CHAPTER II
HISTORICAL EVOLUTION OF THE CONCEPT OF SELF-DEFENCE

2.1 INTRODUCTION

Law of Private Defence can be traced back to the early civilization, wherein every person had a right to defend his life and property. History is abounding with instances of communities exercising their right to defend their property and life. In fact it may not be exaggeration to state here that the two world wars which history has witnessed, and the ongoing conflicts between states and between communities in states are instances of exercise of the right by the communities to defend their land, water or other natural resources from encroachment either by arbitrary acts of the State or vested interests in society. Every legal system in the world today recognizes and accepts that every person has an interest in protecting his life and property.

2.2 HISTORICAL EVOLUTION

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

2.2.1 ROMAN LAW

The roots of right of Self-Defence in England owe their origin to Roman law. It is, therefore, desirable to refer the developments in Roman law before examining the evolution of the right of Self-Defence in English and American legal systems. In Roman law, homicide was considered to be an act by which the life of human being was taken away. There were two degrees of criminal homicide, which did not expose to punishment namely, excusable and justifiable.\(^\text{67}\) Self-Defence was placed in the latter category of homicide. In Self-Defence violence is certainly lawful: ‘Vim enim vi defendere omnes leges emniaque jure permittunt’ (a man, therefore, incurs no liability, if he kills another’s slave who attacks him). In the Justinian’s law, no greater

\(^{67}\) Lord Mackenzie, Studies in Roman law, London, (1898), p. 415
force than what was sufficient to ward off the threatened danger was permitted and there was aquiline liability if the slave apprehended. The same was also true, if the slave comes as thief by night. The Twelve Tables, however, allowed killing in such a case without restrictions because they regarded it as permissible self-redress than of Self-Defense. The principle that the degree of force used must, in any case, be proportionate to the seriousness of the threatened evil, was not expressed in these words but was commonly inferred from a general notion of “moderation”. Subject to this permissible limitation, Self-Defence also included the immediate retaking by force the property of which one had been forcibly deprived. An assault was not an injury if committed in Self-Defence when one’s life or limb was threatened; any amount of force to repel the injury was lawful, if it was reasonably necessary. A man put in fear of his life could, with impunity kill his assailant, but if he could have caught the man, and there was no necessity for killing him he was not justified. In defence of property less latitude was allowed. Even a burglar could not be lawfully killed, if the householder could spare his life without peril to his person. Any less violence was, however, justifiable in defence of property. An injury was held to be aggravated: (i) of the nature of the act, as when a man is wounded or scourged, or beaten with sticks; (ii) of the place, as when the assault it in a public assembly; (iii) of the person, as when parents are struck by children, or patrons by freemen; (iv) or of the part wounded, as a blow in the eye. In these cases exemplary damages were given.

Arnold D. McNair, describes Roman law and common law in comparative perspective on the subject as under: “Necessity appears in Roman texts as a defence in an action for damage e.g. where a ship was driven without fault into a position in which the on hope of avoiding wreck was by cutting the cables of another shop, or again, where it is necessary to pull down a building to prevent a fire from destroying one’s own house. How far this goes in our law is not quite clear, but it is settled that the same rule applies as to checking a fire. It might be said that there is no culpa here; no more is done than a reasonable man would do, and the case is analogous to Self-Defence recognised in both systems of law. But in Roman law Self-Defence was no reply in itself to third person who was damaged by my act and the English law seems

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70 Ibid.
not very clear on this point. In Roman law, it does not appear on the texts that there was any means of obtaining compensation for the harm thus lawfully caused, even where a house was pulled down”.  

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

2.2.2 ENGLISH LAW

2.2.2.1 DURING ANCIENT PERIOD

In the early history of mankind, it had become customary to commute vengeance for a money payment. When once this practice had firmly rooted, disputes as to the amount of compensation, were referred to the tribal assembly for settlement. The tribal assembly was held periodically among primitive people in the beginning, the payment of compensation was optional but later on it was made compulsory. Consequently, during the Anglo- Saxon period, the law treated all homicides, heinous or innocent as matters to be expiated by pecuniary payment which was termed as war. It was the value set upon the man’s life. This was done according to an elaborate tariff, which laid down the price of different blows and wounds varying with the rank of the victim. Quite apart from this, the King also exacted a kind of fine, which was called “wite”. There were some more serious offences, which arose against the King and his peace. They were “botleas” or “bootless”. In such cases, the offender was not entitled to redeem himself and was at the mercy of the king. At a later stage, most crimes became emendable but the gravest offences remained undependable. The

