PRIVATE DEFENCE IN SINGAPORE AND MALAYSIA

In Singapore and Malaysia where the criminal law is codified the concept of self-defence[1] is contained in sections 96 - 106, Exception 2 to section 300 of the Penal Codes. [These provisions are modelled on the Indian Penal Code. Therefore, in so far as these statutes are *pari in materi*, heavy reliance is placed on Indian decisions. Reference will also be made precedents from other Commonwealth jurisdictions whenever applicable]. The rules governing the application of this defence is substantially derived from the English Common Law principles articulated as follows:

> "It is almost a matter of definition that law restricts the freedom of each individual to satisfy his wants and desires in any manner he wishes. The restrictive elements in law may be regarded as justifiable because and in so far as they are necessary to ensure the maximum freedom for each and every individual. Freedom from interference can only be preserved by restricting everyone's freedom to exercise power over others ... Occasionally cases arise in which the maintenance of an individual's right to life conflicts with his duty to abstain from violence. Legal systems generally resolve this conflict by permitting the individual's right to life to override the social duty not to use force."[2]

More specifically, the authors of the Indian Penal Code state,

> "We propose to except from the operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggression ... we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence.... Where an individual citizen or his

[1]The terms "self-defence" "private defence" are interchangeably used in this article
[2]A.J. Ashworth, Self-Defence and the Right to Life [1975] 34 Camb. L.J. 282; see also, Fletcher, G.P. Rethinking Criminal Law (1978) at pp. 857-858

> 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. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious."[3]

The whole law of private defence, according to Mayne,[4] rests on these propositions: (1) that society undertakes, and in the great majority of cases, is able to protect private persons against unlawful attacks upon their person or property; (2) that, where its aid can be obtained, it must be resorted to; (3) that where its aid cannot be obtained, the individual may do everything that is necessary to protect himself; but (4) that the violence used must be in proportion to the injury[5] to be averted and must not be employed for the gratification of vindictive or malicious feeling.[6]

Based on these broad criteria, section 96 lays down the general rule that nothing is an offence which is done in the exercise of the right of private defence. Sections 97 - 106, Exception 2 to section 300 define and explain the exact statutory scope and limitations to this right of private defence. In principle, the right of private defence will, in certain circumstances, completely absolve the accused from all guilt, even where the accused has voluntarily caused the death of another person. Procedurally, it is quite clear from section 96 that no question as to the exercise of the right of private defence can arise unless and until the prosecution has proved what would, but for the exercise of this right, be an offence. It has been held under the Indian Penal Code that there can be no right of private defence against an act which is itself an act of private defence.[7] If and when the prosecution has

[3]Macaulay, Notes on Indian Penal Code, Vol. I (1898) p. 216
[4]Mayne's Criminal Law, at p. 202
[5]Mahandi, A.I.R. (1930) Lah. 93; 31 Cr. L.J. 654
[6]Sitaram, A.I.R. (1925) Nag. 260; 26 Cr. L.J. 587; Khetri, A.I.R. (1952) Ori. 37
[7]Dhanno Khan A.I.R. (1957) All 317. This however is not so under the local Codes: *P.P.* v *Abdul Manap* [1956] M.L.J. 214

established that, then and then only will the question of the right of private defence arise. The right of private defence being an exception must be pleaded by the accused.

Scope of the Defence

Private defence under the Code extends to cover both defence of person and property.[8] [In this article, only defence of the person will be covered]. Every person under section 97 has a right to defend himself or anyone else against acts which are offences against the body,[9] [offences affecting the human body are dealt with in Chapter XVI of the Code which is entitled "Offences Affecting the Human Body."] It includes sections 299 to 377. Section 97 read with these sections therefore makes it clear that the right of private defence of person arises in favour of an accused in cases when any of the offences mentioned in sections 299 to 377 is involved.[10] Normally the act against which the act of private defence is used should constitute an offence. However, where the act is not an offence merely because of the youth, insanity or intoxication of the person doing it or because the person doing it is labouring under a misconception, the right of private defence exists in the same way as if the act were done by a person who knows the true state of the facts (section 98).[11] Thus a man who is attacked by a homicidal maniac may resist even to the point of killing the mad man if necessary. All these various rights are classified and described with some precision in case law and under the Code.[12]

