CHAPTER 1

CONCEPT OF SELF-DEFENCE

1.1 Introduction

The right of private defence is based upon the law of nature. It is a natural instinct in man to defend himself and maintain the possession of that, which belongs to him against unlawful aggression of others. Nature has equipped the man with all those means which are essential to achieve this object. Law does not stand in way of the natural right of self defence, which therefore exists in full force.1 As observed by Donovan J. that the law of private defence is:

Not written but born with us, which we have not learned, or received by tradition, or read, but which we have sucked in and imbibed from nature itself; a law which we were not trained in, but which is ingrained in us, namely, that if our life is in danger by robbers or enemies from violence, every means of securing safety is honourable. For laws are silent when arms are raised and do not expect to be waited, for when he who waits will suffer an undeserved penalty.2

The law of private defence being the natural and inalienable right of every man, the law of society cannot abrogate it. Though abridged to some extent, it cannot be superseded by the law of society. From ancient times this right has been recognised within certain circumscribed limits.3 Criminal Law

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recognized private defence as the first rule and it still continues as a rule, though with the passage of time, this law has been much affected by consideration of necessity, humanity and social order. “The right of defence”, wrote Bentham, is absolutely necessary. The vigilance of magistrates can never make up for the vigilance of each individual on his own behalf. The fear of law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men.

It is both the right and duty of a human beings to defend not only one’s own property but also that of others. This duty, man owes to the society which flows from human sympathy. This right of private defence is not abrogated by the mere presence of other persons who are standing merely as silent observers. The law wants its citizens to hold the ground manfully against unlawful aggression. No man is expected to run away, when attacked by criminals or to exhaust all other remedies available before exercising the right of private defence. It is not required from man to behave like a rank coward at any time, however law abiding he may be. The right of private defence, as defined by law, must be fostered in the citizens of every free country. There is nothing more degrading to the human spirit than to run away in the face of peril. Man is fully justified, if he holds his ground and gives a counter attack to his assailants. But this right being one of defence only and not of punishment and retaliation. The force used for defending the body or property must not be unduly disproportionate to the injury to be averted or which is reasonably apprehended. The right of private defence must never be exercised vindictive or malicious manner.

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6 Id. at 631.
7 Kala Singh v. Emperor, AIR 1933 Lahore 167.
The inability of the state to extend its help at all times and in all cases has led to the recognition of this right of private defence. If this right be not given recognition, a man may suffer a wrong at the hands of an aggressor which may never be remedied by law. Thus primary duty is that the state should give due protection to the rights of its citizens and so long as the state is fulfilling its duty, the individual does not have any right of private defence. The individual does not have the right to encroach upon the duty of the state to maintain law and order. But where it fails to defend its citizens, they are allowed to use violence within certain limits to resist unlawful aggression.

Thus the right of private defence is beyond doubt necessary but it is not a necessary evil. For Pollock observes:

It would be a grave mistake to regard self-defence as a necessary evil suffered by the law because of the hardness of men’s hearts. The right is a just and perfect one. To “repel force by force”, as already stated, is the common instinct of every creature that has means of defence. And when the original force is unlawful, this natural right or power of man is allowed, nay approved by the law. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty.

The right of private defence does not exist against the acts which are not offence. It is available against all assailants whether sane or insane, competent or incompetent and a person mistaken or otherwise. The right prevails against overt attacks irrespective of their intention and meaning. It exists even though the innocent persons are harmed, when there is danger to life or limb, and there no other alternative to protect the person. The test is whether there is immediate necessary for self-defence and further whether or

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not it was immediately necessary for the defendant to adopt that particular course of action. The right exists, if the attack is either actual or threatened. In order to justify the taking of life on the ground of appearance of peril the appearance must be real, though not the peril. The act of killing must commit because of an honest and well-founded belief in the imminence danger. The Courts, should, therefore, view the circumstances from the standpoint of the accused and not that of a cool bystander.11

The law of private defence is founded on necessity and is not superseded by the law of society, although curtailed to some extent. It can be abridged, but cannot be abrogated. The exercise of the right within a circumscribing ambit is recognised in India from ancient times. According to the ancient law-givers, homicide was permitted, if it was committed when danger to life was feared. Manu enjoined to resort to arms in self-defence.12 But in cases where the assailant had desisted before striking, he was to be captured and not killed.13

The right of defending one’s life from death or great bodily harm is also founded upon the same desire and right to live is the legal principle that it is wrong to kill.14

It is also based on the principle that under certain circumstances the conduct of a person is justified though otherwise criminal. Indeed nature prompts a man who is struck to resist, and a man is justified in using such a degree of force as will prevent a repetition.15 The instinct of self-preservation, which is imbedded in human-nature led the individuals to form the groups and later on those groups transformed into social organisation. Thus, the social structure grew and developed on the very fundamental tenet of self-defence.

12 Manu, Ch. VIII, Verses 348, 349.
13 Katyayana, Smritichandrika, p.729.
15 Per Parke, B., 2 Lewin 48.
The root of the concept of self-defence may be found even in Anglo-American jurisprudence.\textsuperscript{16} It is now almost well settled that a man who kills another or even causes serious bodily harm in necessary self-defence may be justified and should be acquitted when indicated.\textsuperscript{17} Even modern lawyers can hardly deny the need for providing right of private defence.

Historically speaking a person accused of a crime at one time was condemned and considered to be an evil, even though the crime was committed \textit{se defendendo}. The moral sense of community could not tolerate it for a long time.\textsuperscript{18} As a result, theory of pardon appeared on the scene and the king began to grant pardon to the accused for such act but his goods were forfeited to the government treasury. During this period, the homicide committed \textit{se defendendo} was categorised as “execusable homicide” because some fault was attributed on the part of accused. With the march of time homicides committed in self-defence were termed as “Justifiable homicide”.