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72 Leges Henrici was compiled as late as 1118, which expressed the Wessex rule that for every homicide, whether intentional or accidental, the wergild must be paid to the family of the slain man. See Morelan, Roy The law of Homicide Indianapolis, (1952), pp. 1:2
73 Wite was the usual word for a penal fine payable to the King or to some other public authority. See Cecil Turner, J.W., Kenny’s Outlines of Criminal Law, (1952), p. 8
74 The “bot” was a more general word, which included all types of compensation, see Pollock and Maitland, History of English Law, Vol. I, (1898), p. 48
“wite” became a source of royal treasury and as a result of this; the King’s jurisdiction was enlarged in this area. By Norman times, the system of emendation became obsolete. In the Norman Chronicles, the main crimes were the rebellions of great men. When the rebel was brought to justice, his punishment was imprisonment or exile and dispersion. The insurgent peasants were punished by mutilation. The kinsfolk of the slain Norman received a certain part of the murder finem which fell on the hundred, if the slayer was not brought to justice. They received six marks out of forty six and the remaining amount went to the King’s treasury. This was known as “presentment of Englishry”.

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

His mental state was not taken into account while determining the liability for the commission of crime. It was imposed. The presence of a guilty mind was not a condition of liability in this period. The accidental injury and the injury done under the coercion of Self-Defence were equally sources of liability. The old law did not exculpate the defendant because of self-defence but he was held liable for his act. Thus, the criminal liability was not related to the evil intention of the actor. Chief Justice Brian, one of the best medieval lawyers said in this context: “the thought of man shall not be tried, for the devil himself knoweth not the thought of man.” This is why; the early law is formal and unmoral.

The intention of the doer was presumed to be reflected in his doings. The homicides committed se defendendo or per infortunium were not exempted from the liability. The actor was held responsible for them. The rule of such strict liability was inhuman at least to the cases of accident and Self-Defence. The plea of Self-Defence ought to have been recognised as an explanation or justification for killing even in the earliest era of civilization. The earliest society was not regulated by rule of law and most probably the state of anarchy prevailed. Consequently, every good ruler made such a law that could eliminate all forms of self-help and maintain peace and security in the society. This was perhaps one of the

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75 Ibid. at 74
causes of the so called absolute liability in the earliest time. The distinction between
tort and crime were unknown. The wrong - doer was liable for all kinds of injury.
Holdsworth maintains that the main principle of the early English Law was that a
man acted at his peril even when causing accidental death or harm or acting in Self-
Defence. “A man acts at his peril” was a popular fundamental principle upon which
criminal liability was grounded in the pre- concept period. The principle seems to be
broad and wide. “A man acts at this peril” generally means that whatever a man does,
will if it injures some - one else, make the doer guilty of a breach of law. Pollock
and Maitland also support this theory: “Law in its earliest days tries to make men
answer for all the ills of an obvious kind that their deeds bring upon their fellows”. A
further possible explanation of the reason for these stringent rules was the difficulty
of proving the presence or absence of the intent of the wrong doer in the commission
of crime. There was no machinery to ascertain it. Thus, the notion of absolute liability
which was in existence due to this reason is also reflected in one of the descriptions of
the Selden Society: “Ancient law could not discuss the question of intent, because it
had not the machinery where with to accomplish enquiry”. Winfield uses an
excellent illustration, when he describes rulers having made laws as wild beasts eat-
“hurriedly, when and how they can, careless of what the food is so long as it fills them
for the moment, in peril of losing it or their own lives to any stronger animal.” He
examines the Laws of Alfred, which allow a man to fight and kill in defence of
himself, his lord or blood relation without any liability to pay compensation.” There
was also provision for a general right of Self- Defence against all but one’s lord and
when killing by accident or misadventure. Further, there had been a long list of
objective facts, which made a man amiable to its penalties, and occasionally, it stated

