CHAPTER 3
WHEN RIGHT OF PRIVATE DEFENCE CAN BE EXERCISED

3.1 General

The law recognises a number of situations in which the use of force is justified or otherwise in the exercise of private defence. Indeed, in several cases even deadly force is allowed to be used provided the defendant reasonably believes that he was placed in the imminence of danger for death or grievous bodily injury. Under such circumstances the killing of the assailant became necessary to save person or property. In other word, the use of deadly force could only be justified in a situation in which the attacked reasonably apprehends grave danger to person or property.

Broadly speaking the aggressor is the creator of a situation in which the assailed has no other alternative except to resort to force to ward off the danger in order to protect person or property.

3.2 Necessity And Private – Defence

To a layman, there is hardly any difference between self-defence and necessity. Necessity itself is a defence in criminal jurisprudence and negatives criminal liability. In common language, it is generally understood that whenever the accused takes the plea of self-defence, he wants to convey the idea that the action was taken to protect the life or property from adversary. Similarly, whenever, it is pleaded by the accused that whatever he did was done due to “necessity” to take those measures to save life or property.

The right of self–defence implies that is a human assailant, who is bound by a legal duty i.e. not to harm others, because every body has a legal right to life and liberty. On the other than, in case of necessity, thee is no violation of legal right of an individual. In self–defence, the defender injures
the perpetrator and embodiment of the evil situation, while in necessity, he harms a person who is in no way responsible for the imminent danger.\(^1\)

Self-defence presupposes the existence of some immediately apprehended grave danger through some human agency or one which is not a natural calamity. It is an action taken by the accused to counteract the immediate apprehended movement or action of the assailant, which is always controlled by human agency.

Necessity, on the other hand, is something which can neither be conceived before hand nor can be seen or realised in advance. It is a situation which comes into existence suddenly on the spot and needs a quick and sudden solution. In necessity the element of any human agency is not always present.

Some problems arise in application of these distinctions. One of them is posed by an attack of animal. Beating it off is no more legally significant than is the control of an inanimate force. Hence such conduct is inaccurately termed as "self-defence". The animal’s behaviour cannot constitute violation of a legal right. More complex is the case of protection against an attack by an insane person, which is treated as "self-defence". Since an insane person is not bound by duties of the penal law, it follows that cannot violate any legal right conferred by that law.

Self-defence connotes the latent idea of protection of body or property against the acts of aggression and, therefore, implies the existence of an aggressive element violating human laws. No such connotation can be inferred or implied in the case of necessity, where the action of the accused is based on necessity and necessity alone.

The distinction between the right of private defence and the doctrine of necessity was made by the Madras High Court in *Thangavel v. State*.\(^2\) The Court held that the concept of necessity is wider and there is no evidence on

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2. 1981 CrLJ NOC 210 (Mad.).

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record to uphold the case that the accused was manhandled and his testicles were squeezed by the deceased, his own wife, there was no injury or swelling in the testicles, plea of self-defence cannot be upheld.

Self-defence can be differentiated from necessity on the basis of the mental approach of the accused. In the case of former, there is an unjust attacker on one’s life or property but in the latter there is not any unjust attacker. In the self-defence, there is apprehension of danger from the assailant but in necessity there is no such thing. Thus, it is obvious that the contention must not be understood objectively by the provisions of law but merely subjectively.3

Self-defence can also be differentiated from necessity on the basis of standard of proof required and the explicit plea taken by the accused. The plea of self-defence may not have been taken explicitly but if from the material on record a case of self-defence is made out, then the accused will get the benefit of it. However, in the case of necessity the accused should prove that his action was justified on the ground of necessity.

It is evident from the foregoing discussion that the concept of necessity is wider than that of self-defence. However, necessity is wider than of self-defence. However, necessity creates the circumstances when the right of private defence could be exercised to protect person or property.

3.3 When Right of Private Defence May Be Exercised

3.3.1 The Problem

The Indian Penal Code does not specifically lay down the situations in which right of private defence can be exercised. However, under Section 101, the right of private defence of body is available against offences which are not covered by Section 100 to the extent of causing harm of death. Similarly, under Section 104 the right of private defence of property is limited to causing to the wrong-doer any harm other than death. Sections 100 and 103 specify

the offences against which even death may be caused in exercise of the right of private defence. Thus, legislature, failed to specify the situations in which the right can be used. In the Courts have been called upon to determine in each case whether the right of private defence can be used or not.

A question, therefore, arises as to when the plea of private defence to person and property maintainable?

3.3.2 A Factual Analysis of the Problem

A survey of decided cases reveals the following pattern of facts situation in which the plea of self - defence may be upheld:

An lawful act which is an offence either against human being or property.ª

The threat of the then offence and not of prospective danger.ª

Reasonable apprehension of death or of grievous hurt.ª

A trespasser in settled possession against the true owner.³

Quite apart from the decided cases Sections 100 and 103 of he Indian Penal Code also specify the following situations in which death may be caused in the exercise of right of private defence:

(i) The assault which may reasonably cause the apprehension of death;

(ii) The assault which may reasonably cause the apprehension of grievous hurt;

(iii) The assault with the intention of committing rape;

(iv) The assault with the intention of gratifying unnatural lust;

(v) The assault with the intention of kidnapping or abducting;

³ Ram Chandra v. State of Rajasthan, 1981 CrLJ NOC 152 (Raj.).
(vi) The assault with the intention of wrongfully confining a person;
(vii) Robbery;
(viii) House-breaking by night;
(ix) Mischief by fire;
(x) Theft, Mischief or house-trespass.

The former six are enumerated under Section 100 and the latter four described under Section 103 of the Indian Penal Code. These are, of course, subject to the restrictions imposed under Section 99 of the said code.

Situation in which the plea of self-defence may not be upheld:

(i) Sudden fight,8
(ii) Free fight,9
(iii) Initiator of attack,10
(iv) Act of private defence11
(v) When assailant runs away after attack,12
(vi) Against an unarmed or unoffending person.13

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8 In re. Erasi Subba Reddy, AIR 1943 Mad. 492. See also Paras Ram v. Rex, AIR 1949 All. 274.
9 Somnath Das v. State, 35 Cut. LT 165, AIR 1969 Orissa 138. See also Kumar Lakshmanan v. Lakshmanan, AIR 1964 Mad. 418.
3.4 Specific Fact Situations: When The Right of Private Defence Arises

3.4.1 Unlawful Act.

The attitude of the Court is to have self-control at least over one’s tongue and not to indulge in offensive outbursts which are likely to provoke breach of public peace.

In Serei Behera v. Bipin Behari Roy, the incident took place on a paddy field which originally belonged to the accused petits and his brother on the day of incident, a peon of the revenue Court come to deliver possession of the field to Gangadhar, the decree holder auction purchaser. On behalf of the decree – holder his brother Kunja Behari was present. The complainant opposite party Bipin Behari Roy alleged that Kunja Behari was present. The complainant opposite party Bipin Behari Roy alleged that Kunja Behari as well as Gangadhar – were his wife’s brothers and he went to the place of delivery of possession to satisfy the curiosity. The accused petitioner abused him in filthy language. Thereupon e complaint was filed under the Section 504 Indian Penal Code. The first class Magistrate convicted the accused and sentenced him to pay a fine of Rs. 50/- and in default to rigorous imprisonment for one month. On appeal the Session Judge confirmed the order of conviction or the Magistrate,

On revision petition the Orissa High Court observed:

There is no provision in the Indian Penal Code, where an accused person can be excused for such insulting outburst in the exercise of the alleged right of private defence. The accused petitioner should have self-control at least over his tongue not to indulge in such offensive out-bursts likely to

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14 AIR 1959 Orissa 155.
provoke breach of the public peace or commission
of any other offence.\textsuperscript{15}

The Court accordingly held that since there was no unlawful set on the
part of the opposite party, the right of private defence could not accrue to the
petitioner.

3.4.2 Reasonable Apprehension of Danger

Decided cases suggest that there is a reasonable apprehension of danger
if- (i) the force was used in communal riot causing death of the assailant and
(ii) harm gives rise to a, reasonable apprehension of grievous injury or death
even where the injuries inflicted by the aggressor are not fatal.

