CHAPTER VIII

CONCLUSION AND SUGGESTIONS

8.1 CONCLUSION

The right of self-defense is a God given right, not dependent on, nor given, nor taken away by the ordinances or statutes of man. It is one of the highest, if not the highest, right known: “To be or not to be, that’s the question”. The right to exist carries with it the right to defend that existence. On the study of the growth and development of the society we find that in ancient times when the modern conception of society had not developed and man used to live in the state of nature, he used to redress his grievances according to the extent of his power. ‘Might is right’ was the dominating rule. Its inevitable result was that the powerful dominated over the weak and sometimes it was a domination of wrong over right and therefore, injustice, chaos and disorder were the necessary consequences. Then with the gradual growth of society in the moral sense, the duty of redressing private rights devolved upon the society or the state. The extent to which the state took upon itself this task depended upon the capacity and the resources of the state in carrying out this duty. But it remains true that however organised and resourceful the society may be it can never extend its help to all at all times and in all cases. This incapacity of the state to afford protection of life and property necessarily led the state to sanction within certain limits the right of every person to resist violence or repelling violence by violence, in times when state help could not be obtained. It is clear that the most important considerations with regard to the right of self-defense are twofold, namely, first, that the primary duty of the society to maintain peace and order must not be allowed to be usurped by private individuals, and, secondly, that there must be some means to protect individual rights in all cases and at all times. These considerations have compelled the state to recognize the right of self-defense in cases where it cannot afford its hand of protection, but it negatives this right in cases when it can do so.

The right of self-defense is very necessary. However, it is not a necessary evil. The importance of this right cannot be over-emphasized in the civilized states as well as which are not well civilized, because the duty of the state to protect the rights
of its members in all cases and at all times is the primary duty and therefore this right assumes an important whenever there is an apprehension of danger to the individual at the hands of aggressor. With the progress of civilization the conception of property is gaining value and consequently the desire of appropriation is also growing correspondingly in proportion, thus necessitating the occasions for the exercise of this right as an effective means of protection against wrongdoers. Therefore, the importance of this right is not reduced in modern states, though the occasions for its exercise are, however, lessened. When a person is suddenly attacked by aggressors and the effective intervention by the police is not possible, then the question is one of choice between a tame submission to the aggressor with the hope of future redress by the public authorities and an effective resistance to such an aggression by taking the law into his own hands. The rule of self preservation renders it fair and just for a person to save his life of bodily integrity even if the only way to do so is to sacrifice the assailant’s life or limb. The right is a means to an end, to save the defender’s interests properly recognized by the law. Law neither requires nor wishes people to submit passively to a bodily assault because this would simply be an inducement to the criminals. There would be logical inconsistency if the right to life has been affirmed but the permission to use reasonable means necessary to repel aggressive threats is refused. Self-defence may be considered as the oldest ground of justification for use of force in all legal systems of the world.

The right of private defence is common to all legal systems in the world, especially in India, England, America and Australia, though its functions and scope may vary with the degree of maturity attained by the system in which it finds a place. It is in the interest of general peace and good order that society should take upon itself the task of protecting rights of individuals and prohibit use of force by them. Although a well regulated and organised society will provide general protection to all its subjects, it cannot guarantee protection at the very moment when an individual is subjected to a sudden attack. This inability of providing protection at all times, in all contingencies led to the recognition of the right of private defence. The use of force in private defence is tolerated only because state fails in its task of providing protection against aggression. It means that the right is not merely an individualistic right to protect one’s own interest rather it is regarded as the actualization of legal interest in
promotion of general peace. Right of private defence is an essential right, for the vigilance of law could never take the place of that watchful care which every individual takes on his own behalf. Aggressors would never be restrained as effectively by mere fear of laws as they are by fear of resistance of individuals. In certain inevitable occasions dependence upon the arrival of official help would be disaster and it would be extremely unjust if the remedy of private defence were altogether denied. Taking away this right is to encourage the mischievous to do wrong. Furthermore, right of private defence is certainly a factor helpful to minimize the incidents of public and private violence. The right can be supported either on the basis of self preference or on the ground that law cannot prevent such a conduct by the threat of punishment. This is because a threat of death on some future time can never be a sufficiently powerful motive to make a man choose death now. If reasonable private defence were to be criminal, it might be thought to undervalue the victim’s life for the sake of that of an aggressor. Private defence, as it is justly called the primary law of nature, cannot be taken away by the law of society.