78 Brown, Bernard, “Self- Defence in Homicide-from strict liability to complete exculpation”, The
80 Brown, Bernard, “Self- Defence in Homicide-from strict liability to complete exculpation”, The
81 Leges Henrici was compiled as late as 1118, which expressed the Wessex rule that for every
homicide, whether intentional or accidental, the wergild must be paid to the family of the slain man.
(1964-65), p. 1, 2
83 Cecil Turner, J.W., Kenny's Outlines of Criminal Law, (1952), p.8
85 Ibid.
circumstances in which he was free from liability.\textsuperscript{86} Winfield holds that early laws show that there were many instances in which a man did not act at his peril. In theory, there was tendency to hold a man liable for some, but not all, accidental harm. In practice this harsh rule was made workable by judicial discretion as to penalties which brought about, in a practical way at best, a crude differentiation between intention, inadvertence and inevitable accident. Professor Winfield is highly critical of Holdsworth, Pollock and Maitland who hold tenaciously to what he calls the “myth of absolute liability”. The code of Hammurabi had fixed the maximum penalties for different crimes but a considerable license was allowed to the judges in this regard. The less you were in fault, the less must you pay.\textsuperscript{87} The liability was related to the amount of the fault. Thus, there were gradations of liability. The truth appears to lie somewhere between these extremes but lack of adequate material makes it difficult to arrive at any such conclusion.

Winfield in the end of his essay, therefore, advocates the use of the term “strict liability”\textsuperscript{88} in place of “absolute liability” for the criminal liability, which was in operation during the early English law. Under the ancient law not only the approach to accident and self-defense became harsh but some idea of rationalism also began to enter in the system of criminal law. During the twelfth century, due to direct influence of the cannon law, the phrase ‘\textit{mens rea}’ was used for the first time in English law.

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

\textsuperscript{86} \textit{Ibid.}

\textsuperscript{87} Goebel, Julius, Jr., \textit{Felony and Misdemeanor}, Pennsylvania, (1976), p. 7-8

Defence by using his prerogative to excuse the defendant.\textsuperscript{89} The patent rolls of Henry III show that it was common proactive in the thirteenth century to pardon for excusable homicide committed by misadventure or in self-defence or while of unsound mind and not by a felony of malice aforethought.\textsuperscript{90} Even during the middle ages, Self-Defence was not a legal justification or excuse for killing but was a ground for pardon. A survey of the law and practice during ancient period leads us to the conclusion that-

(i) The defendant in cases of Self-Defence was not blameless. He was put to some fault and was liable to forfeit his goods;

(ii) During this era; the doctrine of \textit{mens rea} had come to light. It was rational and reasonable and was the outcome of progressive civilization.

Consequently, the homicides committed \textit{se defendendo} started to be treated as excusable and hence became pardonable by the king.

\textbf{2.2.2.2 DURING MEDIEVAL PERIOD}

During the medieval period, though the accused obtained pardon yet he forfeited his goods for the crime committed in Self-Defence. The moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal. Ultimately the jury was allowed to give a verdict of not guilty in such cases.\textsuperscript{91} Unlike the ancient period (spreading up to the twelfth century) which was the age of absolute liability, during the middle ages some rationality entered into the field of criminality, as the notion of \textit{mens rea} had emerged. As a result of this, the King began to grant Pardon in the cases of homicides committed \textit{per infortunium et se defendendo}. So long as the excuse of Self-Defence remained a matter of royal favour, there were no determined rules in this regard. However, certain principles were inherent in the doctrine from the very beginning. One of them was that if the killing was unnecessary, there would have been no pardon. This principle still remains the most important element in the law of Self-Defence. The theory of pardon in the cases

\textsuperscript{90} Morelan, Roy, The law of Homicide, Indianapolis, (1952), p. 10
\textsuperscript{91} Ames, James Barr, Lectures on Legal History, London, (1913), p. 436
of homicides committed *se defendendo* was relevant in regard to criminal liability. Perhaps the idea of pardon originated, when the harshness of the punishment of the homicides committed in Self-Defence or by misadventure reached its climax. The moral sense of the community could not tolerate inhuman action in such cases. Consequently, the King was approached to exercise his prerogative to mitigate the punishment. The act of pardon entirely depended upon the discretion of the King. It was purely an act of mercy. The rules relating to criminal liability were gradually growing during this period. This may be illustrated by the following cases, which were decided by the King’s Court during the thirteenth century. In 1236 there was a controversy between the King and the magnates about the right to arrest and imprison men who were found doing wrong in parks and preserves. Just at that time, the King had pardoned a forester of the Earl of Ferrets, who had slain a malefactor in Self-Defence, but the King expressly protested that this was an act of grace and not of justice.92 A man attempting rape assaulted a woman. She drew a small knife and killed him. She fled. Her father offered the justices forty shillings for a permission that she might be allowed to return to the peace. They received the fine and spoke to the King.93 A perusal of the aforesaid cases suggests that during the thirteenth century grant of pardon was solely the grace of the King. Further a homicide in Self-Defence was not justifiable, even though it was perpetrated in the endeavor to prevent a felony. Thus, there was no uniform practice in granting pardon in this connection. No doubt, in the beginning the accused was pardoned for the commission of homicide in Self-Defence or by misadventure, but he was required to forfeit his goods and chattels under all circumstances. This may be supported by an entry in the Northumberland Assize Rolls. With the march of time the liberality was shown with respect to grant of pardons. Thus, in a judgment, a lunatic chaplain had broken into a house by night. A servant of the house holder struck him on the head and he died. The servant was set free by the justices. Braxton in his text would allow a man to slay a house breaker if to do so was a necessary act of Self-Defence but in his margin he noted a case of this kind where the slayer was pardoned by the King.94 The act of pardon is a kind of excuse. The word excuse itself denotes the condemnation of some wrong committed