In the early English law, justifiable homicides in \textit{strictu sensu} did not involve any punishment. They were not considered to be felonies and caused no forfeiture of the killer’s property. This was simply because the act of homicide was either enjoined or permitted by the law. It is based, on the ancient principle of common law that what the law requires, it also justifies. In other words, the slayer is treated as acting on behalf of the state in the cases of justifiable homicide.\textsuperscript{19} In the modern time, the homicidal acts in self-defence are strictly justifiable. However, it took a very long time to reach this stage.

From the aforesaid discussion it is evident that the right of private defence forms a valuable defence in criminal law has been set forth under the caption “General Exceptions” of the Indian Penal Code. The relevant

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\textsuperscript{17} Foster, \textit{Crown Law}, (1792), p.273.


provisions are laid down in Sections 96 to 106 of the Indian Penal Code. However, these provisions should not be interpreted on the basis of principles governing the right of self-defence under the common law of England. The provisions are complete in themselves and the words used in the Sections must be looked to for finding the scope of the right.²⁰ Be that as it may two principles may be said to underlie these general exceptions: First, the circumstances surrounding the commission of the act amount to a legal justification for its commission. Second, the circumstances are incompatible with existence of *mens rea* and so the actor is not responsible for what he has done. To hold a man responsible for a crime his conduct should be voluntary and he should realise that his conduct would or might produce certain harmful results.

**1.2 The Concept**

Self-defence is a dynamic concept. It varies from country to country and time to time depending upon the circumstances of each case. The concept of self-defence has undergone a marked change over the last few centuries. Prior to 1267 a man was hanged in cases of self-defence just as if he had acted feloniously because such killing was not justifiable homicide. The party indicated was not entitled to an acquittal by the jury. He was sent to prison and was placed at the king’s mercy for a pardon.²¹ There was no concept of exceptions to criminal liability.

With the advancement of society and coming into operation of the concept of welfare state the responsibility of protecting the person and property of individuals was taken over by the states. The judiciary has recognized the right of self-defence and the legislature has given its approval by specifically providing and enacting the statutory provisions in the criminal code.


1.2.1 Meaning

Literally speaking, self-defence means the defending of one’s own person. But in the modern time its scope has widened. It is justified to cause harm on another person on the ground that the harm was caused to protect as a means of protecting oneself.

The term “self-defence” appears to have been derived from the Latin term “se defendendo” which stands defined in the Black’s Law Dictionary as “defending himself, in self-defence, Homicide Committed as defendendo is excusable”.22

James Wilkinson extended its meaning as defending not only of one’s own person but also one’s rights etc.23 This seems to be wider than the earlier one because it not only covers the human being but also the rights of individual. It connotes the almost same meaning which is attributed to “self-defence” at present day. However, it has been defined from another perspective in Jowitt’s dictionary as “Self-defence- life and limb are of such high value in the estimation of the law that it pardons even homicide if committed se defendendo, or in order to preserve them”.

A complete defence is available to those who use force in order to protect cthemselves or another person from an unjustified attack. Unfortunately there is no agreement over the correct name for this defece. Textbooks have used the terms self-defence, private defence, and lawful defence. Self-defence is probably the phrase most familiar to the person in the street, although it is misleading because the defence also applies if the defendant is protecting someone else from an attack.25

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22 Id. at 1218.
The expression “self-defence” has also been defined in many other dictionaries.26

Saunders27 defines self defence as “the defence of one’s self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of his relations, is forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens is chargeable upon him only who began the affray”.

David M. Walker gave a more descriptive account of self-defence by saying:

“It is permissible to cause harm or even death in order to defend oneself or another person from unlawful violence, provided that the person causing the harm or death did what he could to avoid the violence, as by retreating where possible, and inflicts to greater injury than he, in good faith and on reasonable grounds, believes to be necessary to protect himself or the other. If the defence is made out, the accused escape liability entirely, the injury or death being justified, if not he may be guilty of assault, or even murder. The defence of his own life, but extends to defence against rape, possibly against sodomy, and defence of another whom one reasonably should protect, such as a child.”28

The aforesaid definition also covers the defence of another person in the exercise of the right of private defence.

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26 Black’s Law Dictionary, (1999), p.1364: “The use of force to protect one self, one’s family, or one’s property from a real or threatened attack”.
Originally, self-defence was the protection of one’s own person against some injury threatened or caused by another. Later on, it was extended to the protection of one’s property within its ambit.\textsuperscript{29} Subsequently, it was extended to the safety of one’s habitation and the other members of his family. This view is fortified in the Alexander’s writings:

“It is the right of a man to repel force by force even to the taking of life in defence of his person, property or habitation, or of member of his family against any one who manifests, intends, attempts or endeavours by violence or surprise to commit a forcible felony”.\textsuperscript{30}

Thus, in the modern time, the right to defend is not limited to the family members but it is extended to any other person and even to a stranger.

1.2.2 Self-Preservation and Self-defence

Self-defence is based upon the concept of self-preservation. Self-preservation is the natural instinct in every living creature. It was employed against forces-natural and physical and self-defence is used only against man-made calamities. It is found both in human beings and animals. It is based on the struggle for existence. We eat, drink and breathe to sustain and preserve ourselves. Once a living creature is assured of self-preservation within the environment surrounding it, there are still a number of forces both physical and natural against which it has to combat to exist, and the right of private defence is contemplated to meet one of those situation.

Thus, the necessity of self-preservation gives birth to the notion of self-defence. It may be defined as the maiming or killing of another person from necessity where a man finds himself in a position of imminent danger, either to himself or another and when he finds it necessary to strike to save his life or the life of another or to save his property or the property of another from harm. As a consequence, killing done to prevent violent or atrocious crimes,

such as robbery, murder, burglary, arson etc. is justifiable by the law of nature.\textsuperscript{31}

Human-psychology plays a significant role in the context. Though taking human-life in self-defence is an affirmative intentional act, yet it is commonly known that men at times act as a result of automatic reflexes initiated by some previous situation or belief; although they are utterly unconscious of the particular act at the time of action and have no memory of it later on.\textsuperscript{32}

**1.2.3 Legal Concept of Self-defence**

Self-defence is a legal concept and is involved against a party for violence committed by him upon the person of another.\textsuperscript{33}

In this connection, there had been a confusion about the precise meaning of man-slaughter and culpable homicide not amounting to murder. This confusion has given rise to the concept of excusable self-defence.

