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## Ethical Foundation of Legal Provisions of Self-Defence in Nigeria

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### Abstract

In recent times, Nigerians have been grappling with the problem of insecurity, ranging from the marauding criminal herdsmen maiming, killing and kidnapping of harmless and innocent citizens to cult clashes destroying lives and properties. In the midst of all these, there has been a seeming negligence on the side of the government to provide the needed security which ordinarily constitutes the primary aim of forming a government; thus, the calls from different quarters for people to defend themselves. The paper seeks to ethically investigate and establish the justifiability of such calls for self-defence and its possible implications. The research exposes the concept of self-defence, its call in Nigeria, addresses the ethical concerns with self-defence vis-à-vis its accompanying legal provisions; it then, raises concerns with the tenability of such calls considering the level of poverty in the country and other factors that may impede the call for self-defence in Nigeria such as the possibility of slippery-slope and concludes that, in the light of obvious negligence of the government to tackle the menace of insecurity and in accordance to the principle of self-preservation, it is indeed behooves of Nigerians to resolve to self-defence as a last resort but this must be well planned and coordinated considering the legal bottlenecks such as the bureaucratic and tedious nature of obtaining license to own firearm.

## **Introduction**

Self-defence is necessitated by the need for self-preservation; this is because, of all moral injunctions, the principle of self-preservation is paramount. It usually serves as a last resort to the helpless who has no other option than to neutralize that that poses a threat to his life and existence. Aside from its legal backup, self-defence is instinctual in all animals (both human and non-human); no matter how weak an animal is, it always strives to save its life in the face of imminent danger and sometimes, it makes an effort to neutralize the source of such danger. The codifications of self-defence are just to make 'litigational' that which is natural with man.

The right to justifiably use force to repel an imminent proportional attack has always existed and been emphasized by scholars; for instance, Russell held that:

...a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them, he happens to kill his attacker such killing is justifiable.<sup>1</sup>

There are several codifications of self-defence in Nigeria's legal system; the first paragraph of section 286 of the Nigerian criminal code provides this:

When a person is unlawfully assaulted and has not

provoked the assault, it is lawful for him to use such force to the assailant and is reasonably necessary to make an effectual defence against the assault, provided that the force used is not intended and is not such as is likely to cause death or grievous bodily harm.<sup>2</sup>

The second paragraph of the same section provides what should happen if the assault is brutal and deadly:

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm and the person using force by way of defence believes in reasonable grounds that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force on the assailant as is necessary for defence, even though such force may cause death or grievous harm.<sup>3</sup>

There is a plethora of judicial precedents that further buttressed the above provisions of Nigerian laws; for instance, In *Akpan V. State*<sup>5</sup>, Adio (Justice, Supreme Court as he then was) in interpreting section 286 of the Nigerian Criminal Code held as follows:

When a person is unlawfully assaulted and has not provoked the assault, it is lawful for him to use such force on the assailant as is reasonably necessary to make an effectual defence against the assault. The force which may be used in such circumstances must not be intended, and should not be such as is likely to cause death or grievous harm. If the nature of the assault is

such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of the defence believes on reasonable grounds that he cannot otherwise, preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence even though such force may cause death or grievous harm.<sup>4</sup>

Given the increase of insecurity in Nigeria and the indifference to tackling it, a good number of prominent Nigerians have called for people to be allowed to Ideally, the primary responsibility of a government is to secure the lives and properties of the citizenry but this has failed in the Nigerian case, hence, the call for citizens to defend themselves. For instance, it is reported that in the first six months of 2021, over 6,000 people were reported killed in atrocity [*sic*] violence across Nigeria.<sup>5</sup> In August 2021; Premium Times reported the killing of 35 persons in Yelwa Zangam, which prompted mourners to take the corpse of the deceased to the State House of Assembly<sup>6</sup> of Plateau state.