92 Bracton, Note book, Ill (1216) No. 1084
93 Northumberland Assize Rolls, 85
by the offender. Blackstone perceived the essence of excuses to be “the want or defect of the will”. But the doctrine of pardon is entirely based upon the theory of excuse prevailing in the thirteenth century of English Criminal jurisprudence. The defences that the killing was per information or se defendendo did not come into existence until the middle of the thirteenth century and even then their affect was not on the convocation itself but only on the exercise of the royal prerogative of pardon. As the granting of pardons for the accidental or Self-Defence homicides hardened into a practice, the procedure for their automatic grant required the jury to find that the death occurred se defendendo or per infortunium. By virtue of the statute of Gloucester, these defences formed the basis of the law on excusable homicides. Before the statute of Gloucester in 1278, it had become customary for clerks in the Court of Chancery to issue the writ de odio et atia, which authorised an inquest to determine whether the homicide had been committed by misfortune, or in any other manner without felony. The inquest was conducted by the Sheriff or the Coroners and also by the justices, if they happened to be in Eyre. In either case, if the jurors gave a favorable verdict, a pardon was granted. The Statute of Gloucester (1278) is an authority on the development of the law of Self-Defence. This act abolished the writ de odio et atia, which was issued in such cases previously. The act provided that the case of misadventure or Self-Defence was no longer to be bailable. The jury could neither convict nor acquit. The King, on the report of the justices might pardon the party, if he pleased.95 Virtually, the Act regulated and reformed the procedure for pardon. The killing by misadventure or in Self-Defence was not justifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison and must trust to the King’s mercy for a pardon. Furthermore, although he obtained the pardon he forfeited his goods for the crime. Subsequently, pardons for killing in Self-Defence became a matter of course. Afterwards, the juries were bound in cases of trials for homicide, where the defence was misadventure or Self-Defence, to find specially that such was the case, upon which the King was bound to grant him pardon. By the end of the fourteenth century, pardons for misadventure or Self-Defence were becoming a mere formality and the circumstances of their commission were recognised as providing grounds for the issue of a pardon of course. The pardon of

course was accompanied with the forfeiture of the chattels of the accused. As time passed on, the pardon of course became a mere formality. The character of pardon was issued and signed by the chancellor in the name of the King. In this way, it is apparent that the chancellor started issuing the charter of pardon in the cases of Self-Defence without speaking to the King. During the fifteenth and early sixteenth centuries, it was settled that the practice of returning acquittals in such cases was adopted by the Court. It is also found elsewhere in the Year Books of the regal years of Edward IV and Henry VII that a person could establish Self-Defence or misadventure to escape liability for a felony. Thus, it becomes evident that misuse of pardon was realised during this period. Thereafter a statute\(^\text{96}\) was enacted in 1532. The act is entitled, “that a man killing a thief in his defence shall not forfeit his goods”. It further stated that in future no forfeiture should be incurred in any such case but the persons so killing should be entitled to be acquitted simply. This statute clearly proves that killing in self-defence involved forfeiture of goods. A survey of the development of law during medieval period reveals that in the early common law of England, self-defence was not a legal justification or excuse for killing but was a ground for pardon. No uniform practice was observed in granting pardons. But in the fifteenth and early sixteenth century the misuse of pardon was felt. By statute of 1532 the formal pardon in cases of necessary Self-Defence disappeared.