Hawkins has described the circumstances where a man claiming full exculpation for a killing would amount to self-defence. He also included the killing of a man who assaulted another in the high way, or in a house with intent to rob or kill. He extended this protection to the intervention by any member of a family or the servant or lodger of the man attacked.\textsuperscript{34}

Be that as it may, homicide is justifiable in self-defence or defence of another person against an assault causing danger, or reasonably apprehended danger, death or serious bodily injury, or against an attempt to commit some forcible and atrocious felony such as high way robber, rape or a burglarious attempt to break into a dwelling house, provided that no more force was used than was necessary by the conduct of the person killed. Thus, in *R.V. Rose*,\textsuperscript{35}

\textsuperscript{32} (1973) N.J. 96 at 107.
\textsuperscript{35} 15 Cox 540.
where the prisoner shot and killed his father believing that he was cutting the throat of his mother, it was held that his act was justified if he believed honestly and upon reasonable grounds that his mother’s life was in imminent peril and his act was necessary for its preservation.

Hale observed that if a person killing was attacked in a manner which was imminently dangerous to life or if a violent felonious attack was made on a person or property, the killing was justifiable on the principle of self-defence. It is only just that one, who is unlawfully attacked by another and who has no opportunity to resort to the law for his defence, should be able to take reasonable steps to defend himself from physical harm. When the steps taken by him were reasonable he had a complete defence to such crimes against the person as murder and man slaughter. His intentional infliction of physical harm upon the other, or his threat to inflict such harm, was said to be justified when he acted in self-defence, so that he was not guilty of any crime.

However, the aforesaid grounds of justification neither apply to felonies committed without force nor to misdemeanors, although forcible. In defence, however, if a man’s house the owner or his family may kill a trespasser who would forcibly dispossess him of it in the same manner as he might in self-defence kill a man who attacks him personally. But where there is no such force and no apprehension of serious personal danger, there is no justification for killing a mere trespasser.

Foster is of the opinion that the right of self-defence has not been treated with due precision. He does not favour the idea that in the cases of self-defence pardons should become automatic because it will lead to absurd interpretation of law and will abet or encourage homicide. His view appears to be sound.

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37 State of U.P. v. Ram Swarup, 1974 SCC (Cri) 674.
It is submitted that the act done is self-defence must be defensive and not offensive. It must not exceed the bounds of mere defence and prevention. The law of self-defence justifies an act done in the reasonable belief of immediate danger and if an injury is caused by defendant under such belief, he cannot be punished. The right of self-defence neither implies the right of attack nor does it permit the acts to be done in the spirit of revenge or retaliation. The law of self-defence can be employed as a shield for the protection. However, a homicide cannot be justified on the ground of self-defence, where it is pre-meditated or where it is committed by way of revenge of past injuries.

If a person goes with a gun to kill another, the intended victim is entitled to act in self-defence and if he so acts, there is no right in the former to kill him in order to prevent him from acting in self-defence. The act in self-defence is a positive and deliberate one. An anomalous doctrine of “accidental self-defence” is not recognized in this respect. One might intend to kill and yet be guiltless. Every person is justified in using reasonable force to defend himself and others but the force justifiable is such only as is reasonably necessary. Mere appearance that a man might use violence to the defendant does not give the latter the right to exert excessive force by way of self-defence. Professor Glaville Williams suggests that the force used in self-defence should be termed as “protective force”. Such force may be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention.

The right of self-defence normally arises out of an attempt to commit a crime by the assailant and thus consists in the use of force to prevent the commission of crime. The purpose of the person attacked, when he acts in self-defence, is not the enforcement of the law but his own self-preservation.

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40 Shell v. Derriscott, 161 Ala. 259; 49 SC 895.
The degree of force, which is permissible under the circumstances, must be reasonable but an inquiry into the motive of defending person is not practicable.\textsuperscript{44}

If one is assaulted, he has the legal right to defend his person, even to the point of taking the life of his attacker. If it appears reasonably necessary to do so to serve himself. This defence is based upon fear and operates as a complete excuse for the commission of homicide. This arises out of assault. The assault may or may not be an aggravated one.\textsuperscript{45}

1.2.4 Concept of Private Defence in India

The expression “private defence”, which has been used in India, has not been defined in the Indian Penal Code. In the absence of any statutory definition judiciary was invited to delineate the contours of these expressions. In India, the right of private defence is the right to defend the person or property of himself or of any other person against an act of another, which if the private defence is not pleaded would have amounted to crime. It furnishes justifications for an act which would, otherwise, be considered to be a crime. In other words, it creates an exception to the criminal liability.

The law of private defence embodied in the Indian Penal Code is based upon the English law but has been adapted with slight changes suited to the needs of the country. The English law, therefore, is the Fountain-head.\textsuperscript{46} Sections 96 to 106 of the Indian Penal Code deal with the right of private defence of body and property as administered in India. These Sections help the Courts in deciding whether an act has been done within the right or not and whether the accused should be acquitted or punished for the same. According to the law commissioners, the principle laid down in these Sections should not be considered as the foolproof test on the subject.\textsuperscript{47} Law Commissioners observed:

\textsuperscript{45} \textit{Snell v. Derriscott}, 161 Ala. 259; 49 SC 895.
We think it right, however to say that there is no part of the code with which we feel less satisfied than this. We cannot accuse ourselves of any want of diligence or care. No portion of our work has caused us more anxious thought or has been more frequently rewritten. Yet we are compelled to hold that we leave it still in a very imperfect state; and though we do not doubt that it may be far better executed than it has been by us, we are inclined to think that it must always be one of the least exact parts of every system of criminal law.48

These Sections of the Indian Penal Code do not require that before exercising the right, the defender must exhaust all other remedies available to avoid causing harm to his assailant.49 The right of private defence will be of no use if it were to be exercised after the commission of an offence. This right cannot be exercised merely because an unlawful or wrongful act has been committed. Not only that act should be offence but also offence of a particular type like theft, robbery, mischief or criminal trespass.50 An act committed in the exercise of the right of private defence is not an offence; thus the opposite party cannot claim the right of private defence against such an act. Similarly an aggressor cannot claim the right of private defence if his act was likely to cause the death of the other. The right conferred by the Indian Penal Code is a limited right and the benefits of it can only be taken when the circumstances fully justify the exercise of the rights.