In \textit{Amjad Khan v. The, State},\textsuperscript{16} a communal riot broke out it in Katni
between some Sindhi refugee residents and the local Muslims. The shops of
the accused and his brother were very near to each other. Their residences
were also close by. The mob approached the accused’s locality and looted the
shop of the accused’s brother. On hearing the alarming news through is
mother and finding the crowd beating the doors of the accused’s shop with
their at this, the accused fired at thus crowd through whole in the wall of his
dwelling house near the shop which resulted in the death of one Sindhi and
injury to three other Sind his as well. On these facts the Supreme Court held
that the accused had reasonable grounds for apprehending that either death or
-grievous hurt would be caused sitrsr to himself or his family. The
circumstances in which he was placed were quite sufficient to give him a right
of private defence of the body even to the extent of causing death,

The aforesaid view was followed in \textit{Deo Narain v. State of U.P.},\textsuperscript{17} In
this case in the exercise of right of private defence accused had sp-eared the
invader who had used a \textit{lathi}. The Court decided against the accused in view
of the simple weapon, the \textit{lathi} and non-fatal nature of injury already inflicted

\textsuperscript{15} \textit{Id.} at 157.
\textsuperscript{16} AIR 1952 SC 165.
\textsuperscript{17} 1973 CrLJ 677.
by the invader. On appeal, the Supreme Court reversed the judgment of the High Court and held that if the harm gives a reasonable apprehension of grievous injury or death, the person is justified in causing death even where the injury or death, the person is justified in causing death even where the injuries inflicted by the invader are not of fatal type.

The Punjab and Haryana High Court in Dharamvir Singh v. State, observed that whether a person claiming right of private defence of body had any reasonable apprehension of danger or not, depends on the state of his mind and also the situation in which he had been placed at the relevant time and no one can say that what passing in his mind at that time.

3.4.3 Trespasser in Settled Possession Even Against the True Owner

It has now been settled that a trespasser in settled possession has a right of private defence even against the true owner.

In State v. Adra and Others, the accused went to plough the field to which they had undoubted right and of which they had settled possession. As soon as the complainant came to know about it, he went to the spot to intervene accompanied by his three sons, his nephew and one of his supporters. They went there armed. The accused were not prepared to withdraw. As a result, there was a fight in which both the parties received injuries. However, one of the supporters of the complainant had his lungs and liver badly damaged which resulted in his death. On these facts the Rajasthan High Court held that the accused had the right of private defence because the complainant party had come armed to attack and in these circumstances if they hit back with lathes, they were justified in repelling the attack.

In Puran Singh v. State of Punjab, the Supreme Court observed that a trespasser who is in settled possession of land has right of private defence of property against a true owner. From the aforesaid decision it is clear that the

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18 1975 CrLJ 132.
19 AIR 1958 Raj. 42.
20 AIR 1975 SC 1674.
actual owner, who is not in the possession of property, in his attempts to take back possession will disturb the peace. He should, therefore, not take the law into his own hands and get back the possession through process of law. Thus, the trespasser enjoys a better claim than the real owner in the aforesaid situation.

The Supreme Court in *Puran Singh* Case laid down four criteria which may entitle a trespasser to exercise right of private defence of property and person.

1. The trespasser must be in actual physical possession of the property over a long time;
2. If crop has been grown, even the true owner has no right to destroy the crop grown by the trespasser.
3. The process of dispossession of the true owner by the trespasser must not be incomplete.
4. The possession must be in the knowledge, either express or implied, of the owner or without any concealment.

In *Khuddu v. State of UP*, the accused were all harijans, who were allotted land by the *gram panchayat* and were given possession of the same. The deceased and others were members of a co-operative society, who owned a farm. There was no exact demarcation between the two lands and relationships were strained between them. From evidence, it appeared that the accused had taken forcible possession of the land some days ago, and when the deceased and others had gone to the land, the plea of the accused that they acted in self-defence could not be ignored either, as it seemed plausible. The Court however held they exceeded the right of private defence of property and convicted them under s 304 (II), Indian Penal Code.

\[\text{AIR 1993 SC 1538.}\]
3.4.4 The Assault With the Intention of Committing Rape

In Mohammad Shafi v. Emp., the accused found his wife and the deceased in a field where she had gone to ease herself. He also noticed that the undergarments of both the deceased and those of his wife were off. The accused at once drew the inference that the deceased was making an assault on his wife with the intention of committing rape on her, so in order to protect her, he inflicted certain injuries on the person of the deceased which resulted in his death. On these facts, the Lahore High Court held that the accused was justified in killing the deceased in the exercise of right of private defence.

From the aforesaid, it is not clear whether the woman raised any cries or offered any resistance against the act of the deceased. It is submitted that on the evidence of the facts reported it cannot be said to be a case of rape but of adultery and as such the acquittal of the accused was not justified.

In Suraj Narain Lal v. Emp., the accused heard his wife crying out to the deceased “who are you and why have you come? Are you mad?” when the accused entered the room, he found the deceased lying on the top of his wife who was struggling with him. The accused picked up a gandasa lying on a shelf nearby and struck the deceased a number of blows with it. As a result of this, the deceased died. On these facts, the Allahabad High Court held that the accused was justified in the circumstances to kill the deceased in the exercise of right of private defence.

This case may be distinguished from the former facts situation and the view taken by the High Court is correct.

The Joint Committee while commenting on Criminal Law (Amendment) Bill, 1980, 1980 suggested that the offence of molestation be included in rape under Section 100 of the Indian Penal Code.

The Committee observed:

22 CrLJ 281 (Lah.).
23 34 CrLJ 882 (All.).
“The Committee note with great concern that in recent past there has been an increase in the molestation, harassment, etc. of women and the culprits, despite the existence of the criminal law, escape punishment. The Committee feel that outraging the modesty of a women is a most cruel offence and need to be dealt with severely. The Committee are of the opinion that rape and brought within the purview of Section with 100 of the Indian Penal Code relating to the right of private defence of the body extending to causing death”.24

Complainant party received grievous injury, is not sufficient to deprive the accused persons of the right of private defence of person to which they were entitled.

3.4.5 The Assault With the Intention of Kidnapping or Abducting

Prior to 1948 abduction simplicitier was not considered to be an offence. Thus, in Ram Saiya’s case25 the Allahabad High Court observed that the word “abduction” used in the fifth clause of Section 100 of the Indian Penal Code referred to such abduction as was an offence under the code and not merely to the act of abduction as defined in Section 362 thereof. There abduction was not an offence and therefore it could not give rise to any right of private defence. For many years this decision in cases of abduction. But in 1960 the Supreme Court changed the law through judicial process.

Vishwanath v. State of U.P.,26 is an epoch – making judgment in this area. In this case, Gopal, the deceased was married to the sister of Vishwanath, the appellant. The appellant and his father were living in railway quarter. Gopal’s sister was married to Banarasi who was also living in another railway quarter nearby. Gopal lived with his father – in- law for some time but they could not pull on well. As a result, Gopal shifted to the quarter of Banarsi. However, Gopal’s wife continued to live with her father, as she was reluctant

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25 ILR 1948 All. 165.
26 1960 CrLJ 154 (SC).
to go with Gopal. There was some quarrel between the appellant and Gopal about the girl on 11.6.1953 but nothing untoward happened. Gopal went away to Banarsi’s quarter. Gopal collected Banarsi and his two sons to bring back his wife and went to the house of his father-in-law. While Banarsi and Badri, the father-in-law of Gopal talked outside, Gopal entered in the house and dragged his wife out of it. She resisted and caught hold the door. The appellant was also there and shouted to his father that Gopal was adamant to take away his sister. Badri replied, if Gopal was adamant, he should be beaten. On this Vishwanath took out a knife from his pocket and stabbed Gopal. The knife penetrated into the heart and Gopal fell down senseless. Gopal was taken to the hospital by Badri, Vishwanath, Banarsi etc. but he died on the way. On these fact, the Sessions Court acquitted the appellant on the ground that he had right of private defence of person and it extended even to the extent of causing death. On appeal, the High Court set aside the acquittal of the appellant on the ground that the right of private defence of person was exceeded and the Court accordingly convicted and sentenced him to three years rigorous imprisonment. Thereupon, on Special Leave was filed before the Supreme Court. The Court observed:

The right of private defence of person only arises, if there is an offence affecting the human body. Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place. But abduction pure and simple is not an offence under the Penal Code. Only abduction with certain intent is punishable as an offence. It is said that unless an offence under one of the Sections is likely to be committed, the fifth clause of Section 100 can have no application. On a plain reading, however, of that clause there does not see to be any reason for holding that the word ‘abducting’ used there means anything more
that what is defined as ‘abduction’ in Section 362. It is true that the right of private defence of person arises only if an offence against the human body is committed. Sec. 100 gives an extended right of private defence of person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein. Each of the six clauses of Sec. 100 talks of an assault and assault is an offence against the human body. So before the extended right under Sec. 100 arises there has to be the offence of assault and this assault has to be one of the six types mentioned in the six clauses of the Section. So the right of private defence arises against that offence, and what Sec. 100 lays down is that if the assault is committed must always be an offence in itself. In some other clauses, the words used to indicate the intention do not themselves amount to an offence under the Penal Code. For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the Penal Code. Therefore, when the word ‘abducting’ is used in clause (v), that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf of a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting and whenever these elements are present the clause will be applicable.
The Court accordingly acquitted the appellant.

