CHAPTER 2
HISTORICAL BACKGROUND

For an evaluation of the concept of self-defence, it will be necessary to examine the developments that have taken place in this area in various countries. A retrospect of the concept of self-defence under Roman, English and American law may be a realistic.

2.1 Development of the Right of Self-Defence Under Roman Law

The roots of right of self-defence in England owe their origin to Roman Law. It is, therefore, desirable to refer the developments in Roman Law before examining the evolution of the right of self-defence in English and American legal systems.

In Roman Law, homicide was considered to be an act by which the life of human being was taken away. There were two degrees of criminal homicide, which did not expose to punishment namely, excusable and justifiable. Self-defence was placed in the latter category of homicide. In self-defence violence is certainly lawful: 'Vim enim vi defendere omnes leges emniaque jure permittunt' (a man, therefore, incurs no liability, if he kills another's slave who attacks him).

In the Justinian's law, no greater force than what was sufficient to ward off the threatened danger was permitted and there was Aquilian liability if the slave apprehended. The same was also true, if the slave comes as thief by night. The Twelve Tables, however, allowed killing in such a case without restrictions because they regarded it as permissible self-redress than of self-defence. The principle that the degree of force used must, in any case, be proportionate to the seriousness of the threatened evil, was not expressed in these words but was commonly inferred from a general notion of "moderation". Subject to this permissible limitation, self-defence also

included the immediate retaking by force the property of which one had been forcibly deprived.2

An assault was not an injury if committed in self-defence when one’s life or limb was threatened, any amount of force to repel the injury was lawful, if it was reasonably necessary. A man put in fear of his life could, with impunity kill his assailant, but if he could have caught the man, and there was no necessity for killing him he was not justified. In defence of property less latitude was allowed. Even a burglar could not be lawfully killed, if the householder could spare his life without peril to his person. Any less violence was, however, justifiable in defence of property.3 An injury was held to be aggravated:

(i) of the nature of the act, as when a man is wounded or scouraged, or beaten with sticks;
(ii) of the place, as when the assault it in a public assembly;
(iii) of the person, as when parents are struck by children, or patrons by freemen;
(iv) or of the part wounded, as a blow in the eye.

In these cases exemplary damages were given.4

Arnold D. McNair, describes Roman law and common law in comparative perspective on the subject as under:

“Necessity appears in Roman texts as a defence in an action for damage e.g. where a ship was driven without fault into a position in which the on hope of avoiding wreck was by cutting the cables of another shop, or again, where it is necessary to pull down a building to prevent a fire from destroying one’s own house. How far this goes in our law is not quite clear, but it is settled that the same rule applies as to checking a fire. It might be said that there is no

---

4 Id. at pp. 137-138.
culpa here; no more is done than a reasonable man would do, and the case is analogous to self-defence recognised in both systems of law. But in Roman law self-defence was no reply in itself to third person who was damaged by my act and the English law seems not very clear on this point. In Roman law, it does not appear on the texts that there was any means of obtaining compensation for the harm thus lawfully caused, even where a house was pulled down”.5

From this, it emerges that the self-defence was placed under the category of “Justifiable homicide”. There was also a rule of proportionality with respect to the use of force in self-defence, but in cases of grave danger to life or limb any amount of force could be used to repel the injury. In certain cases, compensation was paid to the injured.

2.2 Development of the Right of Self-Defence Under English Law

The criminal liability in cases of self-defence may conveniently be divided into three periods: (i) Ancient period which may be said to the era of absolute liability for homicide committed se defendendo; (ii) Medieval period in which the theory of pardon developed and it became excusable, and (iii) Modern age where homicide committed in self-defence is treated as justifiable, because it is presumed that such act is not backed with intent.

2.2.1 Ancient Period

In the early history of mankind, it had become customary to commute vengeance for a money payment. When once this practice had firmly rooted, disputes as to the amount of compensation, were referred to the tribal assembly for settlement. The tribal assembly was held periodically among primitive people.

In the beginning, the payment of compensation was optional but later on it was made compulsory. Consequently, during the Anglo-saxon period, the law treated all homicides, heinous or innocent as matters to be expiated by pecuniary payment which was termed as war. It was the value set upon the man’s life. This was done according to an elaborate tariff, which laid down the price of different blows and wounds varying with the rank of the victim. Quite apart from this, the King also exacted a kind of fine, which was called “wite”. There were some more serious offences, which arose against the King and his peace. They were “botleas” or “bootless”. In such cases, the offender was not entitled to redeem himself and was at the mercy of the king.

At a later stage, most crimes became emendable but the gravest offences remained unpunishable. The “wite” became a source of royal treasury and as a result of this, the King’s jurisdiction was enlarged in this area. By Norman times, the system of emendation became obsolete. In the Norman Chronicles, the main crimes were the rebellions of great men. When the rebel was brought to justice, his punishment was imprisonment or exile and disaerison. The insurgent peasants were punished by mutilation.

The kinsfolk of the slain Norman received a certain part of the murder finem which fell on the hundred, if the slayer was not brought to justice. They received six marks out of forty six and the remaining amount went to the King’s treasury. This was known as “presentment of Englishry”.

In the early days, the law regarded the word and the act of the individual but it did not search the heart of the man. It was the age of strict liability. Man was held responsible for his acts irrespective of his intention.

---

6. *Leges Henrici* was compiled as late as 1118, which expressed the Wessex rule that for every homicide, whether intentional or accidental, the wergild must be paid to the family of the slain man. See Morelan, Roy *The law of Homicide* Indianapolis, (1952), pp. 1-2.

7. “Wite was the usual word for a penal fine payable to the King or to some other public authority. See Cecil Turner, J.W., *Kenny's Outlines of Criminal Law*, (1952), p. 8.