In Narain Singh v. State of Haryana,51 the Supreme Court stated that the right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It is a right of defence, not of retribution, expected to repel

48 Note B, Reprint, p. 110 quoted in ibid.
49 Barisa Mudi v. State, AIR 1959 Pat. 22.
50 Chandra Bhan v. State, AIR 19 All 39.
unlawful aggression and not as retaliatory measure. It should not be allowed
to be pleaded as a pretext for a vindictive, aggressive or purpose of offence.
While providing for the exercise of the right, care has been taken in Indian
Penal Code not to provide and has not devised a mechanism whereby an attack
may be pretence for killing. A right to defend does not include a right to
launch an offensive, particularly when the need to defend no longer survived.

The person who is in imminent danger of person or property and where
no state help is available is entitled to exercise the right of self-defence. The
main purpose of self-defence is protection of person and property.

1.3 Nature of the Right of Private Defence

The right of private defence is a right and not a privilege. Basically, it
is a natural right which is evidenced from the circumstance. It is given to
every human being and not to a particular person or class. The right flows in
particular situations and everybody in that situation has that right. It is not a
special gift of law but a natural right of human being given reorganization by
law, so it is a right pure and simple, and not a privilege which is expected to
be possessed by particular person or classes.\textsuperscript{52}

The law of self-defence requires that the force used in self-defence
should be necessary and reasonable in the circumstances. The requirements of
necessity place two limitations:

First, there should be “duty to retreat”, while using necessary forces for
self-protection. This duty is subject to certain exceptions. The duty to retreat
does not exist in cases of justifiable homicide or justifiable self-defence at the
common law.\textsuperscript{53}

Second, the amount of force should have been no more than necessary
for the purpose of self-defence. But in the moments of excitement and

\textsuperscript{52} Carol Harlow, “Self-defence: Public Right or Private Privilege”, \textit{The Criminal
disturbed mental condition, this cannot be measured in fine scales. Thus, in order to avert an impending danger, if the right of self-defence is used in an excessive manner, it is forfeited.

According to Moreland, if there is no imminent necessity for the killing, there should be no legal justification for it. Whether a case of necessity exists, must be determined from the viewpoint of the defendant. The act of the defendant must be viewed in the light of the circumstances as they appeared on such occasion. Perkins also lays stress on actual necessity, while dealing with the nature of self-defence. The right to kill in self-defence does not depend upon the necessity actually existing but it is enough that it should reasonably appear to the defendant that killing was necessary. He must have actually believed that he was in urgent danger and the acted upon that belief. The circumstances must be such that make the belief reasonable. The reasonableness of the apprehension is to be ascertained according to the circumstances of the particular case.

A reasonable apprehension of death or serious bodily injury justifies the taking of life. The justification of taking life, according to Edward Miron Dangel depends upon (i) the actor’s honest belief that he is in danger, and (ii) such belief is reasonable warranted by the conduct of the victim and the surrounding circumstances. According to him law has the highest regard for human life and it can be taken only in case of urgent necessity so as to prevent death or serious bodily harm. Probability of slight injury is not adequate. There must be reasonable apprehension of great and imminent bodily injury or loss of life. Killing may only be justified, when it cannot be safely avoided and when all other reasonable safe means have been exhausted. In case of

immediate danger and where there is likelihood of its increase by inaction or
delay, the killing of adversary is privileged in self-defence.\footnote{59}

Slaying an assailant is legally justified, when it is reasonably believed
to be the only sensible way of escaping immediate death or severe bodily
harm. The belief need only be based upon reasonable judgment in the
circumstances. Reasonable apprehension of serious bodily injury or loss of
life permits the taking of life of the aggressor. There must be not only a
reasonable appearance of peril but there must also be an honest belief that it
exits and that killing is the only way to prevent it. In this context, Holmes J.
in Brown v. U.S.,\footnote{60} observes:

Many respectable writers agree that if a man
reasonably believes that he is in immediate danger
death or grievous bodily harm from his assailant,
he may stand his ground and that if he kills him, he
has not exceeded the bounds of lawful self-defence.

The propriety of the defensive conduct depends upon the nature of the
wrongful interference, the requirements of the occasion and other
circumstances. This may includes prior threats, time, place, suddenness,
fierceness of the attack, physical disparity between the parties, the number of
persons and the instruments or weapon used.\footnote{61} The right of self-defence is a
legal justification for the conduct of the defendant. It allows the use of
physical strength or violent means to resist force. That force might be actual,
threatened or reasonably apparent.

To sum up, the right of private defence is a public right and not a
private privilege. The right is available in case of necessity with certain
restrictions to everybody for the prevention of crime on one hand and
protection of person and property of the individual on the other.