Describing the killings in Plateau State, the member representing Jos North/Jos South Federal Constituency of Plateau State in the House of Representatives, Dachung Bagos laments:

*Justice is the answer. Bringing the perpetrators to the book is the answer. The youths that come out to defend themselves are always the ones that are always arrested. Where is justice? Imagine that a community is attacked and at the end of the day the people that are being arrested, are youths from that same community, which means they are the ones that attacked their communities, which is irrational.<sup>7</sup>*

Mr Ortom, the governor of Benue State of Nigeria while decrying the killings in his state states:

*It is an unfortunate development that what is happening if the federal government had taken a proactive step, we will not be where we are. In the last two weeks, [sic] over 70 persons just in Makurdi local government area alone. It is not acceptable. Go to Guma, the same killings are taking place, go to Gwer-west, the same killings are taking place. This is not fair. The federal government has refused to take a proactive step to arrest this ugly situation we are witnessing here today*<sup>8</sup>

Almost every area of the Nigerian state is experiencing one violent threat or another; farmers are no longer free to go to their farms as a result of the killings and kidnapping from the marauding herdsmen with the resultant effect of high prices of food items in the markets. In the South-Eastern part of Nigeria, there are reports of killings, kidnapping and cult clashes. For instance, in Awka, Anambra State, people cannot freely go about their businesses without the fear of cult-related killings. What is worrisome in all these is the government's insensitivity to the yearnings of the people for the security of their lives and property, and this calls for the question: what should the people do? Should they continue watching while they are being killed? As we mentioned earlier, instinctually, man must strive to preserve his life and this calls for an appraisal of the different calls for self-defence in Nigeria. The call for self-defence is not as simple as it sounds, thus, calls for the understanding of the following: the concept of self-defence, the call for self-defence in Nigeria and the ethical justifiability of such call.

## **Understanding Self-Defence**

Self-defence is a justifiable defence, that is, it is a necessary condition and last resort for the preservation of life that is facing imminent danger of extinction. According to the New World Encyclopaedia,

**Self-defence** refers to acts of violence committed to protect oneself. This justification may be extended to the protection of another person, or one's property.... Self-defence... converts what would otherwise have been tortious or criminal acts into excused (sometimes termed "justified") acts when committed to protect oneself or another person. This necessarily includes the use of violence and, sometimes, deadly force. In many jurisdictions, this defence may also be extended to acts in defence of property, although generally in such cases deadly force is not included.

Self-defence is an act that aligns with the instinct to survive; it is always co-eval with human beings and even, the lower animals to defend him/it against whatever poses a threat to his/its life. This is because the preservation of life is a primary and fundamental aspect of one's nature. Going by the uniqueness of the human person as being that is rational, differentiating him from other lower animals; it places the burden of proof on the human person in the face of any case of self-defence. This simply means that self-defence involving the human person must be backed by rational justification. Sequel to this, there is conditions one must fulfil while opting for Self-defence; without which one may be held culpable for murder. This places the case of self-defence among the most tedious pleas in litigation history. To buttress more on this, we will now consider those elements for the justification or otherwise of self-defence namely: Provocation,

Imminence, proportionality, duty to retreat and objectively reasonable fear of injury or death.

### **Provocation**

One may not be entitled to the self-defence claim if he/she initiated the attack first. That is, it is expected that whoever is claiming self-defence should not be the initiator of the act that led to the defence. However, there are possible exceptions to this condition: The "defendant can be the initial aggressor and still raise a self-defence claim if the attacked individual responds with *excessive* force under the circumstances, or if the defendant *withdraws* from the attack and the attacked individual persists."<sup>10</sup>

### **Imminence**

This particular condition states that a person can justifiably claim self-defence if the said attack is imminent, that, immediate. Therefore, one cannot plead for self-defence if the said attack is futuristic. When the attack is not imminent, it behoves the defendant to report to law enforcement to neutralize it. This is also applicable to someone that is trying to avenge an attack that took place in the past, that is, a retaliatory attack. The person is also expected to report to law enforcement. Therefore, self-defence is justifiable only when an attack is imminent.

A question can be raised on the above imminent condition for self-defence; what if law enforcement had shown complacency to the complaints of attacks from a particular group or community of people in the past? Does this complacency not qualify such attacks as imminent since the locals know full well when that law enforcement will not likely act to quell future attacks? These

questions will be addressed while considering the call for self-defence in Nigeria.