2.2.2.3 DURING MODERN VIEW

Finally we have come to a point where liability in such a case is determined upon a consideration of all the surrounding circumstances, upon a basis of fault and a normal reaction of a reasonable man.\(^\text{97}\) Instead, in modern times there is a presumption that there exists no \textit{mens rea} in the homicides committed in Self-Defence and as such it has become a justifiable defence in law. In view of the legal justification of self-defence in modern legal theory, the forfeitures which accompanied the pardon, were also abolished in the year 1828. Thus, the cases of Self-Defence which were pardonable during the Middle Ages have become exculpable in the modern times. So, now no criminal liability is attached to the

\(^{96}\) 24 Henry VIII C-5

\(^{97}\) Miller, J., Criminal Law, St. Paul, (1934), p. 199
defendant in such cases. It is a justifiable homicide, if committed se defendendo. This is in conformity with the provisions of Article-2 of the European Convention on Human Rights. The relevant article runs as follows: “Every one’s right to life shall be protected by law and deprivation of life shall not be regarded as inflicted in contravention of this article, when it results from the use of force, which is no more than absolutely necessary in defence of any person from unlawful violence.” To sum up, the notion of Self-Defence is justified in almost in every legal system today.

2.2.2 AMERICAN LAW

In America the law on this subject has emerge out of English common Law. Like English law the various states statutes in U.S.A. draw a distinction between justifiable homicide and excusable homicide in Self-Defence. When one, without any blame on his part, is attacked by another in such a manner that he has a reasonable belief of suffering death or grave bodily injury and kills in Self-Defence, believing such killing killed to be necessary to protect him, the result is a justifiable homicide. Thus, the right to kill extends even to case of fear of grave bodily injury. But the essential elements are

(i) blamelessness on the part of the killer,

(ii) a reasonable belief as to the existence of imminent threat and

(iii) The necessity of the killing. Such right of Self-Defence has been called “Self-Defence without fault” or “perfect Self-Defence”.

Excusable homicide in Self-Defence arises where in sudden affray or combat, one fearing reasonably imminent death or grave bodily injury, kills the other believing such killing to be necessary to protect himself. This is akin to the se defendendo of common law. The law in this case presumes that both the parties were at fault in some measure. It was for the existence of this fault in the killer that under old English law death penalty was imposed for such homicide and later the penalty of forfeiture of goods was imposed. Such kind of homicide in Self-Defence is called “imperfect Self-Defence” in the American law. There would be no right of Self-Defence where a person himself creates an occasion of killing another. One cannot provoke a quarrel
and then making an excuse of the quarrel kill another. But mere words, however insulting they may be would not deprive one of the rights to Self-Defence for such words would not be sufficiently, provocative. The question who was the aggressor becomes important in cases where the plea of Self-Defence is raised and it is not always easy to apportion blame in cases of chance-medley. As a rule the aggressor is one who by his unlawful act or acts which are reasonably calculated to cause or lead to deadly strife or to cause in another a reasonable apprehension of immediate peril to his life, forfeits his right to Self-Defence. It is not necessary that the one who struck first blow should be aggressor. If a person intentionally provoked an altercation maliciously intending or expecting that it would develop into a deadly strife if actually results in killing, such person would be aggressor and cannot take a plea of Self-Defence. But if such person, in the course of the combat bonafide abandon it or withdraws there from, conveying by his words or conduct to the other, of his intention of not continuing the fight or of withdrawing there from, his intention of not continuing the fight or of withdrawing therefore, his right of Self-Defence will be revived. In such a case, if the erstwhile aggressor, who has withdrawn, is after the withdrawal pursued, he may excusably kill in order to save himself. But the withdrawal giving a revived right to Self-Defence has to be proved strictly by evidence. And if the aggressor has so beaten up the other as to render him incapable of understanding or appreciating the withdrawal, there is no revival of the right to Self-Defence. Phrases relating to the extension of the right of Private Defence to apprehension of bodily injury less than death employ such terms as “great bodily injury” or “great personal injury”. Where such a phrase occurs, it is to be given its ordinary meaning. It is now an established principle of law that the right of Private Defence is not confined to cases where death is feared, but it extends to cases where the danger to be resisted is serious bodily harm of a permanent character, so that