\footnote{59} Ibid.
\footnote{60} (1921) 256 U.S. 342.
\footnote{61} Edward Miron Dangel, Criminal Law, Boston, (1951), p. 162.
1.4 Scope of the Self Defence

1.4.1 General

The scope of self-defence has undergone a change. Under the English law in the early time, the right of self-defence was confined to defence of one’s person only. Later on, its scope was extended. Thus, the modern law of self-defence covers the defence of all persons irrespective of the relationship. It includes any one else under a man’s immediate protection.\textsuperscript{62} Glanville Williams supports this view and says that even a stranger may be defended, because defence is not limited to self-defence, and it is convenient to use “private defence” as a more apt expression.\textsuperscript{63}

1.4.2 Scope of Self-defence in England

The scope of self-defence in England has been delineated in Jowitt’s Dictionary: \textsuperscript{64}

“Self-defence and the defence of such as stand in the relation of husband and wife, or parent and child, or master and servant, is a right which belongs to every person. Probably the right is not limited to these relationships but extends to the defence of any person. If a person is forcibly attacked in person or property, it is lawful for him to repel force by force, and the breach of the peace which happens is chargeable upon him only who began the affray. It is a sufficient answer to this defence to show that the first assault was justifiable. Self-defence is primary law of nature, and it is not, neither can it be, in fact, taken away by the law of society. It is an excuse for breaches of the peace, or even for homicide itself, but if the resistance exceeds the bounds of mere defence and prevention the defender would himself become an aggressor. A defendant who pleads self-defence in answer to a charge of assault, must prove that he did not want to fight. He must have demonstrated by this actions that he was prepared to temporizes and disengage and perhaps

to make some physical withdrawal, but he need not have gone so far as to take to his heels and run away. This is the law whether the alleged assault resulted in death or otherwise.

The English Court adopted similar meaning in various cases\textsuperscript{65} wherein the Court emphasized that there cannot arise any question of private defence where the primary object of both parties was to fight and the vindication of their right to property was merely a pretext. The right of private defence to property can only exist in favour of the person who possesses a clear title to that property and where no such title has been determined, no right of private defence can exist.

The right of self-defence is no longer restricted to a person himself being under attack or being subjected to assault. It would be apposite to refer to the following observation made in the Halsbury’s law of England:\textsuperscript{66}

“A person acting in self-defence is normally acting to prevent the commission of a crime, as is a person acting in defence of another. The test to be applied in such cases is now established to be the same as for cases of prevention of crime that is the force used in self-defence or in defence of another must be reasonable in the circumstances”.

Even a stranger can act to prevent crime.\textsuperscript{67} Windfield\textsuperscript{68} on Tort observes as follows:

“There is no doubt that the right extends to the protection of one’s spouse and family, and, whatever the limits of this defence, almost certainly any one can be protected against unlawful force for the independent reasons that there is general liberty even as between strangers, for the use of force as is reasonable in the circumstances in the prevention of crime”.

\textsuperscript{67} (1966) 1 All E.R. 62.
\textsuperscript{68} Winfield on Tort, (1975), pp. 331-32.
Likewise in Salmond’s law of Torts, the exposition of law of self-defence is in the following words:

“It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. In the older books a distinction is drawn between the defence of oneself and of certain persons with whom one is closely connected (such as a wife, child or master), and the defence of a mere stranger. It my be safely assumed, however, that at the present days all such distinctions are obsolete and that everyman has the right of defending any man by reasonable force against unlawful force, even if he has made a genuine mistake about the perilous position of that other”.

Salmond quoting with approval the observations in Turner v. M.G.M. Pictures Ltd., observed:

If you are attacked with a deadly weapon, you can defend yourself with a deadly weapon or with any other weapon which many protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize-fighter, you are not bound to adhere to the Queensberry Rules in your defence.

Thus, in case of deadly attack, the defender may use force in defence of person.

1.4.3 Scope of Self-defence in America

In America, the law is that whatever one may do for himself, he may do for another. The editor of kenny is also in agreement with this view. According to him the right of self-defence is not limited to the particular person assailed but it includes all those who are under an obligation, even

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70 (1950) 1 All E.R. 449.
though merely social and not legal, to protect him. He was hopeful that the Courts would take a view that it is a duty of the strong to protect the weak.\textsuperscript{72}

1.4.4 Scope of Self-defence in Scotland

In Scotland the law is that:

“although an accused person may commit the first assault and may be, in general, the assailant, he is not thereby necessarily excluded from a plea of self-defence. If the victim, in protecting himself or his property, uses violence altogether disproportionate to the need, and employs savage excess, then the assailant is in his turn entitled to defend himself against the assault by his victim. In a case where there is a struggle, the right of self-defence may be invoked by the original assailant as well as by a man who was at the outset his victim”.\textsuperscript{73}

In John Forrest\textsuperscript{74} the accused was a foreman in charge of some buildings which housed women servants. He killed one of the intruders who were trying to break into the women’s quarters and pleaded both self-defence and accident. This was a case of defence against a felonious attack, but Lord Moncreiff directed the jury in general terms applicable to any form of self-defence, telling them that:

“If you think the fired intentionally, you will then consider whether he had reason to fear immediate danger to his own life, or to the safety of those in his house.”\textsuperscript{75}

In \textit{H.M. Advocate v. Kizileviezius},\textsuperscript{76} the evidence was that the accused had punched his father after picking a quarrel with him about an alleged prior assault by the father on the accused’s mother and that when the father made to pick up a poker, the accused hit him several times with an iron instead of trying to keep the poker from him. After a little, the father approached the

\textsuperscript{73} Robertson, (Aug. 1945) Cr. App. Court, (Edinburgh High Court) Unreported.
\textsuperscript{75} \textit{Ibid.}
\textsuperscript{76} \textit{Id.} at 758.
accused with a flat-iron in his hand and threatened him and the accused took the iron from his father and beat him to death with it.

This can be seen as a case of self-defence in a quarrel initiated by the accused and in fact the accused was convicted of culpable homicide, but Lord Jamieson directed the jury that if they thought the accused had acted in necessary self-defence they could acquit him. There was no suggestion that the accused was not entitled to plead self-defence at all because of his part in the events leading up to the death.

1.4.5 Scope of Self-defence in India

Section 97 of the Indian Penal Code which delineates the scope of the right of private defence lays down that every person has the right to defend:

(1) his own body and the body of any other person against any offence affecting the human body

(2) the property movable or immovable of himself, or of any other person against theft, robbery, mischief or criminal trespass or attempts to commit any of these offences.