### **Proportionality**

This condition is usually adduced when there was a need for the use of deadly force that eventually leads to the death of an attacker. The question becomes; was it objectively rational to use deadly force under the circumstances? This condition admonishes commensurability, that is, the defendant has to ensure that the force applied in the said defence is commensurate to the danger the attacker poses. “The Model Penal Code states that deadly force is not justifiable ‘unless the actor believes that such force is necessary to protect him against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat’.”<sup>11</sup>

### **Duty to retreat**

This particular condition admonishes one to flee from the scene of a danger that potentially poses a threat to life instead of applying deadly force in defence. It is noteworthy to state that not every State admits this; this may be because of the risk involved in the process of retreating, that is, the retreat may reasonably increase the likelihood of death or serious bodily injury. For instance, when an attacker pulls out a gun or any other deadly weapon and starts advancing towards a defendant, the defendant, knowing full well that retreating is risky, is expected to fire the first shot in defence.

### **Objectively reasonable fear of injury or death**

This condition stresses the necessity of self-defence; that is, self-defence is justifiable if the defendant had an objectively reasonable conviction that the attack could have led to serious

injury or death and this will be an option for any reasonable person in the defendant's situation.

The above conditions for self-defence go a long way to underscore how delicate such defence is and this places a huge burden of proof and defence on the defendant. It goes to show that self-defence is a last resort towards the preservation of life and properties. It is also important to state that a community that is exposed to deadly attacks can resolve to self-defence provided that the said community conforms to the above conditions. Given this, we can now expose some of the calls for self-defence in Nigeria and what prompted such calls.

### **Call for Self-defence in Nigeria**

Nigerian State is seriously grappling with different forms of insecurity since its return to democracy in 1999; starting with the Boko Haram insurgency in the northern part of the country that has left scores of people dead and some displaced from their homes to different IDP camps. In addition to the insurgency concerns, the Nigerian State has in recent times, faced other security challenges like kidnapping, election violence, cult clashes, herder-farmer clashes, and land disputes, amongst others. According to Bukarti, the scale of the insecurity threatens the very fabric of Nigerian society: "With every attack, human lives are lost or permanently damaged and faith in democracy and the country is diminishing."<sup>12</sup>

Despite the claims by the federal government that Boko Haram insurgence has been defeated, the northern part of the country is still experiencing a spate of killings and maiming of lives and properties and Boko Haram is even conquering new territories, taking advantage of the poverty and high insecurity in the land to

advance their extremist ideology. According to the UN, by the end of 2020, conflict with the group had led to the deaths of almost 350,000 people and forced millions from their homes.<sup>13</sup> Another aspect of the dwindling nature of security in Nigeria is the one fuelled by the herders-farmers clashes which have resulted in the burning of houses, kidnapping, the killing of scores of people, and destruction of farmlands with the accompanying food scarcity/increase in the prices of food items amongst other harsh effects. Due to the drought that followed the change in the climate, many of these nomadic herders (mostly Fulani) advanced to the southern part of the country with their cattle in search of water and grazing land. In the bid to do this, farmlands with crops are destroyed, thus, triggering reactions from the host communities leading to deadly attacks that have led to the death of thousands of people. Some communities (especially in Benue State) have had their people burnt alive at night while sleeping. Some locals have accused these herdsmen of being behind the kidnapping spree that has been going on in the region. Travelling on Nigerian roads nowadays is a risky exercise because of the high rate of kidnapping that takes place along most major roads in the country; kidnapping is now, a lucrative venture in the land. Because of these herders-farmers clashes, many state governors have passed legislation against open grazing in their respective States.

The kidnapping and banditry are not only restricted to major roads; there have been several attacks on schools where students were kidnapped and ransom demanded. In some cases, some of these students died in the bid of negotiating their ransom. According to a BBC report,

More than 1,000 students have been abducted from their schools since December 2020, and many were only released after thousands of dollars are paid as ransom. Some of the kidnappers are commonly referred to as "bandits" in Nigeria. These criminals raid villages, kidnap civilians and burn down houses. Attacks by bandits have forced thousands of people to flee their homes and seek shelter in other parts of the country. The north-west is the epicentre of these attacks. In Zamfara state alone, over 3,000 people have been killed since 2012 and the attacks are still going on. Hundreds of schools were closed following abductions at schools in Zamfara and Niger state, where children as young as three years old were seized. By every indication, Nigeria's lucrative kidnapping industry is thriving - expanding into previously safe areas - and seemingly beyond the control of the country's army. It poses a real threat to trade and education, as well as the country's farming communities.<sup>14</sup>

One can imagine how traumatized such students will be after such an experience. The southeastern part of Nigeria has also experienced a high level of insecurity where police stations were burnt and policemen killed on sight and other cult clashes, especially in Awka; the capital of Anambra State that has led to the gruesome murder of young boys and girls in the broad-daylight with the law enforcement showing no interest in quelling such open attacks. The most worrisome part of all these is the uninterestedness of the law enforcement in ending these crises and insecurities and one wonders if that is as a result of incapacitation or negligence on their part. Thus, this pushes the burden of defence on the citizens and communities, hence, different calls for self-defence in Nigeria.