9. *Id.* at 74.
His mental state was not taken into account while determining the liability for the commission of crime. It was imposed. The presence of a guilty mind was not a condition of liability in this period. The accidental injury and the injury done under the coercion of self defence were equally sources of liability. The old law did not exculpate the defendant because of self - defence but he was held liable for his act.10 Thus, the criminal liability was not related to the evil intention of the actor. Chief Justice Brian, one of the best medieval lawyers said in this context:

"the thought of man shall not be tried, for the devil himself knoweth not the thought of man."

This is why, the early law is formal and unmoral.11 The intention of the doer was presumed to be reflected in his doings. The homicides committed se defendendo or per infortunium were not exempted from the liability. The actor was held responsible for them. The rule of such strict liability was inhuman at least to the cases of accident and self-defence. The plea of self-defence ought to have been recognised as an explanation or justification for killing even in the earliest era of civilisation.

The earliest society was not regulated by rule of law and most probably the state of anarchy prevailed. Consequently, every good ruler made such a law that could eliminate all forms of self – help and maintain peace and security in the society. This was perhaps one of the causes of the so called absolute liability in the earliest time.12 The distinction between tort and crime were unknown. The wrong – doer was liable for all kinds of injury.

Holdsworth13 maintains that the main principle of the early English Law was that a man acted at his peril even when causing accidental death or harm.

---

or acting in self-defence. “A man acts at his peril” was a popular fundamental principle upon which criminal liability was grounded in the pre-concept period. The principle seems to be broad and wide. “A man acts at this peril” generally means that whatever a man does, will if it injures some—anyone else, make the doer guilty of a breach of law.\textsuperscript{14} Pollock and Maitland also support this theory:

“Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows”.\textsuperscript{15}

A further possible explanation of the reason for these stringent rules was the difficulty of proving the presence or absence of the intent of the wrong doer in the commission of crime. There was no machinery to ascertain it. Thus, the notion of absolute liability which was in existence due to this reason is also reflected in one of the descriptions of the Selden Society:

“Ancient law could not discuss the question of intent, because it had not the machinery where with to accomplish enquiry”.\textsuperscript{16}

Winfield uses an excellent illustration, when he describes rulers having made laws as wild beasts eat—“hurriedly, when and how they can, careless of what the food is so long as it fill them for the moment, in peril of losing it or their own lives to any stronger animal.”\textsuperscript{17} He examines the Laws of Alfred, which allow a man to fight and kill in defence of himself, his lord or blood relation without any liability to pay compensation.\textsuperscript{18} There was also provision for a general right of self-defence against all but one’s lord and when killing by accident or misadventure.\textsuperscript{19} Further, there had been a long list of objective

\textsuperscript{15} \textit{Leges Henrici} was compiled as late as 1118, which expressed the Wessex rule that for every homicide, whether intentional or accidental, the wergild must be paid to the family of the slain man. See Morelan, Roy \textit{The law of Homicide Indianapolis}, (1952), pp. 1-2.
facts, which made a man amiable to its penalties, and occasionally, it stated circumstances in which he was free from liability.20

Winfield holds that early laws show that there were many instances in which a man did not act at his peril. In theory, there was tendency to hold a man liable for some, but not all, accidental harm. In practice this harsh rule was made workable by judicial discretion as to penalties which brought about, in a practical way at best, a crude differentiation between intention, inadvertence and inevitable accident.

Professor Winfield is highly critical of Holds worth, Pollock and Maitland who hold tenaciously to what he calls the “myth of absolute liability”.

The code of Hammurabi had fixed the maximum penalties for different crimes but a considerable license was allowed to the judges in this regard. The less you were in fault, the less must you pay.21 The liability was related to the amount of the fault. Thus, there were gradations of liability.

The truth appears to lie somewhere between these extremes but lack of adequate material makes it difficult to arrive at any such conclusion. Winfield in the end of his essay, therefore, advocates the use of the term “strict liability”22 in place of “absolute liability” for the criminal liability, which was in operation during the early English law.

Under the ancient law not only the approach to accident and self-defence became harsh but some idea of rationalism also began to enter in the system of criminal law. During the twelfth century, due to direct influence of the cannon law, the phrase ‘mens rea’ was used for the first time in English law.

20 Ibid.
In the thirteenth century, there was a shift from strict liability and increased emphasis was laid upon the mental element. During this period, killing was justified in a few exceptional cases. One who killed by misadventure or in self-defence was still guilty of a crime, although he deserved a pardon from the king. The person who killed in defence of himself or his family had to seek the King’s pardon and was considered culpable until he had done so. This may have been due to the King’s desire to retain control over his realm and his suspicions of any disturbance to his peace. The King generally mitigated the harshness of the cases relating to the accidents and self-defence by using his prerogative to excuse the defendant.23

The patent rolls of Henry III show that it was common proactive in the thirteenth century to pardon for excusable homicide committed by misadventure or in self-defence or while of unsound mind and not by a felony of malice aforethought.24 Even during the middle ages, self-defence was not a legal justification or excuse for killing but was a ground for pardon.

A survey of the law and practice during ancient period leads us to the conclusion that (i) the defendant in cases of self defence was not blameless. He was put to some fault and was liable to forfeit his goods; (ii) During this era, the doctrine of mens rea had come to light. It was rational and reasonable and was the outcome of progressive civilisation. Consequently, the homicides committed se defendendo started to be treated as excusable and hence became pardonable by the king.