[8]Nga Chit, A.I.R. (1939) Rang. 225; 40 Cr. L.J. 725; see also, Jai Dev (1963) S.C. 612

[9]"Every person has the right to defend (i) his own body and the body of any other person against any offence affecting the human body; (ii) the property moveable or immovebable of himself or any other person against theft, robbery, mischief, or criminal trespass or attempts to commit any of these offences"

[10]Offences under these sections include culpable homicide, causing miscarriage and the various types of hurt

[11]Offence in sections 97-106 denotes a thing punishable under the Code or under any other local law: Section 40 Penal Code

[12]See, H. Calvert, The Vitality of Case Law Under a Criminal Code (1962) 22 M.L.R. 621

Section 99 deals with two wholly distinct matters. Subsections (1) and (2) concern the question of the right of private defence against public servants (this aspect will not be discussed in this article). Subsections (3) and (4) relate to the restrictions of this right. Sections 100, 101, 103 and 104 may be taken together. These essentially concern the extent of injury that may be inflicted on an assailant in the exercise of the right. Wherever the right exists it extends to the causing of any injury short of death necessary for the purpose of defence but in certain specified cases even the causing of death is justified. Sections 102 and 105 fix the time when the right commences and period during which it continues. Section 106 lays down the situation wherein the person exercising his right of private defence may take the risk of doing harm to an innocent third party when it is unavoidable otherwise. [It will be noted that the arrangement of these sections do not follow a logical pattern. It is intended only to consider the main specifics of the defence and not necessarily in the order in which these sections are drafted].

The right to self defence is a highly prized gift granted to citizens to protect themselves by effective self-resistance against unlawful aggression. There must be a liberty to use force for the purpose of private defence. The corollary of this is that an attacker may, by threatening the life of another, forfeit his own right of life. In this context therefore, there are two principal requirements for a successful plea of private defence, viz. that the defensive act must be reasonably necessary (no other recourse rule) to prevent the threatened criminal harm and that the injury risked by the defensive act must be in reasonable proportion to that harm (proportionality and reasonableness rule).

1. No Other Recourse

The first is that the force should have been necessary rather than employing non-violent means of self-protection. The rule in section 99(3) which provides that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities," is derived from this principle. It is similar to the common law

"duty to retreat" [see Lord Widgery's ruling in *Julien*][13] when an individual's purpose in a threatening situation is to save himself from injury or death; it cannot be necessary for him to inflict harm on his assailant if there is a safe avenue of withdrawal open to him.[14] "The right of self-help when it causes or is likely to cause damage to the person or property of another person, must be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force. ... when he could, ... easily have recourse to the public authorities, his use of force is made punishable .... To hold otherwise would be to encourage [the commission of] offences. The country would, in the language of Holloway, J. 'be deluged with blood' if an offender who could get relief by recourse to law is allowed to take the law into his own hands."[15] To this duty there have always been certain exceptions.[16] "The general principle sustains no more than a *prima facie* duty to avoid conflict."[17] Hence, it does not mean that one is under a duty to run away like a rank coward. In the words of Widgery L.J. ".... It is not, as we understand it, the law that a person threatened must take to his heels and run ...."[18] Indeed, there are instances where this "duty to retreat" cannot apply. As a matter of principle therefore, where withdrawal or other avoidance methods, are not practicable the individual, in order to prevent imminent and serious harm to himself is permitted to undertake a pre-emptive

[13][1969] 2 All E.R. 856; *Cf.*, McInnes [1971] 3 All E.R. 295; Field [1972] Crim. L.R. 435

[14]As to whether present English criminal law on self-defence is based on common law principles or laid down by statute, see the views of, Smith and Hogan, Criminal Law, 5th ed. (1983) 326; C. Harlow, Self-Defence: Public Right or Private Privilege [1974] Crim. L.R. 528

[15]*Kabiruddin* v *Emperor*, 35 Cal. 368; see also, *Jairam Mahton* v *Emperor*, 35 Cal. 103

[16]Generally, for the old common law rules relating to justifiable force, see Russell on Crime, 12th ed. (1964) at pp. 434-457. See also, *Alingal* v *Emperor* 28 Mad. 454. C.P. Bird, The Times, March 18, 1985