Sections 99, 98 and 100 define the limits within which the right can be exercised, the persons against whom it can be exercised and the extent of injury that can be inflicted justifiably upon the person against whom the right avails.

Since under Section 97, every person is entitled to defend his own body and “the body of any other person” against any offence, therefore in a case of rape the right is not restricted to relatives of a woman. When it could reasonably be suspected that the offender had entered the house either to commit rape or some other offence, any person is justified in trying to arrest the accused and if he is armed with a deadly weapon, he would be justified in
causing his death, if necessary.\textsuperscript{77} The expression ‘the body of any other person’ means that the person may even be perfect stranger.\textsuperscript{78}

The scope of the right of private defence was also delineated by the Supreme Court in \textit{Jai Dev v. State of Punjab}:\textsuperscript{79}

This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet the attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property.

The Punjab High Court in \textit{Het Ram Lallu Singh v. State},\textsuperscript{80} observed:

....So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require as Mayne has observed that ‘he should modulate his defence step by step, according to the attack, before, there is reason to believe the attack is over’ the law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force.

\textsuperscript{77} \textit{Mohtasham Aslam v. Emperor}, 39 CrLJ 35.
\textsuperscript{78} \textit{Nga Thau v. Emp.}, AIR 1933 Rang. 273.
\textsuperscript{79} AIR 1963 SC 612.
\textsuperscript{80} AIR 1970 Punj. 85.
In *State of Orissa v. Gollarie Damo*, the accused who was much younger in age than the deceased gave blows with tengia on the head of the deceased when the deceased had given a Lathi blow. On appeal the plea of self-defence was raised. The High Court of Orissa took the view that the Court can consider the plea of self-defence, if it arises from the material on record even if the accused has not pleaded it. However, in the present case the High Court opined that even if the right of private defence was available to the accused he had far exceeded it.

In *Saitu v. State of M.P.*, the Madhya Pradesh High Court justified the plea of self-defence of the accused, where as a result of the exchange of blows the deceased died and the accused stopped giving blows after the deceased had fallen down.

In *Jai Dev. v. State of Punjab*, the Supreme Court while dealing with the right of defence of property and person observed:

> In appreciating the validity of the appellant’s argument, it would be necessary to recall the basic assumptions underlying the law of self-defence. In a well ordered civilized society, it is generally assumed that the state would take care of the persons and properties of individual citizens and that normally it is the function of the state of affords protection of such persons and their properties. This, however, does not mean that a person suddenly...his property. That being so, it is a necessary corollary to the doctrine of private defence, that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury

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81 1973 CrLJ 117.
82 1973 CrLJ 350.
83 AIR 1963 SC 612.
which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never the vindictive or malicious.

The proposition that a person in physical possession of land and in whose presence criminal trespass and mischief is being committed by force is nevertheless obliged to retreat there from and resort to the fitful relief he might secure from a police station ten miles away, is wholly untenable. The right of private defence of property cannot be whittled down to something so inconsequential.

In *Summa Bahera v. Emp.*, the Patna High Court observed that a person in possession of property was entitled to defend himself and his property by force and to collect such number and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which amounts to an offence under the Indian Penal Code and it would be lawful for such a person who has seen an invasion of his right, to go to spot and object. The Court accordingly held:

It is not the law that the rightful owner in peaceful possession of a piece of property must run away, if there is an actual invasion of his right and an attempt on his person.

This view was reiterated in *Barisa Mudi v. State*, where in K. Sahai, J. on difference of opinion between C.P. Sinha, J., and K. Ahmad, J. agreeing with Sinha, J. held that the right of private defence in similar circumstances was attracted and had not been exceeded.

Again in *Ram Narain v. State of U.P.* the parties were putting forward their claims with regard to disputed ownership over a mango tree standing on

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84 AIR 1945 Pat. 293.
85 AIR 1959 Pat. 22.
86 1973 CrLJ 29.
the banjar land. The accused wanted to cut the tree whereas the deceased wanted him to stop from doing so. There occurred a fight between the members of both the parties. In consequence several members sustained injuries and the complainant’s father died. The trial Court accepted the plea of right of self-defence advanced by the accused and acquitted all of them. The Allahabad High Court on appeal set aside the acquittal and convicted them of the offences Sections 302, 340, 147 and 34 of the Indian Penal Code.

In Ishwar Singh v. State of Raj, the field was in possession of the accused and the other party went there to take possession of it. There was a fight between the two parties which resulted into the death of one and causing injuries to several members of both the parties. The High Court was confronted with the question as to whether the accused had used reasonable force necessary to protect their possession over the field and also to protect their persons. The High Court presumed that since the accused were in possession of the field and the complainant’s party had come to take possession of the same, the initiative of beating must have been taken by them, they were justified in using reasonable force necessary to protect their possession over the field and also to protect their persons. Thus, the possessor has right to use force for protection of person and property.

The aforesaid views were affirmed by the Supreme Court. The Court did not accept the plea of self-defence because the accused persons had inflicted number of wounds on the deceased and his companions which were not in proportion to the injuries received by the accused person. Moreover, the accused persons had continued the assault for more time than it was necessary.

The scope of the right of private defence was best summed up in Mozam Ansari v. State, in the following words:

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87 1973 CrLJ 811.
88 Id. at 816.
89 1961 BLJR 824.
“The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees actual invasion of his rights, which invasion amounts to an offence under the penal code and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such persons, if the opposite party is armed, to take suitable weapons, for the defence. The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence”.

Justice Arijit Pasayat succinctly pointed out the private defence concept in *James Martin v. State of Kerala*, in the following words:

Self-preservation is the prime instinct of every human being. The right of private defence is a recognized right in the criminal law. Therefore, Section 96 of the Indian Penal Code, 1860 provides that nothing is an offence which is done in exercise of the right of private defence. The question where exercise of such rights is claimed, whether the ‘Lakshman Rekha’, applicable to its exercise has been exceeded. Section 99 IPC delineates the extent to which the right may be exercised.