2.2.2 Medieval Period

During the medieval period, though the accused obtained pardon yet he forfeited his goods for the crime committed in self-defence. The moral sense of the community could not tolerate indefinitely the idea that a blameless self-

---


defender was a criminal. Ultimately the jury was allowed to give a verdict of not guilty in such cases.25

Unlike the ancient period (spreading upto the twelfth century) which was the age of absolute liability, during the middle ages some rationality entered into the field of criminality, as the notion of mens rea had emerged.

As a result of this, the King began to grant Pardon in the cases of homicides committed per infortunium etse defendendo.

So long as the excuse of self-defence remained a matter of royal favour, there were no determined rules in this regard. However, certain principles were inherent in the doctrine from the very beginning. One of them was that if the killing was unnecessary, there would have been no pardon. This principle still remains the most important element in the law of self-defence.

The theory of pardon in the cases of homicides committed se defendendo was relevant in regard to criminal liability. Perhaps the idea of pardon originated, when the harshness of the punishment of the homicides committed in self-defence or by misadventure reached its climax. The moral sense of the community could not tolerate inhuman action in such cases. Consequently, the King was approached to exercise his prerogative to mitigate the punishment.

The act of pardon entirely depended upon the discretion of the King. It was purely an act of mercy. The rules relating to criminal liability were gradually growing during this period. This may be illustrated by the following cases, which were decided by the King’s Court during the thirteenth century.

In 1236 there was a controversy between the King and the magnates about the right to arrest and imprison men who were found doing wrong in parks and preserves. Just at that time, the King had pardoned a forester of the

---

Earl of Ferrers, who had slain a malefactor in self-defence, but the King expressly protested that this was an act of grace and not of justice.26

A man attempting rape assaulted a woman. She drew a small knife and killed him. She fled. Her father offered the justices forty shillings for a permission that she might be allowed to return to the peace. They received the fine and spoke to the King.27

A perusal of the aforesaid cases suggests that during the thirteenth century grant of pardon was solely the grace of the King. Further a homicide in self-defence was not justifiable, even though it was perpetrated in the endeavor to prevent a felony. Thus, there was no uniform practice in granting pardon in this connection.

No doubt, in the beginning the accused was pardoned for the commission of homicide in self-defence or by misadventure, but he was required to forfeit his goods and chattels under all circumstances. This may be supported by an entry in the Northumberland Assize Rolls.

With the march of time the liberality was shown with respect to grant of pardons. Thus, in a judgment of 1256 a lunatic chaplain had broken into a house by night. A servant of the house holder struck him on the head and he died. The servant was set free by the justices. Bracton in his text, would allow a man to slay to a house breaker if to do so was a necessary act of self-defence but in his margin he noted a case of this kind where the slayer was pardoned by the King.28

The act of pardon is a kind of excuse. The word excuse itself denotes the condonation of some wrong committed by the offender. Blackstone perceived the essence of excuses to be “the want or defect of the will”. The subject of excuses the received little attention in the contemporary literature of the common law. But the doctrine of pardon is entirely based upon the

27 Northumberland Assize Rolls, 85.
theory of excuse prevailing in the thirteenth century of English Criminal jurisprudence. The defences that the killing was per information or se defendendo did not come into existence until the middle of the thirteenth century and even then their affect was not on the convocation itself but only on the exercise of the royal prerogative of pardon.

As the granting of pardons for the accidental or self-defence homicides hardened into a practice, the procedure for their automatic grant required the jury to find that the death occurred se defendendo or per infortunium. By virtue of the statute of Gloucester, these defences formed the basis of the law on excusable homicides.

Before the statute of Gloucester in 1278, it had become customary for clerks in the Court of Chancery to issue the writ de odio et atia, which authorised an inquest to determine whether the homicide had been committed by misfortune, or in any other manner without felony. The inquest was conducted by the Sheriff or the Coroners and also by the justices, if they happened to be in Eyre. In either case, if the jurors gave a favorable verdict, a pardon was granted.

The Statute of Gloucester (1278) is an authority on the development of the law of self defence. This act abolished the writ de odio et atia, which was issued in such cases previously. The act provided that the case of misadventure or self defence was no longer to be bailable. The jury could neither convict nor acquit. The King, on the report of the justices might pardon the party, if he pleased.29 Virtually, the Act regulated and reformed the procedure for pardon.

The killing by misadventure or in self-defence was not justifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison and must trust to the King’s mercy for a pardon. Furthermore, although he obtained the pardon he forfeited his goods for the

crime. Subsequently, pardons for killing in self-defence became a matter of course.

Afterwards, the juries were bound in cases of trials for homicide, where the defence was misadventure or self defence, to find specially that such was the case, upon which the King was bound to grant him pardon.

By the end of the fourteenth century, pardons for misadventure or self-defence were becoming a mere formality and the circumstances of their commission were recognised as providing grounds for the issue of a pardon of course. The pardon of course was accompanied with the forfeiture of the chattels of the accused.

As time passed on, the pardon of course became a mere formality. The character of pardon was issued and signed by the chancellor in the name of the King. In this way, it is apparent that the chancellor started issuing the charter of pardon in the cases of self-defence without speaking to the King.

During the fifteenth and early sixteenth centuries, it was settled that the practice of returning acquittals in such cases was adopted by the Court. It is also found elsewhere in the Year Books of the regnal years of Edward IV and Henry VII that a person could establish self-defence or misadventure to escape liability for a felony. Thus, it becomes evident that misuse of pardon was realised during this period.

Thereafter a statute was enacted in 1532. The act is entitled, “that a man killing a thief in his defence shall not forfeit his goods”. It further stated that in future no forfeiture should be incurred in any such case but the persons so killing should be entitled to be acquitted simply. This statute clearly proves that killing in self-defence involved forfeiture of goods.