[17]*Supra*, n. 3

[18]*Supra*, n. 13 at p. 858H

strike; ample authority exists for this proposition at common law.[19] However, it must be noted that as a general rule retreat is still required by the common law today although it seems to be subsumed under the rule requiring reasonableness of the self-defence as stated by Edmund-Davies L.J. in *McInnes*[20] viz that "a failure to retreat is only an element in the consideration on which the reasonableness of an accused's conduct is to be judged." It is of course, a question of fact whether there existed an immediate threat to safety or life? Was it practicable to avoid conflict? Was it open to the individual threatened to have recourse to other defensive measures? Was he aware of all this?

However, it does mean that when one has sure and ample warning of an attack, one should have recourse to the protection of the public authorities when available and not rely on one's own efforts. This point seems to be crucial - surely a man threatened with attack ought to seek police protection, or at least to inform the police of the threats? For it is only when the attack were sudden and there was no opportunity to inform anyone in authority then the principle of self-defence should become available. This statement finds statutory support in section 99(3) of the Penal Code. The position however, is not quite so under English Law in interpreting the case of *Field*.[21] The defendant was warned that certain men with whom he had had a quarrel were going to attack him. He stayed where he was, allowing these men to find him. He was attacked and in the course of the struggle the defendant stabbed one of them fatally. The court rejected the contention that the defendant had a duty to avoid confrontation by leaving the place [or informing the police about it]. The

[19]Early cases include, Chaplain of Gray's Inn's Case (1400) Y.B. 2 Hen. IV fo. 8, pl. 40; *Bar Foot* v *Reynolds* (1721) 2 Str. 953; Symondson (1896) 60 J.P. 645; Chisam (1963) 47 Cr. App. R. 130; See also, *Devlin* v *Armstrong* [1971] N.I.L.R. 13; A.G.'s Reference (No. 2 of 1983) [1984] 2 W.L.R. 465

[20][1971] 3 All E.R. 295 at p. 300; cf. Smith and Hogan, Criminal Law (6th ed.) at p. 326, "... simply a factor to be taken into account in deciding whether it was necessary to use force and whether the force used was reasonable"

[21][1972] Crim. L.R. 435; cf. *Beatty* v *Gillbanks* (1882) 9 Q.B.D. 308; *Hyde* v *Graham*, 1 H. & C. 503

defendant did not forfeit his liberty to use force in self-defence by remaining where he knew he would be attacked! This decision has led Ashworth J. to conclude that, "... the *Field* principle accords excessive protection to the so-called liberties of the subject, and that good order and human rights should be prohibited by a *prima facie* duty to inform the police about threats of imminent violence. This would at least signify an effort by the defendant to avoid an expected conflict, whereas the *Field* principle makes no contribution to the minimisation of violence."[22] *Quaere:* whether there exists a material difference between the accused remaining passive where he was and where he actively sought the company of his adversary? The answer given by a Wyoming Court seems to favour the greater liberty of law-abiding citizens to go about their business lawfuly as a matter of public policy. In the early case of *State* v *Bristol*,[23] the accused had been threatened with attack. He armed himself and went to a bar knowing full well that his potential assailant would be there drinking. The court in its judgment reasoned as follows:

> "The state thinks that he should have gone home instead of going to the restaurant. ... And, ethically speaking that perhaps is what he should have done .... [But] the restaurant was a public place. It was in itself not unlawful or wrongful act for the defendant to go there. If it was wrongful, it was made so because [his adversary] had made wrongful and unlawful threats ... But the point here under consideration involves ethics and public policy as well. It involves the balancing of the interests between freedom of movement and the restraint thereof. It involves the question whether or not the law can afford to encourage bullies to stalk about the land and terrorize citizens by their mere threats. We hesitate to lay down a rule which would do that."

[22]*Supra*, n. 2 at p. 296. Cf. a duty to report threats of violence to the police has received some recognition in cases involving duress e.g. Hudson and Taylor [1971] 2 Q.B. 202, and Law Commision Working Paper No. 55, "Criminal Law: Defences of General Application," p. 13.
[23](1938) 53 Wyo. 304.