98 Shack v. State, 236 Ala.667, State v. Fettovic, 110 Conn. 303
99 People v. Curtis, 18 N.W. 385
100 Scoggins v. Stage, 120 Ala. 369
101 Myers v. State, 62 Ala. 599
102 Padgett v. State, 40 Flo. 451
103 State v. Health, 237 M.O. 255
104 People v. Button, 106 Cal. 628
105 Rogers v. State, 60 Ark. 70
106 Pond v. People, 8 Mich. 150
where the statute does not contain a reference to bodily harm as one of the basis for the right of Self-Defence, it will be implied that exercise of the right in defence to danger of serious bodily harm is of a permanent character. There are cases in which it has been held that in justifiable Self-Defence there would be no requirement as to the retreat\textsuperscript{107} on the other hand cases are not lacking where American Courts have held that a doctrine of retreat would apply irrespective of the fact whether the case would fall within excusable or justifiable homicide in Self-Defence.\textsuperscript{108} Thus, Mr. Justice Holmes of the Supreme Court of America remarked: “Rationally the failure to retreat is a circumstance to be considered with all the other in order to determine whether the defendant went further than he was justified in doing, not a categorical proof of quit. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him, he has not exceeded the bounds of lawful Self-Defence. That has been the decision of this Court. Detached reflection cannot be demanded in the presence of an uplifted knife”.\textsuperscript{109} From this, it is evident that no uniform practice is available in regard to retreat rule, though its observance depends upon the circumstances of each case. To sum up, there was absolute liability for homicide committed 

\textit{se defendendo} in the ancient period. During the middle age, it became excusable and pardons were granted. In the modern time the homicide committed in Self-Defence is justifiable and as such no liability is attributed to the defendant.

\textbf{2.2.4 AUSTRALIAN LAW}

In the criminal law of Australia, Self-Defence is a legal defence to a charge of causing injury or death in defence of the person or, to a limited extent, property, or a partial defence to murder if the degree of force used was excessive.

In Viro v. Queen,\textsuperscript{110} Justice Mason formulated six propositions on the law of Self-Defence in murder trials. Thus, a full acquittal is achieved if the jury finds that

\textsuperscript{107} Wallace v. U.S., 162 U.S. 406; Row v. U.S., 164 U.S. 540
\textsuperscript{109} Brown v. U.S., (1921) 256 US 335
an accused reasonably believed they were threatened with death or serious bodily harm and, if so, that the force used was reasonably proportionate to the perceived danger. The defence of Self-Defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weight to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defences of Self-Defence, where the evidence makes it’s raising possible, will only
fail if the prosecution show beyond doubt that what the accused did was not by way of Self-Defence."\textsuperscript{111}

The New South Wales Court of Criminal Appeal in \textit{R v. Burgess; R v. Saunders} (2005) NSWCCA 52\textsuperscript{112} held that the concept of Self-Defence only arises where the actions of the accused by way of Self-Defence are directly taken against the person threatening the accused or another’s being or property. The defence was first recognised in the common law in \textit{R v McKay} (1957). In November 2005, pursuant to recommendations from the Law Reform Commission for Victoria, the Victorian legislature introduced new laws regarding Self-Defence. Among them, a new offence of defensive homicide was created: where the accused’s belief in the need for the force applied in Self-Defence was unreasonable, s/he may be convicted of an offence less serious than murder. However, defensive homicide was abolished in November 2014.

\textbf{2.2.5 INDIAN LAW}

There is hardly any branch of Criminal law in respect to which public opinion has undergone a greater change than that which professes to define the criminal responsibility of an accused defendant. A retrospect of law of Private Defence is, therefore, necessary and relevant study that should be made before any discussion on the present day set up of law of Private Defence can be realistic. Tracing the history, we find that under the earliest Hindu Law propounded by Manu,\textsuperscript{113} homicide was permitted when danger of life was feared. Resort to arms in Self-Defence was also permitted. The right was, however, given only for prevention of harm. It could not be used for retribution. If the assailant had desisted from striking, he could not be captured and not killed.\textsuperscript{114} When Muslims invaded India and introduced their laws for governing both Muslims and Hindus, the right of Self-Defence found place in their Criminal Code. The King did not punish men for causing death of another in Self-Defence. Retaliation was, however, permitted. The right of Self-Defence provided in Hindu law and Mohammedan law existed till the advent of British Empire. The