The discussion of the concept of self-defence has sought to establish that the terms ‘Self-Defence’ and ‘Private Defence’ are synonymous to each other. In fact they carry one and the same meaning. Latin words, ‘Se Defendendo’ stands for the same. The words ‘Private Defence’ and ‘Self-Defence’ are interchangeably in this study. Both words carry similar meaning. Nevertheless, most people prefer to use the word ‘Self-Defence’ rather than ‘Private Defence’. Most jurists are of the opinion that the word Private Defence is much more appropriate as it involves the protection of an individual not only of himself, but also other persons and property.

Historically, the concept of right of private defence in the ancient age in western countries was the period of absolute liability and as such killing was considered to be a crime. With the advancement of the society this absolute liability was reduced and killing in self-defence became excusable and in medieval period a person is exempted by the emergence of the concept of pardon. By the passage of time this concept of pardon helps the society to develop a more reasonable approach to the doctrine of self-defence. Gradually, the defendant became immune from the culpability of any offence only in the cases where his act is justifiable. In ancient
times, the criminal jurisprudence of India is influenced by religion and the commission of homicide is permissible only in the cases where the danger to life is present. During the middle age, the Islamic jurisprudence gave a right to the defendant to kill a person in self-defence with the restriction that, it is to be exercised only when imminent danger to life and there was no other way out. Here ancient Indian law of self-defence was wider conceptually and in contrast to the theory of absolute liability developed in western criminal jurisprudence in ancient period. The concept of restricted self-defence was infused by the Britishers in India through Indian Penal code.

On comparative note, in England, homicide cannot be justified upon any ground unless it was essential secure an equal interest of the defender. It is not permissible to commit homicide in private defence when the object can be achieved by any peaceful means including retreat or temporizing the situation. However, retreat is merely one of the circumstances that should be considered with all others in deciding whether the defendant exceeded the reasonable limits. The victim of an unlawful assault is allowed to use reasonable force for private defence but reasonableness of the force should not be measured in jeweller’s scale, rather application of an objective test would be more appropriate and sensible. If he has caused death of an assailant, he should not be convicted of murder provided that the force was not unreasonable excessive in the circumstances. The culpability of a man who honestly believes it necessary to use lethal force in private defence is definitely much less than a man who commits homicide deliberately and in cold blood. The scope of private defence in England is that, the Self-defence and the defence of such as stand in the relation of husband and wife, or parent and child, or master and servant, is a right which belongs to every person. Probably the right is not limited to these relationships but extends to the defence of any person. If a person is forcibly attacked in person or property, it is lawful for him to repel force by force, and the breach of the peace which happens is chargeable upon him only who began the affray. It is a sufficient answer to this defence to show that the first assault was justifiable. Self-defence is primary law of nature, and it is not, neither can it be, in fact, taken away by the law of society. It is an excuse for breaches of the peace, or even for homicide itself, but if the resistance exceeds the bounds of mere defence and
prevention the defender would himself become an aggressor. A defendant, who pleads self-defence in answer to a charge of assault, must prove that he did not want to fight. He must have demonstrated by this actions that he was prepared to temporizes and disengage and perhaps to make some physical withdrawal, but he need not have gone so far as to take to his heels and run away. This is the law whether the alleged assault resulted in death or otherwise. The English Court adopted similar meaning in various cases, where the Court emphasized that there cannot arise any question of private defence where the primary object of both parties was to fight and the vindication of their right to property was merely a pretext. The right of private defence to property can only exist in favour of the person who possesses a clear title to that property and where no such title has been determined; no right of private defence can exist. The right of self-defence is no longer restricted to a person himself being under attack or being subjected to assault. Under the English Criminal Law, the use of force in self defence or the prevention of crime is justifiable. The force used in defence must be not only necessary for the purpose of avoiding the attack but also reasonable in the circumstances i.e. proportionate to the harm threatened. But if the defendant or the accused uses excessive force, he is guilty of murder. The theory is that there may either be a complete defence or no defence at all. It is submitted that this is an oversimplified view. If the action is taken upon an unreasonable mistake of fact, it should amount at most to manslaughter, if the killing would have been reasonably necessary. The defendant’s mistake of fact can be a defence even though it was unreasonable.