Similarly in *State* v *Evans*,[24] the court ruled that a person whose life is being threatened may arm himself and knowingly go into the vicinity of the threatening party; and that the mere fact that he does so in the expectation of being attacked will not deprive him of the right to take life in self-defence. It observed,

> "The fact that the defendant expected an attack did not abate one jot or tittle his right to arm himself in his own proper defence, not to go, where he would, after thus arming himself."

However, is it not the case that the right to take life in self-defence is founded on necessity? Is there therefore any real necessity when the threatened party seeks out his adversary for the sole purpose of provoking by his presence, an execution of the threat? For it has been stated thus, "But if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace."[25]

Under section 99(3) of the Code, this would certainly be the case, *viz.* that such a person cannot set up self-defence if there is time to have recourse to the public authorities for help: *Mulla & Ors.* v *Emperor*.[26]

2. **Proportionality and Reasonableness**

The second requirement is that the amount of force should have been no more than necessary for the purpose of self-defence. "We take one great principle of the common law to be, that though it sanctions, the defence of a man's person, liberty and property against illegal violence and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the

[24]28 S.W.R. (Mo.)
[25]Anon. YB 21 Hen. VII, 39, pl. 50.
[26]89 I.C 158 (Oudh); See also *Queen-Empress* v. *Pragg Dutt*, 20 All. 459.

restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."[27] Section 99(4) provides: "The right of private defence in no case extends to the inflicting of more harm than is *necessary* (emphasis added) to inflict for the purpose of defence." [This principle finds expression also in sections 100, Exception 2 to section 300]. This limitation is generally referred to as the requirement of "proportionality and reasonableness" which demands a sense of proportion between the harm inflicted and the harm thereby prevented. For, the right of private defence is intended to be one of defence and not of punishment. How much harm is necessary is a very difficult question to answer!

The principle of reasonable proportionality plays a restrictive and vital role in the law of self-defence. It requires essentially a rough approximation between the apparent gravity of the attack or threatened attack and the style and severity of the defensive actions. This rule is based on sound policy considerations. Otherwise, the infliction of death or serious injury might in theory be justifiable if it were the only way of preventing a relatively trivial assault. Or, "disproportionate violence may indicate that the assault by the deceased was used to cloak an act of revenge."[28] It is a principle which flows from the "human rights approach, inasmuch as the liberty of a person attacked to use such force as is necessary is curtailed out of respect for the attacker's right to life and

[27]The Royal Commision on the Law Relating to Indictable Offences (1879, C. 2345), p. 11 and at p. 44 it highlighted this requirement of proportionality by citing the example that otherwise it "would justify every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault." See also, *Plunkett* v. *Matchell* [1958] Crim. L. R. 252; *R.* v. *Abraham* (1973) 57 Cr. App. R. 799; *People* v. *Dwyer* [1972] I.R. 416 (Irish Supreme Court).

[28]I. Elliott, Excessive Self-Defence in Commonwealth Law: A Comment (1973) 22 I.C.L.Q. 727.

physical security."[29] There is ample authority that this principle of proportionality forms part of the modern English criminal law[30] and under the Code.[31]

It is quite clear that given the fact that "necessity" and "proportion" are the guiding principles upon which absolute self-defence rests and that the accused should have acted within these parameters in order to suceed in his plea, is this to be tested on the facts -

a) as they were, as the jury (or judge[32]) finds them to have been, or

b) as the jury (or judge) finds the accused reasonably believed them to be,[33] or

c) as the jury (or judge) finds the accused believed them to be?

Proportionality is not measured by objective considerations.[34] Compelling authority exists to show that it is the

[29]Ashworth, Self-Defence and the Right to Life [1975] C.L.J. 282 at p. 297. See also P. Smith, "Excessive Defence" [1972] Crim. L.R. 524; Section 37(2) of the Criminal Code of Canada.

[30]Cf. Provocation in *Mancini* v. *D.P.P.* [1942] A.C. 1, at 6-7; Lee Chun Chuen [1963] A.C. 200; *Palmer* v. *R.* [1971] A.C. 814 at p. 831; under the Firearms Act 1968: *Taylor* v. *Mucklow* [1973] Crim. L.R. 750, where the accused aimed a loaded airgun at a builder who was demolishing brickwork on the accused's property. He was convicted. The divisional court made this general observation: "For anyone to argue nowadays that a loaded firearm was a suitable way of restraining the kind of bad temper exhibited by the builder was to show a lack of appreciation of modern trends and dangers."