\begin{footnotes}
\item[113] Manu VIII, Verses 348 and 349
\item[114] Katyayana, Smritichandrika, p. 729
\end{footnotes}
Britishers in the first few years of their administration did not interfere with the
criminal law of our country. But in 1772, Warren Hastings for the first time interfered
with the prevalent law and issued Regulations. The Britishers found that in certain
areas Mohammedan law was not serving the desired purpose. They, therefore, issued
regulations which subsequently superseded criminal law of both Hindus and Muslims.
Before the drafting of Indian Penal Code, the Britishers administered justice through
various Regulations. These Regulations were based on English common law. Later
on, the Presidencies of Calcutta, Madras and Bombay were given powers to make
laws. The increasing legislative powers were responsible for the growth of a
heterogeneous system of laws, both substantive and procedural. The conflicting laws
created difficulties in administration of justice. This led to appointment of Law
Member of the Council of Governor General. The statute of 1833 provided for
appointment of Law Commission to draft Penal Code for India. The Commissioners,
while drafting the Indian Penal Code incorporated inter alia, the right of Private
Defence in it. Sections 96 to 106 of the Indian Penal Code, 1860, were, accordingly
framed to provide the law of Self- Defence. The Indian Law of Self- Defence is wider
and more comprehensive than the English Law. The Indian Law on the subject made a
departure from English Law, which was justified by the Commission.115

In the early British rule, the Muhammadan Criminal Law was modified from
time and again. Harrington’s analysis of Bengal regulations,116 and the Digest of
Criminal Law of Beaufort117 enlighten us about the position existing during those
days. However, on 31st December, 1600, Queen Elizabeth granted a charter
incorporating the East India Company with the exclusive right of trades between
British India and other countries including United Kingdom. Over the next one
hindered and fifty years, though a succession of charters, this trade adventure
blossomed into political power. The charter of 1600 empowered the East India
Company, to generally regulate its affairs. The charter of 1623 conferred on the
company the power to punish its servants for offences committed by them, whether on
land or sea. The charter of 1661 further extended the powers of the company to

115 First Law Commission of India, Note B, Reprint, (1879), p. 110
116 Harrington’s Analysis of Bengal Regulations, Vol. I, p. 223
117 Beaufort, Digest of Criminal Law for The Presidency of Fort William
include administration of criminal justice in the settlements. Perhaps, the charter of 1668 best reflects the transition of the company from a trading concern to a territorial power. Under the 1683 charter the company could even raise military forces. After the Britishers assumed the duty of administering criminal justice in the country in terms of ‘diwani’ rights found the Muslim law of crimes absurd, illogical, uncivilized and devoid of any rationale in the matter of classification of crimes and the punishment imposed and compelled them to introduce some changes in the law in order it in conformity with the civilized nations. Lord Cornwallis introduced some significant changes in the Muslim Criminal Law. But he did not touch the homicide committed se defendendo. No changes were made subsequently in this field or criminal law and consequently the Muslim law of homicide remained in force until the enactment of the Indian Penal Code. The Indian Penal Code, 1860 was imposed on the entire country irrespective of caste, creed and colour. It, inter alia, governed the law of Self-Defence. In India, the right of Self-Defence has been placed in the chapter of general exception of the Indian Penal Code. It has been provided as an exception to criminal liability. Sections 96 to 106 of the Indian penal code provide the law relating to the right of Self-Defence and its various aspects such as its commencement, duration and the extent. The restrictions imposed on the exercise of the right of Self-Defence have also been governed by these Sections. Since the framing of the Indian Penal Code of 1860 the law relating to Self-Defence has not changed. The judiciary has been interpreting the relevant provisions of law of Self-Defence for more than a century. During this period different social values grew up and vanished. The judiciary has tried to uphold the right of Private Defence within the legal frame-work of the Indian Penal Code to meet the demand of new social values. Realising the need for legislative changes in various areas the government of India setup a Law Commission to review the various provisions of the Indian Penal Code including the law of Self-Defence. The Law Commission thoroughly reviewed the law relating to Self-Defence and made several suggestions for legislative changes in its 42nd Report, which have been dealt with at appropriate places. It is evident from the foregoing discussion that the concept of right of Private Defence in ancient India was very comprehensive and elaborates. It covered even false accusation, defamation

118 Srivastava, Dr. S.C., Industrial Disputes and Labour Management Relations in India, (1984), p. 193
etc. During the medieval period the wide concept of Private Defence was eclipsed, as the Muslim Criminal jurisprudence was imported under which it was allowed in a restricted way. The Britishers continued the Muslim law of Private Defence in India till the Indian Penal Code saw the light in the year 1861. Lord Macaulay, the architect of the Indian Penal Code, gave suitable law of Private Defence which was the need of people in the existing code- economic conditions of the country.