A survey of the development of law during medieval period reveals that in the early common law of England, self-defence was not a legal justification or excuse for killing but was a ground for pardon. No uniform
practice was observed in granting pardons. But in the fifteenth and early
sixteenth century the misuse of pardon was felt. By statute of 1532 the formal
pardon in cases of necessary self-defence disappeared.

2.3.3 Modern Period

Finally we have come to a point where liability in such a case is
determined upon a consideration of all the surrounding circumstances, upon a
basis of fault and a normal reaction of a reasonable man.\textsuperscript{31} Instead, in modern
times there is a presumption that there exists no \textit{mens rea} in the homicides
committed in self-defence and as such it has become a justifiable defence in
law.

In view of the legal justification of self - defence in modern legal
time, the forfeitures which accompanied the pardon, were also abolished in
the year 1828.

Thus, the cases of self-defence which were pardonable during the
middle ages, have become exculpable in the modern times. So, now no
criminal liability is attached to the defendant in such cases. It is a justifiable
homicide, if committed \textit{se defendendo}. This is in conformity with the
provisions of article 2 of the European Convention on Human Rights. The
relevant article runs as follows:

“Every one’s right to life shall be protected by law and deprivation of
life shall not be regarded as inflicted in contravention of this article, when it
results from the use of force, which is no more than absolutely necessary in
defence of any person from unlawful violence.”

To sum up, the notion of self-defence is justified in almost in every
legal system today.

2.3 Development of the Right of Self-Defence Under American Law

In America the law on this subject has emerged out of English common Law. Like English law the various states statutes in U.S.A. draw a distinction between justifiable homicide and excusable homicide in self-defence. When one, without any blame on his part, is attacked by another in such a manner that he has a reasonable belief of suffering death or grave bodily injury and kills in self-defence, believing such killing killed to be necessary to protect himself, the result is a justifiable homicide. Thus, the right to kill extends even to case of fear of grave bodily injury. But the essential elements are (i) blamelessness on the part of the killer, (ii) a reasonable belief as to the existence of imminent threat and (iii) the necessity of the killing. Such right of self-defence has been called “self-defence without fault” or “perfect self-defence”.

Excusable homicide in self-defence arises where in sudden affray or combat, one fearing reasonably imminent death or grave bodily injury, kills the other believing such killing to be necessary to protect himself. This is akin to the se defendendo of common law. The law in this case presumes that both the parties were at fault in some measure. It was for the existence of this fault in the killer that under old English law death penalty was imposed for such homicide and later the penalty of forfeiture of goods was imposed. Such kind of homicide in self-defence is called “imperfect self-defence” in the American law.

The would be no right of self-defence where a person himself creates an occasion of killing another. One cannot provoke a quarrel and then making an excuse of the quarrel kill another. But mere words, however insulting they may be would not deprive one of the right to self-defence for such words would not be sufficiently, provocative. The question who was the aggressor becomes important in cases where the plea of self-defence is raised and it is not always easy to apportion blame in cases of chance-medley.

---

33 People v. Curtis, 18 N.W. 385.
As a rule the aggressor is one who by his unlawful act or acts which are reasonably calculated to cause or lead to deadly strife or to cause in another a reasonable apprehension of immediate peril to his life, forfeits his right to self-defence. It is not necessary that the one who struck first blow should be aggressor.

If a person intentionally provoked an altercation maliciously intending or expecting that it would develop into a deadly strife if actually results in killing, such person would be aggressor and cannot take a plea of self-defence. But if such person, in the course of the combat bonafide abandon it or withdraws therefrom, conveying by his words or conduct to the other, of his intention of not continuing the fight or of withdrawing therefrom, his intention of not continuing the fight or of withdrawing therefrom, his right of self-defence will be revived. In such a case, if the erstwhile aggressor, who has withdrawn, is after the withdrawal pursued, he may excusably kill in order to save himself. But the withdrawal giving a revived right to self-defence has to be proved strictly by evidence. And if the aggressor has so beaten up the other as to render him incapable of understanding or appreciating the withdrawal, there is no revival of the right to self-defence.

Phrases relating to the extension of the right of private defence to apprehension of bodily injury less than death, employ such terms as “great bodily injury” or “great personal injury”. Where such a phrase occurs, it is to be given its ordinary meaning.

It is now an established principle of law that the right of private defence is not confined to cases where death is feared, but it extends to cases where the danger to be resisted is serious bodily harm of a permanent character, so that where the statute does not contain a reference to bodily harm as one of the

---

34 Scoggins v. Stage, 120 Ala. 369.
35 Myers v. State, 62 Ala. 599.
37 State v. Health, 237 M.O. 255.
38 People v. Button, 106 Cal. 628.
39 Rogers v. State, 60 Ark. 70.
40 Pond v. People, 8 Mich. 150.
basis for the right of self-defence, it will be implied that exercise of the right in defence to danger of serious bodily harm is of a permanent character.

There are cases in which it has been held that in justifiable self-defence there would be no requirement as to the retreat on the other hand cases are not lacking where American Courts have held that a doctrine of retreat would apply irrespective of the fact whether the case would fall within excusable or justifiable homicide in self-defence. Thus Mr. Justice Holmes of the Supreme Court of America remarked:

"Rationally the failure to retreat is a circumstance to be considered with all the other in order to determine whether the defendant went further than he was justified in doing, not a categorical proof of quit. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable Writers agree that if a man reasonably believes that he is in immediate danger of 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. That has been the decision of this Court. Detached reflection cannot be demanded in the presence of an uplifted knife".

From this, it is evident that no uniform practice is available in regard to retreat rule, though its observance depends upon the circumstances of each case.

To sum up, there was absolute liability for homicide committed se defendendo in the ancient period. During the middle age, it became excusable and pardons were granted. In the modern time the homicide committed in self-defence is justifiable and as such no liability is attributed to the defendant.