[31]*A.G.* for *Ceylon* v. *K. Don John Perera* [1953] A.C. 200; *Vijayan* v. *P.P.* [1975] 2 M.L.J. 8; *Govindasamy* v. *P.P.* [1976] 2 M.L.J. 49.

[32]Trial by jury in Singapore was abolished in 1969 - See Molly Cheang, "Jury Trial - The Singapore Experience" (1973) University of Western Australia Law Review, 120.

[33]This is often phrased "on the facts as the jury finds the accused reasonably and honestly believed them to be."

[34]One could also however find authority for the objective formula. An instance is the dictum of Lord Simon in *Walker* [1974] 1 W.L.R. 1093 where he regarded "as an essential element of the plea of self-defence that the accused should use no more force than a reasonable man, in all circumstances, would have considered reasonably necessary to defend himself, his family or his home."

accused's reasonable belief as to the necessary force that is crucial.[35] This position recognises the fact that in the heat of the moment, the accused could not be expected to weigh the nature of the force necessary with any precision. One should try and place oneself in the position of a man faced with an attack, for as the Supreme Court in the United States through Holmes J. observed that, "detached reflection cannot be demanded in the presence of an uplifted knife."[36] Indeed, this balance between means and end cannot be expected to possess mathematical exactitude. Commissioner Stanley of the Court of Appeals of Kentucky has captured this benevolent understanding in the following words, "Man-made law is not blind to human nature; at least to self-preservation. So one is not held accountable for taking the life of another in resistance to an attack which from its nature creates a reasonable apprehension of imminent danger of losing one's own life or of suffering great bodily harm.... But the person under attack is not required to measure the force necessary to protect himself with as much exactness as an apothecary would drugs on his scales. The measure is what in the exercise of a reasonable judgment under the circumstances is required to avert the danger. That is all the law demands."[37] In a local case, *Reg.* v *Cumming*,[38] a householder and his guest were aroused by sounds of burglars. Coming downstairs in the darkness the householder saw a man he took to be a burglar holding a spear close to his guest. Thinking that his guest was being threatened, he fired and killed the man who

[35]English authorities include, Rose (1884) 15 Cox C.C. 540, per Lopes, J.; Chisam (1963) 47 G. App. R. 130; *Palmer* v. *R.* [1971] A.C. 814; Australian cases - Howe (1958) 100 C.L.R. 448; Viro (1978) 18 A.L.R. 313; Canadian cases - *R.* v. *Ogal* [1928] 3 D.L.R. 627; *R.* v. *Gee* (1982) 68 C.C.C. (2d) 516.

[36]*Brown* v. *U.S.* (1920) 256 U.S. 335 at p. 343; Edmund-Davies L.J. stated the position as follows in McInnes [1973] 3 All E.R. 295 at p. 302, "If there has been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action." He was quoting from Lord Morris's statement in *Palmer* v. *The Queen* [1971] 1 All E.R. 1077 (P.C.) at p. 1088; [1971] A.C. 814. See also. *R.* v. *Shannon* (1980) 71 Cr. App. R. 192; Attorney-General's Reference (No. 2 of 1983) [1984] 2 W.L.R. 465.

[37]*Silkes* v. *Commonwealth* (1947) 304 Ky. 429; 200 S.W. 2d. 956.

[38](1891) S.L.R. (N.S.) 42.

turned out to be one of his servants. The questions left to the jury were (1) was there such a threat, or attempt by the armed man to commit a murderous or seriously dangerous assault on the guest as would cause a reasonable apprehension on the part o f the householder of death of grievous hurt to the guest. (2) Was there any reasonable possibility of defending the guest, and avoiding his death or grievous hurt, short of shooting the armed man?[39] The jury found the accused not guilty.