In light of the overwhelming nature of insecurity in Nigeria, many prominent Nigerians have publicly called on the people to defend themselves. Governor of Kastina State (which incidentally, is President Buhari's State) is the latest amongst other prominent people to raise such a call in the wake of the high rate of abductions and killings by terrorists in his State. Before him,

The Governors of Benue and Taraba States, Samuel Ortom and Darius Ishaku respectively, had made similar calls, after security agencies, failed to protect their states from the marauding militias that have been maiming, destroying farms, burning houses, kidnapping for ransom and raping. Similarly, the Minister of Defence, retired Major General Bashir Magashi, had early this year told Nigerians to rise and defend themselves. Recall also that a former Chief of Army Staff and Defence Minister, Theophilus Danjuma was the first among leaders to make the call in 2018.<sup>15</sup>

Such calls have been received with mixed reactions; while a school of thought has it that it is not something new to tell the people to defend themselves as the 1999 Constitution of the country (section 33 (2) (a) grants every Nigerian the right of defence of life and properties, another school of thought was of the view that such call amounts to failure on the side of the ruling class in discharging their primary responsibility of protecting the people and shifting the same burden to the people themselves. This is because the primary responsibility of any government is to protect the lives and properties of the citizenry. According to Sowore, "For the governor to now turn around to ask the people who have submitted all their resources, rights and obedience to the state, to defend them, is an admission of failure. I think the people in return should ask him to surrender all his security aides

and armoured vehicles and join them. Where does he expect people, who could barely feed to get money to acquire AK 47 rifles?”<sup>16</sup>

The above calls for people to defend themselves raise serious puzzles; in the face of the obvious hopelessness in the security architecture of the country, what do the defenceless and innocent citizens do to survive? Are these calls for self-defence ethically justifiable given the insecurity in the land and the conditions for self-defence? To resolve these puzzles, we will now turn to the ethical justifiability of the call for self-defence in Nigeria.

### **Ethical Foundation**

Here, we shall attempt to answer: is self-defence ethically justifiable given the high level of insecurity in Nigeria? This question becomes pertinent because, the act of defending oneself is a human act and therefore, falls within the ambit of ethics. To do this, we will have recourse to some selected ethical theories such as; utilitarianism (representing the Teleological ethical theory) and Kantian Ethics (representing the Deontological ethical theory).

Generally speaking, Teleology [from the Greek *telos*, meaning aim or purpose] represents those ethical theories that consider the consequences of an action in determining its rightness or wrongness. Teleological moral theories locate moral goodness in the consequences of our behaviour and not the behaviour itself. 17 As a teleological ethical theory, utilitarianism considers the consequences of an action in determining its rightness or otherwise. Just as the name goes, the goodness of an action is determined by its utility. A good act brings more pleasure than pain to a greater number of people. The question is: will self-

defence bring more pleasure than pain to a greater number of Nigerians? The answer is yes! What if they fail to defend themselves? Then, the answer is that there will be more pain in the land. The criticism that utilitarianism breeds the tyranny of the majority does not apply here because the majority is right in this case. The people that may form the minority in this case are the aggressors and their sponsors who can feel the tyranny of the majority of Nigerians (and justifiably so) who have no other option than to defend themselves. Therefore, the utilitarian ethical theory recommends self-defence for the defenceless Nigerians.

It is important to add a caveat here; utilitarianism has both act and rule versions. While act utilitarianism holds that the rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself, 18 regardless of the rules, rule utilitarianism on the other hand advocates for the observation of rule even while maximizing good consequences. Act utilitarianism is so much concerned with maximization of pleasure while the rule is also in support of this but with the caveat that the rules must be adhered to. In respect to the moral justifiability of self-defence in Nigeria, rule utilitarianism is the ideal, this is because of the legal conditions (some have been explained above) one must adhere to to be legally cleared of any offence. Therefore, in as much as self-defence will bring more happiness than pain to a greater number of Nigerians, they must fulfil those conditions for the legality of self-defence.