In India, Supreme Court held that Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of Private Defence within certain reasonable limits.

The Supreme Court of India held that, to claim right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or

810 Suresh Singhal v. State (Delhi Administration), 2017(2) SCC 737
811 Raj Singh v. State of Haryana (SC) 2015 AIR (SCW) 2941
grievous hurt would be caused to him. The law of private defence does not require that the person assaulted or facing apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him right of private defence. There is no right of private defence where there is no apprehension of danger. Necessity of averting and impending danger must be present, real or apparent.

It was held by the Supreme Court\textsuperscript{812} that the right of private defence rests on following ideas:

(i) There must be no use of more harm inflicted than is necessary for the purpose of defence;

(ii) There must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence and

(iii) Right does not come in to existence commence until there is a reasonable apprehension of danger.

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

Since under Section 97, every person is entitled to defend his own body and “the body of any other person” against any offence.

The scope of the right of private defence was also delineated by the Supreme Court\textsuperscript{813}:

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

\textsuperscript{812} George Dominic Varkey v. State of Kerala, (1971) 35 SCC 275
\textsuperscript{813} Jai Dev v. State of Punjab, AIR 1963 SC 612
The Supreme Court in emphasized that the right must exist at the relevant time. There is no right of self-defence if at the relevant time there was no threat either to the person or to the persons and property of their companions.

The Courts in India emphasize the time element in assessing apprehension in the mind of accused. The reasonable apprehension of danger to person or property is based on various factors, such as real and immediate threat, dangerous form of assault, temperament of the assailment etc. The technique of expanded objective test should be applied to ascertain reasonable apprehension of danger.

There is no provision in the Penal Code or any other similar code in regard to the retreat rule. In the absence of such provision, it might be relevant to see the views expressed by various authors and decision-makers. The Courts in India have not applied the retreat rule because the right of private defence serves a social purpose. Further the law does not expect a law abiding citizen to behave like a coward when confronted with an unlawful aggression.

Indian courts allow the mitigatory plea only in circumstances where the right of self-defence conferred by sections 96-105 (which subsequently codify the common law relating to self-defence) has been exceeded by the use of more force than was required to repulse the violence. The exception itself requires that the excessive violence used should have been in good faith and that it would not operate where the offender took advantage of the situation to pay off a grudge.

In America, in every state, the one is allowed to use reasonable force to defend himself when he is under the imminent threat of bodily harm. The force used must be proportional to the force being used against one’s safety. In many States of United States there is a duty to retreat, if one can safely do so. In other States one does not. If one is in his own house, generally he is not required to retreat, but he would have to check the law in his own state. Fundamentally, there is a consensus regarding one basic principle i.e. one is entitled to use a reasonable amount of force against someone who has attacked him if there is no alternative.