2.4 Development of the Right of Self Defence In India

There is hardly any branch of Criminal law in respect to which public opinion has undergone a greater change than that which professes to define the criminal responsibility of an accused defendant. A retrospect of law of private defence is, therefore, necessary and relevant study that should be made before any discussion on the present day set up of law of private defence can be realistic.

Tracing the history, we find that under the earliest Hindu Law propounded by Manu, homicide was permitted when danger of life was feared. Resort to arms in self-defence was also permitted. The right was, however, given only for prevention of harm. It could not be used for retribution. If the assailant had desisted from striking, he could not be captured and not killed.

When Muslims invaded India and introduced their laws for governing both Muslims and Hindus, the right of self-defence found place in their Criminal Code. The King did not punish men for causing death of another in self-defence. Retaliation was, however, permitted. The right of self-defence provided in Hindu law and Mohammedan law existed till the advent of British

---

44 Manu VIII, Verses 348 and 349.

45 Katyayana, Smritichandrika, p. 729

When a wicked man has attacked one, the latter incurs no guilt, if he kills him. But, if the man has stopped before actually striking, he shall be captured, not killed.
empire. The Britishers in the first few years of their administration did not interfere with the criminal law of our country. But in 1772, Warren Hastings for the first time interfered with the prevalent law and issued Regulations. The Britishers found that in certain areas Mohammedan law was not serving the desired purpose. They, therefore, issued regulations which subsequently superseded criminal law of both Hindus and Muslims.

Before the drafting of Indian Penal Code, the Britishers administered justice through various Regulations. These Regulations were based on English common law. Later on, the Presidencies of Calcutta, Madras and Bombay were given powers to make laws. The increasing legislative powers were responsible for the growth of a hetrogenous system of laws, both substantive and procedural. The conflicting laws created difficulties in administration of justice. This led to appointment of Law Member of the Council of Governor General. The statute of 1833 provided for appointment of Law Commission to draft Penal Code for India.

The Commissioners, while drafting the Indian Penal Code incorporated inter alia, the right of private defence in it. Sections 96 to 106 of the Indian Penal Code, 1860, were, accordingly framed to provide the law of self-defence. The Indian Law of self-defence is wider and more comprehensive than the English Law. The Indian Law on the subject made a departure from English Law, which was justified by the Commission.46

The evolution of right of private defence in its historical perspective in India would be discussed under three heads: (1) The ancient period, (2) The Medieval period and (3) The Modern period.

2.4.1 The Ancient Period

The law of private defence has been elaborately propounded in the Dharma Shastra. But it has no where been recognized as a right, because dharmashastra does not deal with rights. The primary emphasis of dharma has been the duty. There was no separate concept of rights. They flowed from the

duties themselves. What the Courts recognized and enforced was the duty and not the right. For example, while dealing with the claim of maintenance against the husband, Court will not be enforcing the right of the wife to maintenance but the duty of the husband to maintain his wife. It has been so laid down that the duty of man is that he should maintain his wife, old parents and infant children even if he has to take recourse to an undesirable profession. This stress on duty probably had a beneficial effect that every body thought of his duties and the rights followed in due course. If every body performs his duty, the enjoyment of rights is ensured, but if every body is conscious only of his rights, duties suffer to the detriment of all. Indeed, it is not possible to find in Sanskrit an equivalent term for “right”. The word “adhikar” which is akin to right was commonly used in the sense of control. It was not exactly a right. So the whole criminal law is an enunciation as to how the ruler should punish a particular offence. In so far as the private right of defence is concerned, it has no where been enunciated in the dharma-shastra as a right.

Vasistha says that “the Brahmin and the Vaishya may wield a weapon in self-defence and in case of confusion of castes.” Vishnu spoke in almost similar terms. Gautam says that “in case of danger to life even a Brahmin may wield a weapon”. The law of private defence was widely recognised by the dharma-shastra that it had become a part of common life, which is illustrated by the explanation given by Hanuman when arrested by Meghnad and brought before

47 See also Raja Rama Rao v. Raja of Pillapur, (1918) 45 I.A. 148.
49 Vishnu in Smritichandrika, p. 725.
50 Gautam in Smritichandrika p. 725.

Where his life is in danger, even the Brahmana may take up arms.
his father, the ruler of Lanka i.e., Ravana. It may be recalled that when Hanuman was in the Ashok Vatika he was attacked by Ravana's men led by his son Akshay Kumar. Later Hanuman was arrested by Meghnad and presented before his father as stated above:

“My lord, everybody deeply loves his own person. When I was attacked by the wicked then I caused hurt only to those who had actually attacked me. In spite of that I was (wrongly) captured by your son”.51

Similar was the position in the Mahabharata period, where the assailant was killed in self-defence. Lord Krishna says to Arjuna that an aggressor coming to kill one should be killed at once even if he be senior, old and equipped with other virtues in self-defence.52

Vashistha expressly says53 “by killing an atatayin they say the killer incurs no sin whatever” and quotes three verses

“an incendiary, a prisoner, one armed with a weapon, a robber, one who wrests a filed or carries away one’s wife – these six are called atatayin. When an atatayin comes to attack with the desire to kill or harm, one may kill him even though he be a complete master of Vendanta; by so doing one does not become a brahmana – murderer. If a person kills one who has studied the veda and who is born of a good family, because the latter is an atatayin, he does not thereby become a brahmana – murderer as in that case fury meets fury.”

In the Shantiparva of Mahabharat we have similar verses. If a barahmana approaches wielding a weapon in a battle and desirous of killing a person, the latter may kill him even if the former be a complete master of the Veda. If a person kills a brahmana atatayin who has severed from right conduct, he does not thereby become a brahmana –murderer as in that case fury meets fury.