3.4.6 Abduction Justifying Causing of Death in Exercise of the Right of Private Defence

The Law Commission in its 42nd report examined the fifth clause of Section 100 of the Indian Penal Code, which extend the right to causing of death of assailant, if he makes assault with the intention of abducting, keeping in view the decision of the Supreme Court in Vishwanath’s case.27 After this historical decision abduction simpliciter could also extend the right to cause death in self-defence. The rule down in Ram Saiya’s case28 that only offence type of abduction could authorise causing of death was no more good law. The Law Commission examined the law relating to the assault. It observed that the assault with intent to abduct may in some cases and for such a simple offence, there was no justification to kill the fifth paragraph of Section 100 of the Indian Penal Code should be limited to cases where abduction is punishable under the Code. i.e. where assault is to abduct with any of the intents specified in Sections 364 to 369 of the Indian Penal Code.

In pursuance of the recommendations of the Law Commission, clause 35 of the Indian Penal Code (Amendment) Bill 1972 proposed to amend clause (d) of present Section 100 of the Indian Penal Code by providing the following new clause:

“Section 100 (d) an assault with the intention of abduction where the abduction is an offence”.29

With this proposal only offence type abduction would justify the exercise of right of private defence causing death. This proposal tried to set at rest the controversy arising out of new interpretation given to clause (d) of Section 100 of the Indian Penal Code by the Supreme Court in Vishwanath’s case. However, the aforesaid Indian Penal Code (Amendment) Bill of 1972

27 Ibid.
28 ILR 1948 All. 165.
29 Law Commission of India, 42nd report 1971.
has lapsed and it could not become law. There is also no move to reintroduce the same in near future.

3.5 When Right of Private Defence Does Not Arise

3.5.1 Sudden Fight

Decided cases reveal that the right of private defence is not maintainable to either party in sudden fight as it is difficult to ascertain the aggressor in such a situation.

In Paras Ram v. Rex,30 there was a sudden quarrel with regard to the ownership of a cattle trough between the accused A on one hand the deceased B on the other hand. On 14th June, 1947 a quarrel ensued resulting in a fight. Both were armed with lathis from before the start of the fight but there was no evidence to show that the parties had made any pre-arranged plan of fighting out dispute that day or had made any preparation to that end before the start of the fight. The deceased B struck the first blow without A having assaulted him or having threatened to assault him. A’s son C rushed to protect his father. The accused A and C struck lathi blows on B resulting in the death of the latter. On these facts, the Allahabad High Court held that it was not a case of two persons having come pre-determined to fight and measure strength, but was a case in which there were bickerings over a cattle trough and exchange of abuses. This conferred no right on the deceased to attempt to strike the accuses in the first instance and as such the counter-attack by the accused would be deemed in self-defence. It could not in the circumstances be held that the accused A and his son C exercised any right of self-defence.

3.5.2 Free Fight

Decided cases reveal that in free fight the plea of right of private defence is not maintainable.

30 AIR 1949 All. 274.
In re. Erasi Subba Reddi, there was a riot in which six persons participated. They gathered to fight and both parties sustained casualties. After an exchange of strong abusive words, the deceased stooped down to pick up a stone, whereupon the appellant threw a stone at the head of the deceased and caused fatal injuries. Then, the co-accused number 2 struck the deceased on the right arm with a stick which caused the deceased to fall down. Thereafter the other accused began to throw stones on the complainant’s party and drove them away from the field of battle. On these facts, the Madras High Court observed:

Where there is a spontaneous fight between two parties, each individual is responsible, for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self - defence.32

The Court accordingly held that the conviction of the appellant was right as no one could plead the right of private defence in a free fight.

In Jumman v. State of Punjab, when Lakha Singh, Tara Singh and Sangha Singh alongwith three prosecution witnesses reached the bridge of a water-course, the six accused persons emerged out of a Khal which was then dry. Hazara had a gun in his hand, Bansa had pistol, Sohani and Chanan carried spears. Darshu had a Kirpan and Jumman carried a kattar. The accused’s party was in wait for their rivals to pass that way. On seeing the prosecution party, the accused raised a lalkara that none should be spared; whereupon Jumman and Sohani opened an attack on the deceased Lakha Singh. Darshu attacked Tara Singh and Chanan invaded Sangha Singh. When

31 AIR 1943 Mad. 492.
32 Id. at 493.
33 AIR 1957 SC 469.
Lakha Singh fell down with injuries, Jumman launched attack on Sangha Singh and Sohani attacked Tara Singh. Various injuries were inflicted on the victims by the assailants. When the prosecution witnesses saw the three individuals being attacked and falling down, they escaped to a nearby field. While they were escaping Bansa and Hazara fired at them but shots were missed. Then they turned round and pounced upon the firing party, and snatched the gun from Hazara and the pistol from Bansa. Seeing this, the other four accused threatened to attack the witnesses, who ran away, and then the accused retreated. After a while Lakha Singh, Tara Singh and Sangha died on the spot.

On these facts the Supreme Court held that where a mutual conflict develops and there is no reliable evidence as to how it started and as to who the aggressor it will not be correct to assume private defence for both sides.

In *Sajjan Das v. State*, Sajjan Das and his co-petitioner were on terms of enmity with prosecution witness Raghu Majhi and his nephew Nanda Majhi, the deceased. The quarrel started 4 years ago when they were both competing for the purchase of a piece of land. The land was eventually purchased by Raghu Majhi. On 12.9.1961 there was a quarrel between raghu Majhi on the one hand and the two petitioners on the other, because the petitioners’ suspected that Raghu Majhi had thrown some weeds uprooted from his land into the adjoining lands of the petitioners. Raghu Majhi conveyed a *panchayat* to settle the dispute but the petitioners did not attend the *panchayat*. Troubles arose again on 14.9.1961 between the parties. The two petitioners met Raghu Majhi and the deceased Nanda when they were returning from the field after carrying out weeding operation. Petitioner Khushna confronted them and asked them whether they had thrown the weeds on his paddy fields as they did on 12.9.1961. Thereupon Raghu Majhi said that they should see their fields first before charging him and Nanda had committed such an act. This led to exchange of words. Khushna gave a blow on the forehead of Raghu Majhi, which caused him a lacerated injury. Sajjan

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34 AIR 1964 Orissa 251.
Das was also standing there with a stick. The deceased Nanda gave him (Sajjan das) a blow on his head.

Thereupon Sajjan gave a terrible blow with his *lathi* on Nanda who immediately fell down with his skull fractured. Nanda was again beaten and became unconscious and died on the next day when he was being taken to hospital by boat. On these facts, the Orissa High Court observed that once a party to a fight is held to be an aggressor, it is immaterial as to who gave the first blow. The other party would be justified in taking such measures as may be necessary to prevent further attack on that party and merely because one of that part retaliated after the first blow had been given by the accused’s party, the latter cannot claim any right of private defence.

The Court accordingly dismissed the revision petition. It is evident from the above that the right of private defence was not available to any party in free fight, as it is difficult to decide as to who was aggressor and who was defendant in such a situation.

### 3.5.3 Initiator of Attack

Aggressor cannot claim the right of private defence. In *Kishan v. The State*, the appellant and his co-accused went to the house of deceased with the intention of causing physical harm to him. The appellant and his associate pulled the deceased out of his house and subjected him to punching and kicking. The deceased contrived to escape from their grip and caught hold of Khutai. He struck three blows on the head of one of the accused. Thereafter the appellant snatched the Khutai from the hands of deceased and gave two three blows on his head causing profuse bleeding inside the brain and a fracture. On these facts, the Supreme Court held that the appellant and his co-accused took the law in their hands. They went to the house of the deceased, pulled him out and subjected him to punching and kicking. The appellant and his co-accused in exercise of the right of private defence. The appellant and

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35 AIR 2005 SC 244.
his associate being aggressor could not take benefit of right of private defence.