That includes lethal force if the threat is a potentially lethal one. Generally, though, especially in public places, the amount of force used must be reasonable and
proportionate to the threat. Shooting someone who throws a wad of paper at someone is disproportionate and unreasonable, as is, often, killing someone who throws a punch or other non-lethal threat. Punching back, of course, is reasonable self-defense. Many states also have enhanced self-defense statutes. In Colorado, for example, it is generally legal to use any amount of force against an intruder who has illegally entered into one's home, with the idea that such a situation raises a legitimate and immediate threat to the home's occupants. Such Castle Doctrine statutes generally provide for civil and criminal immunity for homeowners who use force against an intruder into their home. The idea there is that someone who unlawfully enters a home can be considered to represent an immediate threat to the home's occupants and can be reacted to as such. In other states, they go even farther than that, with Stand-your-ground statutes, essentially extending "castle doctrine" to "anywhere you have a right to be", and allowing any level of response to any threat. In America, the law is that whatever one may do for himself, he may do for another. Nearly all states allow some use of deadly force to protect his own body and property, based on the "Castle Doctrine." In some areas, many people still have a "duty to retreat" if possible against an attacker outside their home. But some states have expanded their laws to boost those protections in other areas. In the United States, self-defense is an affirmative defense that is used to justify the use of force by one person against another person under specific circumstances. In the U.S., the general rule is that “a person is privileged to use such force as reasonably appears necessary to defend him or herself against an apparent threat of unlawful and immediate violence from another.” In cases involving non deadly force, this means that the person must reasonably believe that their use of force was necessary to prevent imminent, unlawful physical harm. When the use of deadly force is involved in a self-defense claim, the person must also reasonably believe that their use of deadly force is immediately necessary to prevent the other's infliction of great bodily harm or death. Most states no longer require a person to retreat before using deadly force. In the minority of jurisdictions which do require retreat, there is no obligation to retreat when it is unsafe to do so or when one is inside one's own home. Duty to retreat” laws specifically pertain to the use of deadly force. A state with a form of a “duty to retreat” policy expects individuals to attempt to retreat from imminent danger by running away or escaping the situation. If
the individual is physically incapable of fleeing the situation, the use of deadly force can be considered self defense. If a person is cornered or physically restrained and facing bodily injury or death, they are then authorized to use whatever force necessary to protect them, including deadly force. The States currently have “duty to retreat” laws in place are Arkansas, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Missouri, Minnesota, Nebraska, New Jersey, New York, North Dakota, Rhode Island, Wisconsin and Wyoming. In America, the matter has frequently been considered, and in several jurisdictions it has been held that if one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant. On the other hand, in several jurisdictions it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat rather than kill. There are states that have laws similar to “stand your ground” but with significant differences such as California. California does not have a specific “Stand Your Ground” law in place, but instead it has the “Castle Doctrine” which means an individual can use deadly force within their own home if they have a “reasonable fear of imminent peril or great bodily harm”. Other states with similar laws include: Illinois, Iowa, Oregon, and Washington.

Currently there are 24 states with “Stand Your Ground” laws in place, including North Carolina and Florida. A “Stand Your Ground” law means a person can use force or in some states even deadly force to defend themselves without first attempting to retreat from imminent danger. In many “stand your ground” states a person can avoid trial altogether and be granted immunity from prosecution with a claim of self-defense. “Stand your ground” laws can differ from state to state. Some still require a “duty to retreat” when it comes to using lethal force. The use of lethal force in self defense cases is often a source of controversy. Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia follows the Stand Your Ground Rule.

Under the “Castle Doctrine”, castle referring to a person’s domain often including house, office, or automobile, these laws are similar to “stand your ground” policies,
but are limited to a person’s property. The “castle doctrine” enforces the belief that a person has the right to be safe and secure inside one’s home or place of business and should not have to retreat from their domain in order to be safe. This law essentially means homeowners who use lethal force within their home, place of business, or automobile may be able to claim self-defense in “Castle Doctrine” states when facing severe bodily harm or death. While most states have a form of the “Castle Doctrine” these laws differ from state to state. Most states no longer require a person to retreat before using deadly force. In the minority of jurisdictions which do require retreat, there is no obligation to retreat when it is unsafe to do so or when one is inside one's own home. A majority of U.S. jurisdictions do not follow the common law rule that a person must retreat prior to using deadly force. Whether the person retreated may, however, be relevant as to the reasonableness of the use of deadly force. Under the common law rule and the rule in a minority of states, the actor must have shown that he or she retreated prior to using deadly force unless: 1) it was not safe to retreat; or 2) the incident occurred at the actor's home. In addition, the Model Penal Code requires retreat or compliance, if it can be done with complete safety. Like England in America also there may either be a complete defence or no defence at all. Thus, in cases of excessive force used in self-defence, the punishment of murder is awarded to the accused. However, a new trend is emerging namely, where the aggressor used only non-deadly force or began the fight with fists or some other non-deadly weapon and the victim responded by using deadly force. This may be explained that the initial victim’s response to the aggression was excessive and thus beyond the victims own right to self-defence. Here, the initial victim became the aggressor and the altercation became attributable to the over-reaction of the initial victim.