51 Tulsidas, Ramcharitmanas, Sunderkand, between the couplets 21 and 22:
52 Mahabharat, Bhismaparva, 6.103.95:
54 Mahabharat, Shantiparva, 34.17 and 19.
Udyogaparva\textsuperscript{55} similarly says that, if a man kills in a battle a \textit{brahmana} who fights like a \textit{ksatriya}, it is a settled rule that he does not incur the sin of \textit{brahmana} – murder. \textit{Shantiparva} \textsuperscript{56} and \textit{Matsyapurana} \textsuperscript{57} are to the same effect.

Samantu says, “there is no sin in killing an \textit{atatayin} except a cow or a \textit{brahmana}”. This implies that a \textit{brahmana} even if an \textit{atatayin} should not be killed, but if he be killed sin is incurred.

According to the Indian Penal Code, the right of private defence can be exercised only when there is no opportunity to have recourse to public authorities.\textsuperscript{58} The same principle has been enunciated in the \textit{Mitakshara}.\textsuperscript{59} It says that only the ruler has the right to kill. It is his function to protect the twice born etc. i.e. the subjects. That is why the wielding of weapon by a Brahmin has been prohibited by saying “A Brahmin should not wield a weapon even for the purpose of test” However, if it is apprehended that the very purpose will be defeated by the lapse of time taken in reporting to the ruler, then one can kill the rapist or adulterer himself. This observation was made by Vijnaneshwar while commenting on the couplet of Yajna Valkya dealing with rape and adultery. That is why the observation has been confined to rapist and adulterer. That is why the observation has been confined to rapist and adulterer. As motioned earlier prior to that there was no special right of private defence vis-à-vis the rapist or adulterer. They also were among the various \textit{atatayees} against whom the right of private defence was available. As such what Vijnaneshwar has stated in regard to the rapist or adulterer will hold good in respect of the other categories of \textit{atatayees} also. We may, therefore, generalise that the right of private defence was to be exercised when there was no opportunity to take recourse to the public authorities of exceeding the right of private defence. Apararka\textsuperscript{60} is very explicit when he says that killing is permitted when the aggressor can not be checked other-

\textsuperscript{55} \textit{Mahabharat}, Udyogaparva, 5.178.27.
\textsuperscript{56} \textit{Mahabharat}, Shantiparva , 22.5
\textsuperscript{57} \textit{The Mitakshara}, on Yaj, II-21 edited by S.S. Setlur (Madras, 1912).
\textsuperscript{58} Section 99, \textit{Indian Penal Code}, 1860.
\textsuperscript{59} Yajnavalkyasmrityi 2/286.
\textsuperscript{60} Yajna Volkyasmrityi 3/227.
wise, if he can be checked simply by causing him some hurt then killing him would be an offence. It may, therefore, be inferred that only the necessary amount of force could be used in exercise of the right of private defence.

As to the continuance of the right of private defence, the various authorities cited above prescribed the wielding of weapon against an aggressor only in defence or when the aggressor is coming or there is danger or apprehension of harm. This implies that the right of private defence is available only so long as the question of self-defence is there. It follows as a corollary that if there is no risk or apprehension, there can be no right of private defence. Katyayan is very clear on this point. He says that the principles discovered by him from ancient wisdom form part of the Indian Penal Code even today. He states:

“When a wicked man attacks one, the latter incurs no sin, if kills the assailant. But, if he has stopped before actually striking, then he is not to be killed but to be only captured”.

Some texts suggesting that even a killer, may be killed, have to be understood in that light, because on an overall assessment of the various authorities, it can be safely asserted that the Dharmashastra does not permit the taking of law in one’s own hands. There could, therefore, be no right of private defence against a completed act.

2.4.2 The Medieval Period

The Islamic Jurisprudence was imported into India by Muslim Sultans and later on adopted by Mughals with certain modifications to suit the circumstances of the age and too satisfy the needs of the people of the time. The Muslim system of criminal law was also adopted by British rules with certain modifications till the enactment of the Indian penal code, 1860. Even thought the Hindu and Muslim systems of law differed in various respects but

---

61 Manu, 3.350, Vashishta 3.17.
62 Ibid.
63 Ibid.
having regard to their doctrinal basis, they were essentially identical. Thus, both the systems have a religious conception of law in the sense that they were based on revelation and that the law bound the king, judges and the subjects. 

Be that as it may the entire criminal administration of justice was based on the principles of Muslim Criminal Law and the punishments were inflicted upon criminal in accordance with the provisions of that law only.

The law of homicide was subject to the exceptions namely Wajib, Mandub, Muhab, self–defence and Mukruh. Wajib was the murder that was undertaken out of necessity or duty such as killing of the Murtadd or the apostate. Mandub was a murder that was recommended e.g., when the Ghazi killed his unbelieving Kinsmen if they insulted Allah or His Prophet. Muhab was the permitted qatle when the Iman killed the unbelieving prisoners of war. Killing in self–defence was also allowed. The Mukruh or of war. Killing in self–defence was also allowed. The Mukruh or the disapproved murder was haram illegal and, therefore, forbidden.

To kill a person in self–defence was justifiable but only in cases of imminent danger and when there was no other way out except by killing the person in prevention of adultery, rape, or other heinous offences, being chiefly such as are punishable with death; or at the express desire or command of the person killed. Homicide committed by a person under threat of death was also outside the purview of illegal homicide. Thus, the law of self–defence and benefit of doubt in acquitting of a criminal from punishment which are well recognised in every civilized system were duly recognised by the Sharia.

The Koran lays down that “........he who helps himself after he has been wronged for these there is no way against them...”