The Orissa High Court reiterated the same principle in *Bhajan Suna v. State*. In this case A in possession of land had sown crops. B unlawfully entered on the property and began to plough it. A then prevented B by force from ploughing it. B then inflicted injuries on A and caused his death. On these facts, the Court held that B was an aggressor and A act in preventing B from ploughing the property, being an act in self defense was not an offence and B cannot have a right of private defenses of person against A’s act.

In *Gangada v. The state of Rajasthan*, Ramkin, the deceased was grazing his camel in the field. Amalakh, Bhinya, Teja, son of Dhuda, Ladu and another Teja, Son of Kheta were also present in neighbouring fields. The appellant came to the field and picked a quarrel with Ramkin, the deceased over some money matter. The appellant attacked Ramkin and inflicted several blows on his body with a *lathi*. The deceased raised an outcry i.e. “beaten, beaten” which attracted five witnesses to the place of occurrence. As a result of these blows Ramkin fell down unconscious. The witnesses rushed towards the deceased and found his bleeding from his head injury. Meanwhile the accused disappeared from the scene of occurrence. The two Tejas removed Ramkin to his house and stayed with him during the night. Ladu also reached there with the camel of Ramkin. At about midnight the deceased succumbed to his injuries.

On these facts the Rajasthan High Court held that the circumstances of the case do not give rise to a right of private defence and do not show that the appellant acted in the exercise of such a right. The absence of injury on the body of the appellant may lead to an inference that the deceased was unarmed and the appellant was the aggressor. As a result, no benefit of right of private defence was allowed to the accused-appellant.

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36 1975 CrLJ 1555.
37 1975 CrLJ 1445.
The question as to who was the aggressor becomes important in cases where the plea of self-defence is raised. The Supreme Court re-affirmed the law in State of U.P. v. Pussu\textsuperscript{38} that a person who is an aggressor and who seeks an attack on himself by his own aggressive attack cannot rely upon the right of self-defence if in the course of transaction, he deliberately kills another whom he had attacked earlier.

The Supreme Court again reiterated in Soen Lal v. State of U.P.\textsuperscript{39} that the aggressors, even if they receive injuries from the victims of their aggression, cannot have the right of private defence.

In deciding the question of sanctity of bodily interest the Courts are inclined to favour the accused who are victims of initial aggressions. Thus, in all cases the question of justification of right of private defence has largely centred around to the issue of aggressor. The two notable decisions in this regard are State of U.P. v. Ram Swarup\textsuperscript{40} and Kishan v. State of M.P.\textsuperscript{41} In former case the Supreme Court laid down a very stringent test which will entitle initial aggressor to claim the right of private defence under exceptional situations. The observation made by the Supreme Court in this case requires that the aggressor should have made all efforts to escape from the situation already created by him, thereby in a way negativing the aggression.

The similar issue became critically crucial for justifying exercise of right of private defence of body in Kishan v. State of M.P.\textsuperscript{42} In this case the sessions judge acquitted the appellant holding that they were not the aggressors under that situation. The High Court reversed the decision of the session Court and held that the appellant party was the aggressors. The Supreme Court upheld the finding of the high Court and decided that the appellant had no justification in exercising the right of private defence because they were aggressors. All these cases give a clear idea that the law of

\textsuperscript{38} 1983 All. C.R. R. 355 (SC)
\textsuperscript{39} 1983 All. C.R. R. 345
\textsuperscript{40} AIR 1974, SC 1570
\textsuperscript{41} AIR 1974, SC 294
\textsuperscript{42} Ibid.
private defence is not to help those who initially take the law into their own hands and commit aggression against other persons. This type of interpretation hedges the right of private defence within socially meaningful dimensions, thereby bringing the law of private defence in consonance with the dominant policy of criminal justice administration.

5.3.1 American Law

The American Law is similar to that of the Indian law on the subject. Like India there should be no right of self-defence where a person himself creates an occasion and later resulting in the necessity of killing another. One cannot provoke a quarrel and then making an excuse of the quarrel kills another. But mere words, however, insulting they may be would not deprive one of the right of self-defence, for such words would not be sufficiently provocative.

However, it is widely agreed in U.S.A. that a self-generated necessity will not support a claim of self-defence and as such the aggressor in an alteration is not entitled to act in self-defence during that altercation. Several considerations might support this rule. First, the sort of aggression which stimulates attack is undesirable conduct and as such it should be discouraged. Second, one who culpably begins altercation that creates the need for persons to defend themselves can reasonably be regarded as blameworthy despite the need for self-defence. In other words, the aggressor has demonstrated morally blameworthy conduct despite the existence of necessity.

A serious assault upon the victim constitutes the sort of aggression that deprives the actor of the right to use self-defence in the resulting altercation. But the American Courts have held in United States v. Peterson that any affirmative unlawful act reasonably calculated to provoke an affray foreboding injurious or fatal consequences is also an aggression for purposes

43 Shack v. State, 236 Ala. 667; State v. Feltovic, 110 conn. 303.
44 People v. Curtis, S.I.N.W. 385.
of this rule. The Courts tend to deny a defence to those who appear “responsible” for an altercation. Thus, in Mitchell v. United States\textsuperscript{47} after a quarrel in an apartment the victim left, saying, “you have whipped me one time. Now I am leaving. If you want me, I will be outside”. Since the victim indicated a willingness to avoid battle, the defendant’s action in following the victim out constituted aggression. It seems clear that Courts are willing to find aggression in conduct without inquiring as to whether the conduct is specifically and affirmatively prohibited by the criminal law.

5.3.2 Limited Right of Aggressor to Self-defence

Despite the general rule depriving an aggressor of the right to exercise self-defence during the altercation resulting from the aggression, an aggressor does, under the general rule, have limited rights of self-defence. Since these depend upon post aggression conduct by someone, it is useful to consider these situations as ones in which the aggressor’s right of self-defence is ‘reinstated’ following conduct of either of two kinds:\textsuperscript{48}

The first situation in which the aggressor’s right of self-defence is reinstated can develop only where the aggressor initially used only non deadly force, as where he began the encounter using fists or some other non deadly weapon. If the victim responds by using deadly force, the aggressor has the right to defend against such deadly force.\textsuperscript{49} Consequently, this can be explained by noting that the initial victim’s response to the aggression was excessive and thus beyond the victim’s own right to self-defence. The initial victim thus became the aggressor, and the altercation became attributable to the initial victim’s overreaction.

The second situation in which the right to use force in self-defence is reinstated exists where the aggressor has withdrawn from the altercation that he began. The American Courts are divided, however, on whether the intention to withdraw must be actually communicated to the victim or whether

\textsuperscript{47} 399A. 2d 866 (D.C. 1979).
reasonable efforts to communicate this intent will be sufficient. Again, this exception can be explained on the ground that once the aggressor has withdrawn, the continued altercation cannot be attributed to the initial aggressor but must rather he considered the result of the victim’s overreaction in continuing the battle.\textsuperscript{50}

In the aforesaid first situation, the position of Indian law is different. It amount to the excessive forced used in self-defence. Consequently, the accused defendant would be punished in such a case but his offence would be reduced from murder to the culpable homicide not amounting to murder, if the aggressor dies. However, for the second situation the judicial delineation of the Indian Courts is lacking. No law is laid down on the subject. However, in State of U.P. v. Ram Swarup,\textsuperscript{51} the Supreme Court has shown the American tendency that the right of private defence should revert to the aggressor in such a situation.

3.5.4 Act of Private Defence

The right of private defence is not available against the act of private defence.

The Supreme Court in Munney Khan v. The State of M.P.\textsuperscript{52} stated that the right of self-defence is available against an offence and, therefore, where an act is done in exercise of the right of self-defence, such act cannot give rise to any right of self-defence in favour of the aggressor in return. That would seem to be so, even if the person exercising the right of self-defence has the better of his aggressor.