In Australia, as a rule, an individual can take any defensive or evasive steps they believe to be reasonably necessary given the situation. Unlike much of the common law, self-defence is not a formulaic area of law, but concerns itself with the circumstances of each instance. A person carries out conduct in self-defence if, and only if, he or she believes the conduct is necessary to defend him or herself or another person; Or to prevent or terminate the unlawful imprisonment of himself or herself or another person; Or to protect property from unlawful appropriation, destruction,
damage or interference; Or to prevent criminal trespass to any land or premises; Or to remove from any land or premises a person who is committing criminal trespass.

While term ‘self-defence’ suggests it is only available when the person is under threat themselves, it can in fact also be used in the defence of another. At common law, self-defence was traditionally limited to certain relationships – parent and child, husband and wife or ‘master and servant’. However, numerous Australian Jurisdictions allow for self-defence beyond these limited categories, as codified in s 418(2) (a) of the *Crimes Act 1900* (NSW) and Section 9AC, Section 9AE(a) of the *Crimes Act 1958* (VIC). The imminence or otherwise of the feared attack is clearly a relevant factor in deciding whether self-defence will provide an excuse. There now appears to be a major difference at least in theory between the position taken in the United Kingdom and that taken in Australia. In the United Kingdom the tendency is to regard the defence as available only if the attack is imminent. In Australia, imminence, though important, is one among many other factors to take into account. The latter is the better solution and should be adopted in the United Kingdom as well. The imminence or otherwise of the feared attack is clearly a relevant factor in deciding whether self-defence will provide an excuse. There now appears to be a major difference at least in theory between the position taken in the United Kingdom and that taken in Australia. In the United Kingdom the tendency is to regard the defence as available only if the attack is imminent. In Australia, imminence, though important, is one among many other factors to take into account. The latter is the better solution and should be adopted in the United Kingdom as well. Imminence, usually understood to require a close temporal connection between an actual harm or threat of harm and a defensive response, has traditionally served as a key consideration in self-defence. Previously functioning as a rule of law, in more recent times imminence has served as an evidentiary matter going to the reasonableness and necessity of an accused’s conduct. However, during the past two decades imminence has proven problematic in cases involving victims of chronic family violence who killed their abusers in non-confrontational circumstances and sought to plead self-defence. A number of jurisdictions in Australia responded to this by developing distinctive approaches to imminence. Five key approaches are discernible, with the most radical reform (in Queensland) seemingly substituting a history of domestic
violence for a requirement of imminence. Other jurisdictions, including Victoria and Western Australia, have considerably relaxed imminence considerations. It now appears that while imminence previously may have operated as an independent temporal measure, its function as a proxy for necessity is now clear, at least in cases involving victims of family violence who kill their abusers. The absence of effective State protection for some of these individuals may justify an exception to the general rule that only the State can use force to protect in non-imminent circumstances. Consequently, for victims of family violence who kill their abusers, necessity rather than imminence may be the key consideration.