---

There were also other circumstances were murder was regarded justifiable. For example, a husband could kill a man who attempted to rape his wife or sister. A rich Muslim merchant slew his wife along with a baby when he found her in bed with her lover. For this crime only a fine was imposed.\textsuperscript{70} Manucci says that a customs officer insisted on seeing the cart in which soldier’s wife was sitting, the soldier repeatedly tried to assure him that the cart contained no tobacco. He put the officer to death when he refused to believe him. Aurangzeb took compassion on the temper of the Youngman and granted him pardon.\textsuperscript{71} As a matter of fact, the right of private defence in the Islamic Criminal Jurisprudence is related to necessity, as human action is guided by it.

These observations are further supported by the declaration of human rights which is based on the Quran, sacred book of Muslims.

Article 3 of the Declaration of Human Rights Stases:

“Every one has the right to life, Liberty and security of person.”

Islam has recognised this “natural right” to life. Thus Quran says:

“If one Slayeth another, unless it be a person guilty of man- slaughter, or of spreading disorder in the land, shall be as though he had slain all mankind, but that he who saved a life shall be as though he had saved all mankind”.\textsuperscript{72}

The prophet said:\textsuperscript{73}

“The believer in God is he who is not a danger to the life and property of any other”.

From this it is evident that the aggressor who is danger to the life and property of the defendant is not considered to be a believer in God and be

\textsuperscript{70} John Fryer, A New Account of East India and Persia, Vol. II, p. 245.
\textsuperscript{71} Manucci, Nicolao, Storia Do Mogor, Vol. II, p. 175.
\textsuperscript{72} Quran 5:32.
\textsuperscript{73} Al. Fathal – Kabir, Vol. III, p. 164.
killed in the exercise of right of private defence, because it is a just cause. He
further observed:

“Your lives, your property and your honour are as
sacred as this day (the day of Hajj) is sacred and
your blood and your property are inviolable till the
last day”.74

During the medieval period, the Muslim Conquerors kept the
administration of the criminal law into their own hands and ignored the laws
of Manu on the subject. But the Muhammadan law itself provided for the
exemption of tributary infidels from some of its penalties, which expressly
declaring them amenable to others. The same author has called the
Muhammadan law as sacred law for the administration of criminal justice.75

Fatawi Alamgiriyah was compiled during the region of Aurangzeb, the
Mogul emperor. It contains the entire provisions relating to the Criminal Law
prevailing during the medieval era of India. During this period, a man was
entitled to kill another in self-defence provided the defendant was a Muslim
by faith:

“If any person draws upon a Mussulman, he (the Mussulman) is at
liberty to kill him in self-defence, because the prophet has said:

He who draws a sword upon a Mussulman, renders his blood liable to
be shed with impugnity; and also, because a person who thus draws a sword is
a rebel, and guilty of sedition; and it is lawful to slay him, God having said, in
the Quran, “slay those who are guilty of sedition, to the end that it may be
prevented” sides, it is indispensably requisite that a man repel murder him
himself, and as, in the present instance, there is no method of affecting this
but by slaying the person, it is consequently lawful so to do. If, however, it

74 A.A. Sayed Muhammad, “Islam and Human Rights”, In Islam at a Glance,
edited by Hakim Abdul Hamud, Indian Institute of Islamic Studies, p. 83.
75 Sir Roland Knyvel-Wilson, Anglo-Muhammadan Law, London, (1903), pp. 36-
37.
be possible to effect the self-defence without slaying the person, it is not lawful to slay him”.76

It is obvious from the above assertion that under Muslim Criminal Jurisprudence, an aggressor was considered to be a rebel and guilty of sedition and hence it was lawful to kill him. This was supported by the saying of Quran. But, whenever, it was possible to defend oneself without killing the aggressor, it was lawful to kill him.

The Hedaya further quoted that it is described in the Jama Sagheer that if a person strikes another with a sword, either during night or day, or in the day-time outside the city, and the person so threatened kills him who thus strikes with the sword, or the club, nothing is incurred, because in the case of striking with a sword, there is no room for delay or deliberation, it is necessary to kill the attacker in order to repel him. Though in the case of club, there is more room for deliberation, yet in the night time threatened is forced to repel the attack and kill the aggressor.

There was a provision to realise fine from the accused for killing an infant of lunatic in self-defence. If a lunatic drew a sword upon a person and the person killed him in self-defence, the fine of blood was due from his property and did not fall upon his Akilas. Shafei maintains that nothing whatever was incurred in this instance. Also in the same way if an infant drew a sword and made an attack upon a person, or if an animal attacked any one, and the person so attacked killed the infant or the animal, a fine was used on account of the infant, or the value on account of the animal, according to Haneefa, but not according to Shafei. The arguments of Shafei upon this point are twofold. First, as the person attacked slew the infant or lunatic in self-defence, they are therefore, accounted the same as a sane person or an adult. Secondly, the person attacked slew the infant or lunatic because of their act furnishing him with a reason for so doing. He is, therefore, in the same predicament with a person acting under compulsion. In other words, if a

person threatens another by saying to him, “Kill me, or I will kill you” and the person thus threatened perceives that if he does not kill him (the compeller), nothing whatever is incurred and so here likewise. The argument of Haneefa is, that the slayer if so in this instance killed a person of perpetually protected blood, or has destroyed a property (the animal) protected in right of the proprietor. Now the act of an animal is not of a nature to do away its protection neither can an infant, by any act, forfeit the protection of his blood, notwithstanding, it be purely on behalf of his own right, infants not being capable of distinguishing between and wrong: (Whence it is that an guilt of willful murder is not liable to be put to death) in opposition to an adult, or one of sound understanding, as those are capable of distinguishing. Still however, retaliation is not incurred by the slaying of the infant or lunatic; because, in the case in question, a reason exists for their blood being out of protection, namely, the repulsion of evil. A person attacked by them, therefore, is allowed to slay them, under a condition of responsibility, in the same manner as a person who eats the provisions of another in a time of famine is responsible for the value; and the fine of blood is accordingly due.77

Retaliation is incurred by killing an assailant while going off, after having made an attack upon another. If a person draws a sword upon another, and strikes him and then goes away, the person so struck or any other afterwards kills this person, he is liable to retaliation. This is where the striker retires in such a way as indicates that he will not strike again, for as upon his retiring, he no longer continues to be an assailant, and assault, reverts to him. If under such circumstance, he is killed, retaliation in incurred.