In Durga Pal v. State,\textsuperscript{53} where the accused started initial firing on the police and the police fired in self-defence, there upon each of the accused again fired towards the police. The Allahabad High Court held that the initial

\textsuperscript{51} AIR 1974 SC 1570
\textsuperscript{52} AIR 1971 SC 1491
\textsuperscript{53} 1963 All CrR 442.
firing was with the common intention to overawe the police and that the firing by the police did not give any right to act in self-defence.

The aforesaid view appears to have to have been adopted by the Orissa High Court in *Iswar Bahera v. The State*.\(^54\) The Court ruled (i) the right of private-defence of a person is available against an offence and (ii) the act in exercise of the right of private defence is not an offence. The Court accordingly held that it cannot give rise to a right of private defence in turn; provided he does not exceed his right, because the moment he exceeds, he commits an offence.

In *State of Orissa v. Digan Dalai*,\(^55\) the deceased was running away with bamboo. He was pursued by the accused with a wooden staff in hand. When the accused shouted that he would kill the deceased, the latter turned round and gave a blow on the head of the accused. Thereafter, the accused gave a stroke on the head of the deceased with the pole. The deceased fell down and while he was trying to get up the accused gave him two or three blows on the head which resulted in his death. On these facts the Orissa High Court held that the accused had no right to chase the deceased when he was running, when the accused threatened the deceased the latter had the right to private defence. The assault by the deceased on the accused was produced by right of private defence. The Court also held that the deceased having committed no offence, the accused had no right to private defence,\(^56\) because the right of private defence does not give in turn the right of private defence.

A survey of decided cases suggests that the right of private defence is available against an unlawful act and the act of self-defence is a lawful act, so it is not available against it.

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\(^54\) 1976 CrLJ 611.
\(^55\) 29 Cut.LT 200.
\(^56\) *Ibid.*
3.5.5 When Assailant Runs Away After Attack

Courts have generally held that the right of private defence ends when the assailant starts running away.

In *Jai Dev v. State of Punjab*,\(^\text{57}\) the appellants and their brother Ram Pat and Basti Ram came to the field with their tractor and started ploughing the *Bajra* crop sown by the villagers who were tenants in possession. The villagers protested that the crops raised by them should not be destroyed. The accused party was armed with deadly weapons and three of them had fire arms. The protest turned on deaf ears. The accused persons told them that they had got possession of the land and hence they would not permit any interference in their ploughing operations. This led to an altercation and an attempt was made to stop the working of the tractor. A terrible scuffle was ensued. It resulted in so many deaths. Then every body on the side of complainant party started to run away. After that Jai Narain was shot dead by the appellant Hari Singh. Dil Kaur was killed by Parbhati. Mst. Sagroli and one more victim were shot dead by the appellant Jai Dev.

On these facts the Supreme Court held that where the aggressor has already started running away and there was no danger either to the property or to the body of the accused, he could not invoke the right of private defence and was not justified in causing his death.

In *State of M.P. v. Saligram*,\(^\text{58}\) the Madhya Pradesh High Court clearly stated that the right of private defence is not available in a situation where the deceased was trying to run away from the scene of occurrence and the accused prevented him from doing so. As a result the assault on the deceased was held to be unjustified.

Similarly, the Orissa High Court in *Nicholas Khadia v. State*,\(^\text{59}\) ruled that in the situation when the deceased was running away to save his life,

\(^{57}\) AIR 1963 SC 612.  
^{58}\) 1971 Jab.LJ 292.  
^{59}\) 1965 Cut.LT 1014.
there was no justification to chase him. The Court further added that since the
deceased has left the scene of occurrence, there was no reasonable
apprehension for danger either to person or property, the right of self-defence
was not available to the appellant Nicholas in the said circumstances.

Aforesaid cases suggest that right of private defence is not available
against the assailant who runs away.

3.5.6 Against an Unarmed or Unoffending Person

The right of private defence does not exist in the situations where the
individual is unarmed and unoffending including the intervener. Under such a
circumstance, there would be no apprehension of danger from such a person
and as such there is no justification for exercising the right of defence under
such a circumstance. This is the general rule of law under such a situation.

The Punjab and Haryana High Court in Mukhtiar Singh v. State,60
clearly laid down that the intervener who was armless and did not assault the
accused, no right of private defence was available against him.

The Saurastra High Court in State v. Bhima Deoraj,61 laid the similar
ruling. In this case, the deceased entered the house to outrage the modesty of
the wife of the accused. He did something to express his intention. The
accused beat the deceased with sticks. He continued to beat him even after he
had fallen down. The Court held that after falling down, he could not continue
to trespass. Whatever intention he had at the time for entering the house, that
disappeared when he fell down. He remained on the premises, as he was
physically unable to get out. The Court ruled that as soon as the deceased fell
down, he became unoffending and consequently the right of private defence of
the accused terminated.

Likewise, in Ramesh Chandra Sutraddhar v. State,62 the Tripura High
Court held that the accused crossed the limits of the right of private defence,

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60 (1971), CrLJ 1049
61 AIR 1956 Sau. 77.
62 AIR 1969 Tripura 53.
because he inflicted blows on the deceased after he had fallen down on the ground and his weapon was also wrested from him. Under such a situation, he had no right of self-defence against the deceased.

The Supreme Court in *Gurbachan Singh v. State of Haryana*,63 observed that no right of private defence as the assault was continued even after the deceased persons had fallen down on the ground and become inactive. The Court further added that the right of private defence was not available to the accused because his party had come prepared to teach a lesson to the deceased for having raised a dispute in respect on land about which they had hinted even about a month ago. It was the accused party who assaulted and caused multiple injuries and death of three persons. The Court also observed that in view of the motive of the accused, manner of assault, the nature of injuries inflicted, there is no justification in granting the right of private defence to the accused.

However, there may be situation when the right of private defence accrue even against an unarmed person. For instance, the Gujarat High Court in *Baburao Vithal Survade v. State of Gujarat*,64 held that there is nothing in the law of private defence to suggest that the right of private defence of body cannot be claimed against an assailant who is not armed with some sort of weapon. The Court observed:

Looking to the plain language of Section 100 of the Indian Penal Code, it appears that the question whether a person has a right of private defence in a given case depends on the manner in and the ferocity with which he is attacked and the apprehension in his mind resulting from such an attack and not on the question whether he was armed or otherwise. If in view of the manner of

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63 AIR 1974 SC 496.
64 1972 CrLJ 1574.
attack, he has a genuine apprehension that the person assaulting him would either cause his death or grievous hurt to him, he would be justified in causing death of his assailant in exercise of the right of private defence irrespective of the fact whether the assailant was armed or not.

Thus, under exceptional circumstances the right of private defence may be available even against unarmed person.

It is submitted that the current thinking about the striking of the first blow and falling down on the ground of the victim (who has not died) does not led to reasonable apprehension in the mind of the accused that the danger to his life still continues is full of danger to the life of the accused and is impracticable. It is far from reality. A hurt beast or serpentine is more dangerous and revengeful than the ordinary beast or serpentine. On the same principle, if the victim intended to cause the death of the accused and the accused struck a blow and the victim fell down, the reasonable apprehension of death or grievous hurt from the victim to the accused does not come to an end.

It is evident from the foregoing discussion that the one who has Courted the attack is not entitled to the benefit of self-defence. Where it is difficult to ascertain as to who the aggressor was and who was the defendant as in case of free fight and sudden fight, neither side is given the benefit of private defence. Further, the right of private defence is not available against unoffending and armless persons. It is available only in the circumstances where there is reasonable apprehension of danger to the person or property. This right arises only in the cases of unlawful attack and on violation of legal right of an individual.
3.6 Property To Be Defended

3.6.1 General

Section 96 of the Indian Penal Code declares that an act done in the exercise of the right of private defence is not an offence. Section 97 of the Penal Code empowers to exercise the right of private defence against certain specified offences under certain restrictions.65 Section 97 of the Penal Code regarding the defence of property states:

“Every person has a right, subject to the restriction contained in Section 99, to defend - The Property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or, which is an attempt to commit theft, robbery, mischief or criminal trespass”.