2.3 OBJECT AND SCOPE OF SELF-DEFENCE

2.3.1 OBJECT

The authors of the Indian Penal Code have nicely explained the object of the provisions relating to Private Defence, in the following words:

“It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of the opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling 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 manner by bands of ruffians, is one of the most...discouraging symptoms which the state of society in India present 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 Self- Defence.”

2.3.2 SCOPE

The right extends not only to the defence of one’s own body against any offence affecting the human body but also to defending the body of any other person. The right also embraces the protection of property, whether one’s own or another person’s, against certain specified offences, namely theft, robbery, mischief and criminal trespass. The right of Private Defence, however, cannot be claimed by an accused, if the facts suggest that the parties had involved in a free fight between them,

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Draft Penal Code, note, p.110
and it could not be determined as to which party was the first aggressor, thus forcing the other party to use force against the aggressor, so as to defend.\textsuperscript{120}

The following principles emerge regarding scope of the right of self-defence in India:\textsuperscript{121}

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

\textsuperscript{120} Bhagwan Sahai and anothers v. State of Rajasthan, Crl. A. No. 416 of 2016 @ SLP (Crl.) 2301 of 2016

\textsuperscript{121} Madhu Gupta v. State of NCT of Delhi, CRLA 357 & 514 of 2017, Del. H.C.
(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

**2.4 JURISPRUDENTIAL ASPECT OF THE RIGHT OF SELF-DEFENCE**

There are three main theories\(^{122}\) in regard to the basis of right of Self-Defence. They are-

(i) Social contract theory;

(ii) Retributive theory; and

(iii) Utilitarian theory.

**2.4.1 SOCIAL CONTRACT THEORY**

According to this theory, State is born as a result of social contract. The individual parts with his rights and entrusts them to the State. He pledges to carry out instructions of the king. In turn, the State promises protection to the individuals. When men enter into contract, they retain right to protect themselves, where the government is unable to help them. In case of non-availability of State-help, the individual is authorised to defend his person and property. The State has only those powers which were given to it by the individuals. The rest are retained by them. This is the view of Locke and Kant.\(^{123}\) There are many other thinkers who support this school of thought.

Thus, it is obvious that in view of this theory, the right of Self-Defence is retained by the individuals in case of non-availability of State-help. For practical purposes this theory is very significant, as even in modern time, this limitation is imposed on the exercise of right of Private Defence.

\(^{122}\) Francis Wharton, “Disputed questions of criminal law-Self-Defence-its Basis”, southern Law review, Vol. V. (1879-80), P.366

\(^{123}\) *Id.* at p.367
If this theory is taken to be correct, then whenever the State fails to defend the individuals, can protect themselves. It is undisputed that the origin of State rests on social contract and the right of Self-Defence was specifically reserved by the people, as it is founded on natural instinct of living creatures.

2.4.2 RETRIBUTIVE THEORY

According to this theory, Self-Defence is a retributive act. It is based upon the notion of vengeance. In other words, the right of Private Defence is akin to the retributive theory of punishment, which is grounded on the dictum, ‘eye for eye and tooth for tooth’. This theory was enunciated by Hegel. It was subsequently adopted by many other philosophers. All wrongs are to be resisted on moral grounds. To refuse to resist wrong or to yield to wrong is in itself a wrong. Truly speaking, the State may impose restrictions on this right of the individual but still it continues to exist subject to those limitations.

According to this school of thought, the right of Self-Defence is not based on contract but it is moral duty and a right as well. Life is priceless and a gift of God. Consequently every individual is morally bound to protect it. When one cannot give life to another, what right he has to take it. As a result, the assailant forfeits his right to life and the defendant who is innocent has every right to protect his life from aggression on all cost.

This theory of right of Self-Defence has been criticized on the ground that it is substantially lynch law, as it would justify a vast amount of wrong done by volunteer crusaders in the name of this right.

2.4.3 UTILITARIAN THEORY

This theory was advocated by the thinkers of the utilitarian and materialistic school of thought. The protagonists of this school look to utility and not to duty as the proper spring of action. According to this theory, State is the law-giver and as such all law springs from the State exclusively. This theory is also known as “prevention”, because the right of Self-Defence is justified on the ground of prevention of crime.

124 Id. at p. 368
The main object of law is maintenance of common good and welfare of the individual. The State also undertakes to protect and enforce the rules of law. This is done through various agencies.\textsuperscript{125}

\textsuperscript{125} ibid. at p. 369