In *Rajinder v. State*, the Supreme Court observed that right of private defence is now recognized in every free, civilized and democratic society. The right is, however, preventive and not punitive. With this background the provisions of Sections 96-106, dealing with the right of private defence, are to be construed. The fascicle of Sections 96 to 106 codify the entire law relating

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to right of private defence of person and property including the extent of and limitation to exercise of such right.

A survey of judicial decisions reveals that in order to invoke the right of defence to person or property the accused must prove that he was placed in such a dangerous situation and to protect himself he had to use reasonable force. The accused defendant need not wait till he is struck, for exercising the right of private defence. He may use the right where there are reasonable apprehensions of immediate danger of person or property.

1.5 Ingredients

One of the determining elements in self-defence is the belief of accused in the imminence of danger. For this it is not only necessary that he has reasonable grounds to believe but it is also necessary that his mind reacts to those grounds to the extent of believing that (i) danger is imminent and (ii) that force must be used to repel it. When an offence is committed or is about to be committed by one against another and there has not time to seek the aid of the state, he can prevent that by committing or continuing to commit the offence. If one is threatened with a reasonable apprehension of death or grievous hurt, he can cause that one death if he cannot otherwise avoid it.

Necessity is another condition, which the law imposes on the right to kill in self-defence. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. Indeed, self-defence is indiscriminately treated as a form of action in teleological necessity in the sense that the defender’s conduct is justifiable on the ground that the harm which he inflicted was necessary to preserve his legally protected interest i.e. right to live. The right of self-defence implies that there is a human assailant, who is bound by a legal duty. The question of self-defence arises only on the violation of the defendant’s legal right and as such the defender injures the creator and embodiment of the

\[U.S. v. Peterson, (1973) 483 F. 2d 1222.\]
Indeed, the rule of law does not allow a right of private defence when there is no violation of a legal right.

1.5.1 Ingredients Under English Law

Black’s Law Dictionary enumerates two elements which are necessary to constitute and (ii) there must be impending peril without convenient of reasonable mode of escape.94

William’s95 analysis of the elements of self-defence is more comprehensive. He articulated the following elements of self-defence:

(i) that force is threatened against a person
(ii) that the person threatened is not the aggressor,
(iii) that the danger of harm is imminent,
(iv) that the force threatened is unlawful,
(v) that the person threatened must actually believe:
   (a) that a danger exists
   (b) that the use of force is necessary to avert the danger
   (c) that the kind and amount of force he uses is necessary, and
(vi) that the above beliefs are reasonable.

He advocated that different elements are required for the concept of offences and that of defence. The question is how to distinguish between mens rea required for an offence and the working of the mind (motive) of the accused, where self-defence is pleaded? The answer is not an easy one but it may by pointed out that if the accused believing that he has to act urgently in self-defence kills or wounds a person, who is completely innocent, this may be accounted a tragic accident and it is pointless to punish for it.

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According to Alexander,⁹⁶ there are four different elements that go to make up the plea of self-defence:

(i) One must show that he was without fault in bringing on the difficulty, or continuing it,

(ii) One must show that at the time he fired that fatal shot or inflicted the serious blows, he really believed that he was in actual danger of death or serious bodily harm;

(iii) One must show that a reasonably prudent person would have acted as he did under the circumstances, and

(iv) One must show that he had no apparently safe means of escape or means to avoid his danger, or to avoid the use of extra force.

Thus, it is evident that the defendant should not be aggressor. He must apprehend serious harm. He should have no opportunity to retreat. The situation should be objectively assessed in order to avail the right of private defence.

1.5.2 Ingredients Under American Law

As a general rule, defendant cannot be convicted of a crime for a conduct which was reasonably regarded by him as necessary to defend against what he reasonably perceived to be an unlawful and imminent attack upon his person. Implementation of this doctrine involve three major elements; (i) the demand that the defendant’s perception be “reasonable”, (ii) the requirement that the threatened attack be “imminent” and (iii) the prohibition against using more force than reasonably appears necessary to repel the attack.⁹⁷

The prevailing position is that a defendant must both honestly and reasonably have regarded the situation as calling for self-defence i.e., as

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involving threatened harm of sufficient magnitude and immediately to justify the defensive force used.

The model Penal Code takes the position that only an honest belief in facts and circumstances giving rise to the right to defend oneself or another should be required. Modern American statutory provisions tend to follow the traditional approach and require that the belief must be a reasonable one.

The judicial decision and statutory delineation of self-defence generally impose a requirement that the harm or attack defended against be reasonably regarded as imminent. The Model Penal Code requires that the defendant believes the force at issue to be “immediately necessary” for protecting himself against the use of force by another on the said occasion.

One entitled to act in self-defence is required to use only that amount of force which reasonably appears necessary to prevent the threatened harm. The reasonableness of the defendant’s apprehension of death or serious harm must be determined on the basis of all the facts and circumstances as they appeared to the defendant at the time.

In the course of time, this principle of proportional force was accepted in the United States and other common law countries. The defendant has the right to resist the application of force to himself or to those under his immediate charge by force proportionate to the attack. But it is not true in case of a felonious attack. A violent personal outrage may be repelled by any suitable means, and it is immaterial to what injury the assailant is put. However, New York Courts have applied different rules, where a plea of self-defence is invoked, in cases involving indictments for homicides and in those involving indictments for assault. In case of homicide, it is incumbent upon the defendant to show that he was in apprehension of grievous bodily harm and that killing his assailant was his only possible means of escape. This rule

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101 Ibid.
is in conformity with the provision applied different rules, where a plea of self-defence is invoked, in case involving indictments for homicide and in those involving indictments for assault. In case of homicide, it is incumbent upon the defendant to show that he was feloniously attacked and he was in apprehension of grievous bodily harm and that killing his assailant was only possible means of escape. This rule is in conformity with the provisions of Section 1055 of the New York Penal Law, which reads as under:

“Homicide is also justifiable when committed. In the lawful defence of the slayer....when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer.... and there is imminent danger of such design being accomplished”.