The word “property” in Section 97 of the Penal Code includes both movable as well as immovable property. There can be criminal trespass of movable property also such as in the case of a motor car or an airplane or a boat or a carriage.66

3.6.2 Private as Well as Public Property

The right of private defence against specified offences namely theft, robbery, mischief and criminal trespass can be exercised not only in defence of one’s own property but also of any other person’s property.67 Thus this right can be claimed even by strangers.68 Bentham observed:

“Can ire defend nobody but ourselves? Ought we not have the right of protecting our fellows against an unjust aggression? Surely, it is a noble moment of the heart that indignation which kindles at the sight of the feeble injured by the strong. It is a noble moment which Bakes as target car own danger at the first cry of distress. The law ought to beware how it enfeebles

66 Dhananjay v. Provat Chandra, 35 CrLJ 949.
this generous alliance between courage and humanity. Let him rather be
honoured rewarded who performs the function of the magistrate in favour of
the oppressed. It concerns the public safety that every honest man should
consider himself as the natural protector of every other”.69

To give due protection to the property of ‘any other person’ is the duty
of man which he owes to the society of which he is a member.70 The word ‘any
other person’ includes also the state to which public property belongs. The
right of private defence of property can be exercised not only against private
property but also against public property. If any person attempts to commit
mischief on public property, any citizen can use force to prevent that mischief.
The Penal Code does not make any distinction between public and private
property. All acts of violence sabotage and wanton destruction of public
property must be suppressed but that should be done by public authorities - as
it is their duty to do - not left in private hands.71 But no one has the right to
give protection to the property of another when that other person is engaged in
a free fight with some unknown persons and shoot at the crowd without
knowing the identity of the robbers even though dacoities and robberies are
prevalent in the area.72

Under English Law, the right of defending the property of others Is
United to certain relations who bare a sort of community of interest, for
example, parent and child, master and servant, husband and wife, landlord and
tenant, and companion and neighbour.73 But in ease of felonies, any person
present there may interfere to avoid the mischief.74 It is rather the duty of
every man to give protection to the other in such cases of felony and if he

69 Principles of Penal Code (Bentham), pp. 269-270 quoted in R.C. Nigom, Law of
70 Id. at 427.
71 Editorial notes: “Private defence of Public Property”, Calcutta Weekly Notes,
(1965-66), p. 70 at 140-141.
72 Budho v. Emperor, ILR 1944 Kar. 420.
same as Indian law on this point. One can do all such acts in defence of others
which he can do for himself while protecting his property (Miller Handbook of
Criminal Law, p. 214).
74 Foster: Homicide, p. 247. quoted from Id. p. 425.
does not help, he is liable to fine and imprisonment.\(^\text{75}\) Thus the Indian law is wider than the English law.\(^\text{76}\) Law Commissioners observed:

"It may be thought that we have allowed too great a latitude to the exercise of the right; and we are our-selves of the opinion if we had been framing laws for a bold and high-spirited people accustomed to take the law into his own hands, and to go beyond the line of moderation in repelling the injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves. The patience with which they submit to the cruel depredations of gang robbers and to trespass and mischief committed in the most outrageous manners by the bands of ruffians is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of private defence. We are of the opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation is resisting the body of dacoits".\(^\text{77}\)

3.6.3 Property to be Defended Should be in Possession

3.6.3.1 De-facto Possession and Not Title

The word ‘defend’ gives the indication that it is the possession of property which is to be defended. A person not in possession does not have anything to defend. Possession itself is property and is in law a good title which must be protected against all. Law protects the de-facto possession of property without going into the title of the property. The right of private defence can be exercised even against the owner or a person setting up a fanciful title, if he attempts to commit any of the offences enumerated, in

\(^{75}\) Ibid.
\(^{76}\) Ibid.
\(^{77}\) Note B, Reprint p. 110. quoted in Id. at 425-426.
Section 97 of the Indian Penal Code against peaceful possession. The right is available only against de-facto possession78 “for without possession no trespass on any movable property can amount to theft, robbery or mischief, and no trespass of immovable property could, amount to criminal trespass”.79

Thus a person having possession can claim the right even against the true owner unless evicted by due course of law. But the possession must be settled possession extending over a sufficiently long time and consented by the true owner. Stray acts of trespass do not give any right to the trespasser who can be turned out forcibly.80 Criminal law is not to protect titles, (it does so when it can) but to maintain peace. Because of this reason, it protects peaceful possession and not title. Thus a person in physical possession is entitled to collect men to give due protection to his property.81 But before the right of private defence is exercised, there should be immediate danger or reasonable apprehension of danger from aggressor affecting the property.82

A person who does not have possession over the property cannot claim any right of private defence. Thus where A transferred, his disputed land to B by registered document and handed over also the physical possession of the land. C who had earlier cultivated the land on behalf of A, and not on his own behalf, assaulted B, when B was ploughing the land, C was not entitled to claim any right of private defence of property as regards the disputed land.83 But for the exercise of this right, it is not of any importance whether a person in actual physical possession had or had not the right of possession.84 The thing which is of paramount importance is actual possession and not constructive possession.85

80 Munshi Ram v. Delhi Administration, AIR 1968 SC 702.
82 Dorik Gope v. Emp., AIR 1946 Pat. 251.
85 Munshi Ram v. Delhi Administration, AIR 1968 SC 702.
3.6.3.2  Possession to be Defended Should Not be of The Trespasser

The right of private defence is not only available to the person actually in possession but extends also to other persons who have gathered there to help him to protect his property.86 The possession which law protects is not the possession of a thief, for possession in criminal law means at least prior peaceful possession.87 Thus undisputed prior possession is an essential ingredient for the exercise of the right of private defence. In case of disputed possession, no one can claim the right of private defence.88 The Section 97 of the Indian Penal Code has used the word ‘property’ and not ‘possession’ which has been explained by Gour as:

“By no stretch of legal imagination can the word “be extended to forcible possession usurped by a rank trespasser Against a protesting owner who is too weak to resist. If Section 97 was to throw its protective mantle over this kind of possession it will be converted into the reverse of what the legislature intended the right to be. From being a shield for the protection of property it will become a weapon for destruction. Nothing is more likely to undermine the foundations of property than an Interpretation of self defence which will assure every goonda, ruffian or bully in the land that Section 97 will come to his aid, after he has turned out the rightful occupier by force. Such an interpretation will be destructive of the cardinal principle of law that no man can derive any benefit under the law from his own wrongful or criminal act”.89

A person in actual physical possession has a right to turn out the criminal trespasser by force. But the force used should be reasonable for turning out the intruder.90 And where the title is with one person and possession with the other and the owner has acquiesced in his possession, if then the person with title tries to oust the person in possession, the latter has a

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86 Bangaruraja, 1942 M.W.N. 42.
88 Jasuram, 74 I.C. (Pat.) 73.
90 Ram Krishan Singh, (1922) 3 PLT 335.

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right of private defence against the person in title. He does not lose his right
of turning the trespasser out merely because he has informed the authorities
before taking any action. The law does not insist that the property should be
protected behind the authorities only.\textsuperscript{91}

If a rightful owner who has never submitted to the trespasser’s entry,
re-occupies the land in trespasser’s absence, he has committed nothing
criminal and the trespasser cannot force the owner out and at the same time
claim the right of private defence. As the trespasser does not own the property
and he is not in possession, so there is nothing to defend. But the question of
private defence may arise if the trespasser continuously takes care of property
and does not allow the owner to re-occupy.\textsuperscript{92} While a trespasser is acquiring
the property and possession has not turned into a settled possession, the owner
can forcibly occupy the property in the exercise of the right of private
defence.\textsuperscript{93} Thus a person who forcibly takes his property from the possession
of another who has no title to it without any bad intention or an intention to
commit or attempt to commit any offence regarding property, does not give
the right, of private defence to the other party.\textsuperscript{94}

A judgement debtor has no right to resist the decree holder who has got
the possession and is ploughing the field, even if prior to the delivery
judgement debtor has cultivated the land. If he still obstructs, he cannot claim
the right of private defence of property, it rather can be claimed against him.\textsuperscript{95}
A landlord who had not tendered to his tenant lease of the land, seized his
cattle for arrears of rent with the help of the police. The tenant along with his
party used force to get his cattle released. It was held that tenant and his party

\textsuperscript{91} Ambika Singh v. State, AIR 1961 All. 38.
\textsuperscript{93} Bhagaban Das v. The State of Orissa, (1964) 30 Cut. LT 556.
\textsuperscript{94} Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhagirath
Mahato, (1934) 61 Cal. 991.
\textsuperscript{95} Chandra Bhan, 1954 CrLJ 26.
were not entitled to the right of private defence of property and were guilty of rioting.96

A useful summary of the right of private defence of property as enacted in Sections 97 and 99 of the Indian Penal Code has been given, by the Allahabad High Court97 in Rex v. Paras Ram,98 as follows:

(a) There can be no danger to property if the accused is not in possession. If he has merely a bare title to the property, his remedy is to seek possession from a Court of law and not to enforce it by force himself.