The historical duty to retreat referred to the obligation that someone facing danger “should retreat as far as possible before employing self-help”. While no longer a legal requirement, the High Court\footnote{Zecevic v. DPP (1987) 162 CLR 645, 663} stated that a failure to retreat in the face of danger was relevant as a “circumstance to be considered in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence”. Australian courts have indicated in a series of decisions that an accused, which used more force than reasonably necessary to defend him and caused the death of his assailant, would be guilty of manslaughter and not murder; provided he believed that the degree of force he was using was warranted by the situation.\footnote{Howe (1958) 100 C.L.R. 448; McKay [1957] V.R. 560; Bufalo [1958] V.R. 363; Enright [1961] V.R. 663: Turner [1962] V.R. 30; Tikos (1) [1963] V.R. 285; Tikos (2) [1963] V.R. 306.} The most authoritative Australian decision on this point is Howe, (1958) 100 C.L.R. 448

It is concluded that the right of private defence was originally confined to the defence of self only but subsequently it includes the near and dear ones. By the passage of time, the scope of private defence or self-defence is widened. Now in India, England, Australia and America, the right of self-defence may be exercised for the protection of own body and the body of other person, and one’s property and the property of others against the offences affecting human body and property but subject to the many factors i.e. the real and immediate threat must be present, time of apprehension must be considered, fit case of dangerous form of assault, reasonable apprehension of danger, time to seek protection of public authorities.
We have discussed about the whole concept of the private defence in India and also discussed the circumstance which often creates confusion as well as compared the prevailing laws relating to right of private defence in England, America and Australia.

8.2 SUGGESTIONS

1) There is a need for structural reform in the law relating to the right of private defence by rearranging the provisions, by clustering the sections dealing with the right of private defence of body in one section and those the related to defend property in another, so that it could be convenient to read and understand the concept of person and property on after the other.

2) There is a need to abolish Section 96, Indian Penal code, as it is merely a declaratory law. Without this section also we understand that anything done in exercise of right of private defence is not an offence because the other related sections comes under Chapter IV of Indian Penal Code, which nullifies the culpability.

3) There is a need for the deletion of the words “any act which is an offence” in Section 97, Indian Penal Code prefixing the phase “falling under the definition of theft, robbery, mischief or criminal trespass” in secondly. Reason behind it is that Section 98, Indian Penal Code adequately covers all cases where the act, though not an offence, allows the doer to exercise right to defend.

4) There is a need to amend Section 99, Indian Penal Code, so as to give immunity against the plea of right of private defence of an individual where the public servant is acting in good faith while attempts to execute a judgment or an order passed by a court having no jurisdiction. Even though Public Servant by virtue of section 78, Indian Penal Code, is immune from prosecution if he, in good faith, believed that the court had the jurisdiction.

5) There is a need for the deletion of the words “time to have recourse to the protection of the public authorities” in Section 99, Indian Penal Code. In my opinion, there is a need to review the law on his point because protection of public authorities is neither readily available nor adequately provided for. On
the comparative note, there is no such restriction in the penal law of other
countries.

6) There is a need to spell out the components of “reasonable harm” or
“proportionate harm”, which are not clearly mentioned in Section 99 Para IV,
Indian Penal Code.

7) Fifth paragraph of Section 100, Indian Penal Code, is to be amended, so as to
limit the cases where the abduction is punishable under the Indian Penal Code.

8) There is a need for deletion of Secondly, house breaking by night, from
Section 103, Indian Penal Code as ‘all aggravated forms of criminal trespass’
are governed by general provision in clause ‘fourthly’ of the section.

9) There is a need to expand the scope of the right of private defence of property
by including the offences of ‘mischief by explosive substance’, ‘mischief by
fire or explosive substance committed on any vehicle’, ‘mischief by fire or
explosive substance committed on places of worship’ be added in ‘thirdly’ of
Section 103, Indian Penal Code.

10) There is a need to substitute the word ‘house- trespass’ by ‘criminal trespass’
in ‘fourthly’ of Section 103, Indian Penal Code.

11) There is a need to expand the scope of Section 106, Indian Penal Code by
including the case of apprehension of grievous hurt also.

To summarize, the major finding explained through this research is that it is
high time to review the existing provisions relating to the right of private defence, as
they are not adequate. It is hoped that the above suggestions of the thesis will help in
widening the concept of private defence in India.