A different rule, however, prevails, where the accused is indicated for assault. Thus, in People v. Franzone,\(^{102}\) it is indicated that the accused need not be in actual danger to sustain a plea of self-defence; he may act in self-defence even from apparent necessity. In cases of assault, it must be shown that the defendant used only such force as was necessary to repel the attack and to protect himself. However, in the United States many Courts apply the same rules upon indictment of assault as are applied upon indictments for homicide.\(^{103}\)

1.5.3 Ingredients Under The Canadian Law

One should reasonably apprehend the danger. The danger must be imminent. The force used in self-defence should be reasonable in the circumstances. Such are the elements that go to constitute the right of self-defence in the Canadian Criminal Law.

In case of R. v. Bogue,\(^{104}\) the Court while discussing the issue as to whether or not the force used by the accused was disproportionate to the

\(^{102}\) (1914) 211 N.Y. 284.


\(^{104}\) (1976), 30 C.C.C. (2nd) 403.
The original force used by the deceased held that it is only a matter of evidence for the jury to consider in determining whether the accused had a reasonable apprehension of death or the accused had reasonable and probable grounds to believe that she could not otherwise preserve herself from death or grievous bodily harm.

1.5.4 Ingredients Under Indian Law

In India, the restrictions or limitations contained under Section 99 of the Indian Penal Code are as important as the right itself. Indeed, these are the basic principles upon which the doctrine of self-defence is built. However, the right of self-defence is not absolute but is subject to certain restrictions, namely, there is no right of private defence against (a) an act which does not reasonably cause apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not strictly be justifiable by law; (b) the same act as in (a) if done under the direction of a public servant; (c) acts where there is time to have recourse to the protection of public authorities; (d) the right of private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Since the right of private defence is essentially one of defences or self-protection; and not a right of punishment, the harm inflicted in self-defence must be no more than is legitimately necessary for the purposes of defence. Further, the right is co-terminus with the commencement and existence of reasonable apprehension of danger to body from an attempt or a threat to commit the offence. It avails only against a danger real, present and imminent. Under such circumstances, every person has a right to hold his ground and not to run away like a coward. He is perfectly justified to deliver counter attacks to the assailant, which may be disproportionate to the injury inflicted.

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106 Mehandi v. Emperor, AIR 1930 Lah. 93.
In order to establish a plea that an act of killing is justifiable homicide in the exercise of the right of private defence and not a culpable homicide it must be proved:

(a) that the deceased attacked the accused and the assault was an offence;

(b) that it was such as might reasonably cause an apprehension of that death or grievous hurt would be the consequence of such assault, unless the accused exercised his right of private defence and;

(c) that voluntarily causing the death of his assailant was necessary for the purpose of defence.\(^\text{107}\)

In the case of injuring another in self-defence three elements must be satisfied: (i) there must be no more harm inflicted than is necessary for the purpose of defence and (ii) there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence; (iii) the right does not commence until there is that reasonable apprehension.\(^\text{108}\)

The aforesaid elements were also recognized in *Balbir Singh v. State*,\(^\text{109}\) where it was stated that the same components must be present before taking the life of another in exercise of the right of self-defence, namely:

(i) the accused must be free from fault in bringing about the encounter;

(ii) there must be present and impending peril of death or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity;

(iii) there must be no safe or reasonable mode of escape by retreat, and;

\(^{107}\) *Hakim v. Emperor*, 41: P.R. 1884 Cr.

\(^{108}\) *Queen v. Hussainuddy*, 17 W.R. 46.

\(^{109}\) AIR 1959 Punj. 332.
(iv) there must have been a necessity for taking life.

The basic principle of the doctrine of private defence is that when a person or his property is under danger, and assistance from state machinery is not provided, in such a situation person is entitled to protect himself and his property. The force which the person use must not be disproportionate to the injury which is sought to be averted. In order to find whether right of private defence is available or not, the injuries received by accused, the injuries caused by the accused, the imminence of threat of his safety and the circumstances whether the accused had time to have assistance of public authorities are all relevant factors should be taken in to consideration.110

Since the basis of this right is defence against offences of violence, it follows that where the defendant had no reasonable ground to anticipate such a killing, the killing in self-defence was not justifiable.111

In George Dominic Vareky v. State of Kerala,112 it was held by the Supreme Court that the right of private defence rests on following ideas:

(i) there must be no use of more harm inflicted than is necessary for the purpose of defence;
(ii) there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence and
(iii) right does not com in to existence commence until there is a reasonable apprehension of danger.

The right of private defence includes not only the right to protect person and property of oneself but also person and property of others against aggressor by private means. This right has been recognized in every civilized society in one form or another and has found a place in the statutory provisions of such country. The extent of the right and its basis varies in different legal systems but the right in one form or the other is prevalent

112 (1971) 35 SCC 275.
almost in every legal system. Indeed, the right has developed on the basis of instinct of self-preservation which is common in every living creature. Since the person and property are very valuable in the eye of law, the state grants the right of private defence to the individual for their protection, though its exercises has been limited by imposing certain restriction so that it may not be misused.

It is evident that the right of private defence was originally confined to the defence of self but was subsequently extended to his close relations. In the modern times, its scope has been further widened. Now every individual may exercise this right for the protection of his body and the body of any other person, and his property and the property of others against the offences affecting human body and property.

From the aforesaid analysis it is evident that the intentional infliction of death or bodily harm is not a crime when inflicted by a person to defend himself or any other person, from unlawful violence, provided that the person inflicting it creates no greater injury in any case than he in good faith and or reasonable grounds believed to be necessary at the time. A person is entitled to protect himself from an aggressor. The following elements are essential when the plea of self-defence may be sustained:

First, the accused must be free from fault in bringing on the difficulty.

Second, there must be reasonable apprehension of danger to life or of great bodily harm.

Third, there must be no safe way of escape by retreat.

Fourth, there must have been a necessity for taking life.

Lastly, no more force than necessary should be used.

These are the pillars upon which the right of self-defence stands.