If a person comes in the night to stranger, and carries off his goods by that, and the owner of the goods follows and slays him, nothing whatever is incurred, as the prophet said:

“Ye may kill in preservation of your property”. It is to be observed, however, that this is only where the owner can not recover his property but by

77 *Id.* at 292-93.
killing the thief; for if he knew that upon his calling out, the thief would relinquish the goods, and he notwithstanding neglects calling out, and slays him, retaliation is incurred upon him since he in this case slays the person unrighteously.78

Nigeria has adopted the Muslim Jurisprudence known as Maliki law. Prof. F.H. Ruxton has presented a view of the legal system in Nigeria. The following portions of that book are not only the relevant there but also expository of the nature and scope of the right of private defence.

“In every encounter or fight between two armed or unarmed men, on foot or on horseback, if both combatants succumb, retaliation has taken place, if not, the survivor becomes liable to the law. Thus the law practically prohibits dueling. Homicide in self-defence or in defence of property entails no punishment”.79

“There is neither crime nor misdemeanor in using force to defend oneself or one’s property against an aggressor; the latter should, however, be abjured to desist if he is in a state to understand the appeal. The term ‘oneself’ includes wife, family and Kinsmen. Killing in such a case is permissible if no other means will cause the aggressor to desist; but if flight from him can be taken without exposing oneself (or one’s goods) to injury, the law does not even permit the wounding of the aggressor” 80

The principle on which the right of self-defence is based is that when a man takes up arms against another, he loses the protection of the law. If the person threatened can have recourse to the assistance of the law time to prevent the harm, he cannot take the law into his own hands.

78 Ibid.
80 Id. at 348-49.
2.4.3 The Modern Period

In the early British rule, the Muhammadan Criminal Law was modified from time and again. Harrington’s analysis of Bengal regulations,\(^81\) and the Digest of Criminal Law of Beaufort\(^82\) enlighten us about the position existing during those days.

However, on 31\(^{st}\) December, 1600, Queen Elizabeth granted a charter incorporating the East India Company with the exclusive right of trades between British India and other countries including United Kingdom. Over the next one hindered and fifty years, though a succession of charters, this trade adventure blossomed into political power. The charter of 1600 empowered the East India Company, to generally regulate its affairs. The charter of 1623 conferred on the company the power to punish its servants for offences committed by them, whether on land or sea. The charter of 1661 further extended the powers of the company to include administration of criminal justice in the settlements. Perhaps, the charter of 1668 best reflects the transition of the company from a trading concern to a territorial power. Under the 1683 charter the company could even raise military forces.\(^83\)

After the Britishers assumed the duty of administering criminal justice in the country in terms of ‘diwani’ rights found the Muslim law of crimes absurd, illogical, uncivilized and devoid of any rationale in the matter of classification of crimes and the punishment imposed and compelled them to introduce some changes in the law in order it in conformity with the civilized nations.

Lord Cornwallis introduced some significant changes in the Muslim Criminal Law. But he did not touch the homicide committed *se defendendo*. No changes were made subsequently in this field or criminal law and consequently the Muslim law of homicide remained in force until the enactment of the Indian Penal Code. The Indian Penal Code, 1860 was


\(^{82}\) Beaufort, *Digest of Criminal Law for The Presidency of Fort William*.

imposed on the entire country irrespective of caste, creed and colour. It, inter
alia, governed the law of self-defence. In India, the right of self-defence has
been placed in the chapter of general exception of the Indian Penal Code. It
has been provided as an exception to criminal liability. Sections 96 to 106 of
the Indian penal code provide the law relating to the right of self-defence and
its various aspects such as its commencement, duration and the extent. The
restrictions imposed on the exercise of the right of self-defence have also
been governed by these Sections.

Since the framing of the Indian Penal Code of 1860 the law relating to
self-defence has not changed. The judiciary has been interpreting the relevant
provisions of law of self-defence for more than a century. During this period
different social values grew up and vanished. The judiciary has tried to uphold
the right of private defence within the legal frame-work of the Indian Penal
Code to meet the demand of new social values.

Realising the need for legislative changes in various areas the
government of India setup a Law Commission to review the various provisions
of the Indian Penal Code including the law of self-defence. The Law
Commission thoroughly reviewed the law relating to self-defence and made
several suggestions for legislative changes in its 42nd Report, which have been
dealt with at appropriate places.

It is evident from the foregoing discussion that the concept of right of
private defence in ancient India was very comprehensive and elaborates. It
covered even false accusation, defamation etc. Besides, if one did not kill the
aggressor, he incurred the sin of Bahman-Killing and such it was an absolute
duty of the assailed to kill the assassin. During the medieval period the wide
concept of private defence was eclipsed, as the Muslim Criminal jurisprudence
was imported under which it was allowed in a restricted way. The Britishers
continued the Muslim law of private defence in India till the Indian Penal
Code saw the light in the year 1861. Lord Macaulay, the architect of the
Indian Penal Code, gave suitable law of private defence which was the need of
people in the existing code-economic conditions of the country.