Deontology derives its name from the Greek word for duty: *Deon*. As an ethical theory, it considers what one's duty and obligations are in determining what is morally good or bad. According to Powers,

Deontology refers to a general category of ethical or moral theories that define right action in terms of duties and moral rules.

Deontologists focus on the rightness of an act and not on what results from the act. Right action may end up being pleasant or unpleasant for the agent, may meet with approval or condemnation from others, and may produce pleasure, riches, pain, or even go unnoticed. What is crucial in this view is that the right action is required and that the goal of moral behaviour is simply that it is performed.

The slogan of much of deontology is that the right is independent of the good.<sup>19</sup>

As a deontologist, Kant argued that the rightness of an action is independent of its consequences rather a right act flows from duty simply because it is one's duty. What determines the rightness of an action is the proper intention/motive without having any inducement like the pursuit of pleasure or avoidance of pain. The question is: are Nigerians duty-bound to defend themselves? Yes! Generally speaking, self-defence naturally flows from one's instinct to preserve and protect his/her life, therefore, one can say that it flows from duty. One is naturally duty-bound to preserve his/her life.

To further explore the Kantian ethical theory, we will now turn to his categorical imperative formulations with special emphasis on the first two: the universal law formulation and humanity or end in itself formulation. The universal law formulation holds: "Act only according to that maxim by which you can at the same time will that it should become a universal law." This particular formulation simply employs us to always opt for the actions that

are universalizable; that is to say that any act that is universalizable is a good one and vice versa. Is the act of self-defence for Nigerians universalizable? If I happen to be a farmer who is willing to defend himself against the killer-herdsman, will I wish that I be killed if were to be in the killer-herdsman's shoes? If the answer is yes, then, my action is universalizable and therefore, morally justifiable. On the other hand, the humanity or end in itself formulation holds: "Act in such a way that you always treat humanity, whether in your person or the person of any other, never as a means only, but always at the same time as an end." This formulation upholds the dignity and sanctity of the human person as a being that is worthy of respect. But what happens if a person poses a death threat against another human person? The person posing this threat automatically loses his dignity because he/she is trying to treat a fellow human person as a means. Killing in self-defence does not amount to treating the human person as a means and allowing oneself to be killed even when one had the opportunity of defending his life, tantamount to allowing oneself to be treated as a means. Therefore, to be treated as an end, one must act as a member of the kingdom of ends without which, he/she diminishes his/her dignity to the level of a means instead of an end.

Judging by the above, it is crystal clear that self-defence as a result of the high level of insecurity in Nigeria is ethically justifiable given the reasons considered above.

### **Conclusion and Recommendation**

From the foregoing, one can deduce the need for the citizens of Nigeria to protect themselves. These calls from different quarters point to this need because, when leaders whose responsibility is to protect you turned to admonish for self-help, it simply depicts the sorry state of things in the country. Self-defence is the last resort to the helpless which is coeval with human nature as well as that of the lower animals. Constitutionally speaking, Nigerians are granted the right to self-defence provided that one conforms to the conditions attached as discussed above.

There is always the fear of a slippery slope and lawlessness if people are allowed to own firearms for self-protection; the fear is to not get to the kind of mess that the countries like United States of America into where gun control has been a spectre haunting the whole country. The Nigerian firearms act prescribes how licences should be issued; who (which is either the President or the I.G.P.) issues and to whom is to be issued. With this firearms act, the fear of a possible slippery slope is curbed. To further forestall any possibility of abuse, the communities where security threats are prevalent should devise more systematic and strategic means of defending themselves; which may include forming armed vigilante groups that know the terrain for the protection of their lives and properties. Therefore, the recent suspension of the issuance of a licence by the Inspector General of Police is not an ideal one given the realities of insecurity in the land. Since it has become obvious that the Police and other security establishments of the State have failed in guaranteeing adequate security for Nigerians, the I.G. of the Police should be more circumspect in taking some decisions. It behoves these security establishments in Nigeria to devise a way of establishing a good network with these

community vigilante groups in ensuring that scores of Nigerians do not continue getting killed daily.

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