

3 See the restrictions imposed by section 28, the Brunei Shariah Penal Code Order, 2013.

4 Section 3(1), the Brunei Penal Code Order, 2013.

5 See Ratanlal Ranchhoddas, Ratanlal & Dhirajlal's Law of Crimes - A Commentary on the Indian Penal Code, 1860 (New Delhi, Bharat Law House: 2007), p. 435.

6 See the case of Bhupendrasinh A Chudasama AIR [1997] SC 3790; [1998] Cri LJ 57 (SC).

7 See the case of Bishna @ Bhiswadeb Mahato [2005] 12 SCC 657.

8 See the case of Mahabir Choudhary AIR [1996] SC 1998; [1996] Cri LJ 2860 (SC).

9 Section 378, the Brunei Penal Code.

10 Section 383, the Brunei Penal Code.

11 Section 39, the Brunei Penal Code.

12 Section 46, the Brunei Penal Code.

13 Section 319, the Brunei Penal Code.

14 Section 339, the Brunei Penal Code.

15 Section 383, the Brunei Penal Code.

16 See the case of Ram Prasad Mahton AIR [1919] Pat 534.

17 [1870] 6 Beng LR (Appx) 9.

18 AIR [1965] SC 257; [1965] 1 Cri LJ 242 (SC).

19 See Ratanlal Ranchhoddas, n. 5, at p. 406.

20 Section 99(3), the Brunei Penal Code.

21 See Bashir Ahmad Mallal, Mallal's Penal Law (Kuala Lumpur, Malayan Law Journal Sdn Bhd: 2002), p. 805.

22 See Ratanlal Ranchhoddas, n. 5, at p. 436.

23 See the case of Ali Mea v King Emperor AIR [1926] Cal 1012; See also the case of Dhu Ram AIR [1929] All 299.

24 [1865] 2 WR (Cr) 43; Ram Lall Singh [1874] 22 WR (Cr) 51; See also the case of Padmeswar Phukan [1971] Cri LJ 1595 (Ass).

25 Section 105, the Brunei Penal Code.

26 AIR [1930] Oudh 408; [1931] 32 Cri LJ 44 (Oudh).

27 AIR [1979] SC 577; [1979] Cri LJ 584 (SC).

28 Section 99(4), the Brunei Penal Code.

29 See Bashir Ahmad Mallal, n. 22, at p. 652.

30 [1982] Cr LJ 1633 (All).

31 See the case of Jassa Singh AIR 2002 SC 520: [2002] Cri LJ 563 SC.

32 See the case of Bishna @ Bhiswadeb Mahatto [2005] 12 SCC 657.

33 [1924] 18 Cr. App. Rep. 160.

34 [1974] CLR 154.

35 [1904] 1 Cri LJ 997; See also the case of Mithu Pandey AIR [1967] Pat 464; [1967] Cri LJ 102, where the court held that the accused had sufficiently made out the case for private defence.

36 Surah Al-Baqarah 2: 194.

37 Mohamad Ismail Mohamad Yunus, "The Right of Private Defence of A Person: A Comparative Legal Alignment", Journal of Islamic Law Review, 2015, Vol. 11, No. 2, pp. 118-119.

38 Anwarullah, The Criminal Law of Islam (Negara Brunei Darussalam, Pusat Da'wah Islamiah, Kementerian Hal Ehwal Ugama: 2015), p. 134.

39 Ibid.

40 Id, p. 136.

41 Section 63(1)(a), (b) and (c), the Brunei Penal Code Order, 2013.

42 Section 63(2)(a) and (b), the Brunei Penal Code Order, 2013.

43 Anwarullah, n. 39, at p. 134.

44 Section 28(3), the Brunei Penal Code Order, 2013.

45 Surah Al-Ma'idah 5: 38.

46 Section 319, the Brunei Penal Code.

47 Section 320, the Brunei Penal Code.