(b) If the accused was previously in peaceful possession but the other side has dispossessed him and the accused has acquiesced in the dispossession for some time, then again he must have recourse to law and not enforce his right to take back possession by his own force.

(c) The accused may have lost possession but if immediately on coming to know of the other side having entered, on his land or taken possession of his property he rushes to oust the trespasser, he is entitled to oust him by force. He is not bound to have recourse to a lengthy process of a trial in a civil Court. But this rule cannot be applied to a case in which the trespasser has already peacefully established himself in the enjoyment of the property for some time.

(d) If, however, there is no question of permanent deprivation of one’s possession over property and the question is of infringement of enjoyment of a mere right over property, then in that case, unless the injury to be caused by the obstruction of the enjoyment to one’s right is expected to be enhanced if recourse

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96 Ramayya, (1889) 13 Mad. 148.
98 AIR 1949 All. 274.
to public authorities for protection, one is bound to take such recourse.

(e) In every case, however, if one is already in possession of one’s property or in enjoyment of a right, one is entitled to reach the spot earlier than the other party, with arms and reinforcements and to wait in readiness to defend, such property or right from the expected aggression from the other side.

(f) If the information of the expected aggression is of a definite kind it would be proper for the party in possession to inform the public authorities and seek their help but one is not bound to seek such help unless an apprehension of danger to such property has actually commenced.

(g) If the apprehension of danger has actually commenced and if one can have recourse to the public authorities before an actual injury is caused to the property or right, he roust do so or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute and the public authorities are within such a reach that one could inform them before actual damage to the property is done, e.g., when the police station is on the way to the land in dispute and the accused can inform them while proceeding towards it for its protection.

(h) When a fight takes place not because property or person has to be protected but because parties want to measure their strength, and protection of property is merely a pretext, no question of self-defence arises, but this finding can be arrived at only when the possibility of either party fighting for the protection of his property has been excluded.

(i) When the determination to fight is bonafide in the desire to protect one’s property, that would not be a case in which it can
be said that the right of self-defence is excluded. In this connection, it would be important to note whether one is fighting for maintaining one’s possession or maintaining one’s enjoyment of a right which has been enjoyed for sometime previously, or one tries to obtain possession of a property which he thinks belongs to him, or to enforce a right which may be his but which he had never enjoyed before. In the latter class of cases there is no right of self-defence. In the former class of cases there is.

(j) Again, where a fight takes place in an open field, not on or near the property to be protected but for away from it, this fight cannot be said to be one for the protection of that property and there will be no right of self-defence in such cases.

(k) Again, where one party challenges the other party for a fight then also the right of private defence is excluded, even though the fight be near or on, the property. One is, however, entitled to say to the aggressor ‘if you attack you will be met by force’, but it would be challenging another to fight if one were to abuse him and say ‘come on, try your strength if you like’.

(l) Where there is a dispute over ownership and possession of property and parties quarrel, and there is an exchange of abuses, but the party out of possession has neither attempted or threatened to take possession immediately, nor attempted or threatened to cause injury to the party in possession the party in possession has no right to strike first and if he does so, he gives the other party the right to strike back in self-defence”.

Sometimes the right of private defence may become useless if one is not fully prepared to face the expected aggression. Therefore, one has a right to prepare himself before actual aggression. But this right of preparation

99 Jaganath, 25 Cal. 324; Hira, 45 All. 250.
against expected aggression is denied in some of the Allahabad cases. In order to justify the exercise of the right of private defence, there must be attack on the property either actual or threatened. A mere protest from a distant is not sufficient for claiming the right. Disturbance of the possession on some previous day does not stand in the way of claiming the right of private defence by a person in possession of the property. There is no right of private defence against a person who is cultivating the land obtained by an order passed under Section 145 of the Criminal Procedure Code even though the order is an ex parte order.

In Puran Singh v. State of Punjab, the supreme Court observed that a trespasser who is in settled possession of land has right of private defence of property against a true owner. From the aforesaid decision it is clear that the actual owner, who is not in the possession of property, in his attempts to take back possession will disturb the peace. He should, therefore, not take the law into his own hands and get back the possession through process of law. Thus, the trespasser enjoys a better claim than the real owner in the aforesaid situation.

3.7 Why Right Is Available Against Four Offences Only

The only offences in respect of which right of private defence is granted are theft, robbery, mischief and criminal trespass. There are other offences which can be committed against property are not mentioned in Section 97 of the Indian Penal Code. Both Rattanlal and Gour are of the view that the word theft must include all offences ejusdem generis. According to them the applicability of the principle of ejusdem generis to the specified

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100 Prag Dut, 20 All. 459; Kaliji, 24 All. 143.
101 Sidha Gope v. Emp., 1946 Pat. 84.
102 Bindeswari Prasad Singh v Emperor, AIR 1918 Pat. 239.
103 Kabiruddin v Emp., ILR 35 Cal. 368.
104 AIR 1975 SC 1674.
offences in Section 97 of the Indian Penal Code is based on similar reasons. Ratanlal says:

“As to the defence of property the Section speaks of “theft and robbery” but not offences like “house breaking” and “dacoity”. It, therefore, seems that the mention of “theft” must be taken to include all offences ejusdem generis. The same consideration applies to the mention of “mischief” and “criminal trespass”.

Gour is of the opinion:

“The enumeration of these offences in apparently inexhaustive. Indeed, it is not intelligible why the Section should have mentioned theft and omitted to mention house-breaking and dacoity. Indeed if the two offences mentioned were intended to be referred to only generically, then the mere mention of “theft” without “robbery” would have been sufficient. As it is the right being declared to exist against theft must be deemed to exist against all offences ejusdem generis. And the same may be said mischief and criminal trespass.”

According to Raju, both Ratanlal and Gour are in error while applying the principle of ejusdem generis to the offences mentioned in Section 97 of the Indian Penal Code. Robbery is mentioned along with theft in Section 97 of the Indian Penal Code because of the fact that robbery does not always include theft. Robbery can be committed by extortion also. Both Gour and Ratanlal have not taken into consideration, this distinction between theft and robbery.

The other offences which can be committed against property are not mentioned in Section 97 of the Indian Penal Code because of the fact that the right of private defence can be used only against offences mentioned in Section 97. In the case of extortion, when violence is used, the offence comes

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under robbery mentioned here. Cheating is not enumerated because the moment a man will discover that he was deceived, he can have recourse to authorities. Criminal misappropriation and breach of trust are omitted as they are committed by the wrong doer in the absence of the wronged persons so there can be no right of private defence against the wrong doer. Dacoity is simply another form of robbery; and house trespass and house breaking are forms of criminal trespass. Thus, even if only four offences are enumerated, the right of private defence can be claimed against all the offences against property so long as it is practicable. But it is practicable only in cases of theft, robbery, criminal trespass and mischief and the aggravated forms of these offences.\textsuperscript{110} It is not necessary that one of the offences mentioned in Section 97 of the Penal Code should have been committed, for the exercise of the right of private defence, as it is enough if there is an attempt to commit the same.\textsuperscript{111}

3.8 Right Against Specified Offences

3.8.1 Theft

When a person is said to have committed theft, the Indian Penal Code\textsuperscript{112} says:

“Whoever intended to take dishonestly any movable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft”.

The right of private defence is guaranteed to all persons against any person or persons who attempt to commit the offence of theft.\textsuperscript{113} So long as the act of theft is continuing, the owner can recover the property using force necessary for the purpose in the exercise of the right of private defence.\textsuperscript{114} The right of private defence can be exercised not only by the person whose property is being stolen or attempted to be stolen but also by any other person

\textsuperscript{110} Whitworth, George Clifford: \textit{Raj Kumar Law Lectures} (1909), pp. 63-64.
\textsuperscript{111} Dalganjan, (1923) 25 CrLJ 481.
\textsuperscript{112} Section 378 of the Indian Penal Code.
\textsuperscript{113} Saidu \textit{v. Mehr Dad}, AIR 1927 Lah. 355.
\textsuperscript{114} Sidhnath Raj, 1958 ALJ 511.
against the thief. Where the death of a thief was caused by strangulation, as the accused after capturing the thief while he was entering the house kept his face downwards, it was held that the accused was within his right of private defence. Also where in a field, frequent theft was committed. One night the accused killed the deceased with a heavy blow of a stick while he was stealing. It was held that the accused acted within his right. The Court observed: “No man finding a plunderer in his field by night in a place where others may be within call is expected to deal his blows very gently”.

Capture of cattle trespassing on the land at a very long distance amounts to theft. In other words illegal seizure of cattle amounts to theft and the owner of the cattle has a right of private defence against such act.

3.8.2 Robbery

What amounts to robbery is given by the Indian Penal Code as follows:

“In all robbery there is either theft or extortion. Theft is “robbery” if, in order to the committing of theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. Extortion is “robbery” if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted”.

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116 Karim Bux, 3 W. R. 12.
117 Maker, 12 W.R. 15.
119 Section 390 of the Indian Penal Code.
The right of private defence against robbery or attempt to commit robbery is laid down in Section 97 of the Penal Code.\textsuperscript{120} When a man is surprised or surrounded by robbers, he need not weigh his danger in golden scales. He has a right to strike a decisive blow. Even if the force used in unnecessarily sever, the Court has to see the feelings of the person while in peril.\textsuperscript{121} As was observed in one of the cases that the force used is justifiable or not depends not only upon actual danger but also on apprehended danger. While deciding whether an act is justifiable or not, the feeling of the man at the time of peril, his exaggerated sense of danger, the want of self possession, and the disconcerted state of mind, must all be taken into consideration.\textsuperscript{122}

3.8.3 Mischief

The Indian Penal Code speaks of the essential ingredients of mischief as follows: “Whoever, with intent to cause, or knowing that he is likely to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits “mischief”.\textsuperscript{123}

If an act of mischief has started, one has got right of private defence of property because there is more than an apprehension of danger to the property. He can immediately exercise the right of private defence without having recourse to public authorities.\textsuperscript{124} But the right is available only against criminal trespass and not civil. For example, where B made certain construction on a lane which was disputed by A and A attempted to pull down the construction, B resisted and attacked him. It was held that A was guilty of mischief and right of private defence accrued to B because the remedy for


\textsuperscript{121} Bhut Nath, 3 I.C. (C) 867.


\textsuperscript{123} Section 425 of the \textit{Indian Penal Code}.

\textsuperscript{124} \textit{Abdul Hadi v. Emp.}, AIR 1934 All. 829.
civil matter was going to the Court for a decree for possession against B. A does not have any right of following lynch law.125

But the digging and removal of earth from the land is a criminal trespass and mischief as it is likely to decrease the value of the property and thus gives the right of private defence of property.126 Similarly it amounts to criminal trespass and mischief, where a permanent water course is constructed on another’s land and without his consent, it gives right of private defence to the occupier of the land. He can use force in order to avoid the mischief and need not have recourse to the authorities.127 Where a person starts constructing on a jointly owned land and is resisted by the co-owners, the person making the construction is liable for the offence of mischief and so gives the right of private defence of property to the co-owners.128 An easement does not come within the provisions of property in Section 425 of the Indian Penal Code.129 So an obstruction to the easement of light and air cannot give a right of private defence of property.130

Where the villagers of the village Y passed through the village Z in a religious procession taking with them a pot containing consecrated water, and were obstructed by the villagers of Z and they even attempted to break the pot containing consecrated water. Upon this the villagers of Y retaliated and injured some of the obstructers. It was held that villagers of Y were within their right and the obstruction to the procession amounted to an attempted mischief and thus gave rise to the right of private defence which was exercised within the limits.131 In another case, A took two loaded carts forcibly from the field of B where there was standing crop. The carts were about a furlong and a half away from the public passage which was by the side of B’s field. B had the right to prevent the continuance of criminal trespass

125 Chhotey Lal v. State, 1972 CrLJ 59 (All.).
126 Abdul Hadi v. Emp., AIR 1934 All. 829.
128 Jai Narain, AIR 1954 Punj. 697.
131 Reghula Bheemappa, (1902) 26 Mad. 249.
and could give any direction which A was bound to obey. Because so long as they were inside the field, criminal trespass and mischief were continuing. A was not permitted to go in any direction. 132

3.8.4 Criminal Trespass

The Indian Penal Code tells us as to when a person is said to commit criminal trespass as: “Whoever into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “Criminal trespass”.” 133

When a trespass is committed on a field, the occupier has a right of private defence against the trespasser but subject to the restrictions contained in Section 99 of the Indian Penal Code. So a person in possession does not have any right of putting the trespasser in imprisonment. Where the trespass has been committed without any criminal intention, trespass does not amount to criminal trespass and thus gives rise to no right of private defence. 134 Thus a person merely demanding a rent persistently cannot be said to have committed a criminal trespass and so no right of private defence can be claimed against him. 135

But where a person in actual possession was not allowed to seed his field by other persons, through without using force, the latter have committed criminal trespass and thus give the right of private defence to the former. 136 Similarly where a person enters into the property of another under an illegal order of delivery of possession by an unauthorised person in order to intimate

133 Section 441 of the Indian Penal Code.
the person in possession, his entry is a criminal trespass and thus the latter has a right of private defence against such act.\footnote{137}{Munshi Ram v. Delhi Administration, AIR 1968 SC 702.}

A party in actual physical possession of the land has a right of private defence of property against the aggressor’s party even though the assailants claim a right of possession of the land.\footnote{138}{Jaganlal Biswal v. State, 24 Cut. L.T. 332.} If a person in possession is compelled to use force in order to maintain his right and he uses absolutely necessary force required for the purpose, it cannot be said that he was enforcing any right or supposed right by force or show of force. There is no right of private defence available against enforcement of any right or supposed right. The distinction between maintaining a right and enforcing a right is quite clear: “One is the right to defend the property while the other is to enforce any right or supposed right. The former cannot be deemed to be enforcing any right or supposed right. The letters is not permissible under law”.\footnote{139}{Jaganlal Anjordas v. State, 1963(2) Cr.LJ 570.}

If a wild animal or wild bird is killed by a person on the property of another, the dead creature belongs to the latter and not the killer. The owner of the land can capture the dead creature form the possession of the killer and the other persons helping him to recover the creature would be protected by Sections 97 and 99 of the Indian Penal Code.\footnote{140}{King Emperor v. Artu Rautra, AIR 1924 Pat. 564.} To protest against the tethering of cattle on one’s own land by others in none of the offences mentioned in clause 2 of Section 97 of the Indian Penal Code, even though stray acts of tethering one’s cattle may amount to possession, does not give any right of private defence.\footnote{141}{Kundan v. State, 1959 Raj.LW 857.} It is not necessary that right of private defence should be exercised on the property itself. It can be exercised some distance away from the property even provided he reasonably apprehends that property is likely to be damaged, if the right is not exercised.\footnote{142}{Ram Autar v. State, AIR 1954 All. 771.}
3.9. Views of Law Commission

Section 97 of the Indian Penal Code in its second clause has used the words “any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass” which obviously include all aggravated forms of the offences enumerated. However, in order to be more clear and to resolve the controversy discussed above the law commission has proposed to omit the words “act which is an” from the second clause of Section 97 which do not carry any weight and has thus defined the right to defend property as follows:

“Every person has a right to defend the property, whether movable or immovable, of himself or of any other person against any other person against any offence which is or includes robbery, theft, mischief or criminal trespass and any attempt to commit any such offence”.143

The law commission report has further omitted the words “Subject to the restrictions contained in Section 99” of the Indian Penal Code with regard to the right to defend the property under Section 97. These words have been omitted because the commission does not think of any necessity of having recourse to authorities as the effective protection of public authorities is generally delayed to such an extent that the very purpose of the Section is defeated.

Still the importance of the words “Subject to the restrictions contained in Section 99” of the Indian Penal Code has not decreased. These words must be retained because the force used should in no case be more than absolutely necessary for the purpose. If these words “Subject to the restrictions of Section 99” are omitted as has been proposed, the citizens will be free to follow lynch law and cause any harm they wish, thus creating lawlessness and chaos in the country. Moreover, the commission also in its proposal while

giving new shape to Section 99 have retained the words that force used in the exercise of right of private defence should in no case extend to the causing of more harm than necessary for the purpose of defence and has omitted the third paragraph of Section 99 of the Indian Penal Code which speaks of having recourse to the protection of public authorities.