The extent to which the exercise of the right of self-defence is justified under the Code depends very much on the reasonable apprehension of death or grievous hurt to the person exercising the right. The crucial element is the apprehension perceived by the accused; it does not matter whether the injuries inflicted on him are trivial or whether he had any injuries at all![40] In injuring another in self-defence, there must exist two factors: there must be no more harm inflicted than is necessary for the purpose of defence and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence. However, it is settled law that in determining whether an accused was in danger of death or grave bodily injury so as to make his act justifiable, the court must view the circumstance from the accused's standpoint at the time they reasonably appeared to him. Quite clearly, the subjective perception[41] of the amount of force necessary is the criterion of proportionality. The Code contains a subjective formulation emphasising the accused's belief as to the necessity of self-defence in the circumstances in which the accused was placed at the time. Therefore, a person need not be in actual imminent peril of his life or of grave bodily harm before he may attack his assailant. It is

[39]Cf. Gladstone Williams (1984) 78 Cr. App. Rep. 276; Cousins [1982] 2 W.L.R. 621; *Barrett* v. *Barrett* [1980] Crim. L.R. 642.
[40]*Bishen Singh* v. *Emperor* (1929) Lah. 443; 31 G.L.J. 47; Kesvalu Naidu, Inre, (1930) in M.W.N. 502.
[41]*Cf.* McInnes [1971] 3 E.R. at 295 at p. 301; *Palmer* v. *The* Queen [1971] 2 W.L.R. 831; *Edwards* v. *R.* [1973] A.C. 648.

sufficient if he has reasonable ground to believe and does believe so; and kill his assailant if that be necessary to avoid the apprehended danger, though it may afterwards turn out that there was in fact neither design to do him injury nor danger that it would be done. Indeed, facts unknown to him but proved before the court at the trial, should not be taken into account and made the basis for finding against the plea of self-defence.[42]

The law of self-defence justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is that of a person approaching another pointing a revolver and indicating an intention to shoot, the latter is justified in the curcumstances to even kill that other; such a justification is not avoided even if there is subsequently proof that the party killed was only intending and that the revolver in his hand was not loaded. As a general rule, it is immaterial to the right of self-defence whether the person exercising it knew the dangerous character and disposition of his assailant. It is sufficient that the "appearance" of immediate danger be "real" though the peril itself need not be.[43]

It is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot be expected to regulate the extent of force to be used by him by any precise standard. Neither is it possible to lay down any abstract standard beyond which it is unjustifiable to go. "It would be unreasonable to demand from a person, placed in peril, a calm calculation of the force and the number of his blows when his power of judgment is impaired by fear of impending danger."[44] In deciding whether the right of private defence has been exceeded, regard must be had to the manner of the attack, the means used in the attack and to the comparative physical strengths of the accused and the deceased respectively and also to the antecedents of the deceased and

[42]Kuppusami (1929) A.I.R. Mad. 748; 31 Cr. L.J. 452; Barisa A.I.R. (1959) Pat. 22.
[43]*Banku Behari Dutt* v. *Emperor*, 14 Cr.L.J. 442; 20 I.C. 602 (Cal.)
[44]Marudevi A.I.R. (1958) Kev. 8; Abu Zar A.I.R. Lah. 748; Kala Singh A.I.R. (1933) Lah. 167; *Abdul Manap* v. *P.P.* [1956] M.L.J. 214.

his conduct at the time of the occurrence. However, mere number or types of injuries caused will not *per se* mean that, the test of proportionality was exceeded.[45] As pointed out by Harrison, J. in *Imam Din* v. *Emperor*

> ".... it is easy to lose sight of the fact that in the heat of the moment and while defending one-self from a man armed with a stick it is practically impossible to calculate with accuracy the exact force which one is entitled to employ in self-defence. In cold blood it is possisble to say that a blow, which would have put out of action the right arm of the opponent, would have been quite sufficient to effect the desired object, but in the middle of a fight it is practically impossible to think this out and it may further be extremely difficult to make certain of only hitting a man on the right arm when he is moving about and presumably trying to get in another blow himself and delay may prove fatal."[46]

Indeed, the nature of the attack, the danger apprehended, the imminence of such danger and the real necessity of inflicting harm by retaliation for the purpose of self-defence are all matters to be taken into consideration in dealing with the issue of self-defence. "In determining whether the force used was reasonable the court will take into account all the circumstances of the case, including the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means."[47]

Excessive Self-Defence Under the Code

What happens when the accused in the exercise of the right private defence exceeds that right and voluntarily causes death. Under the Code the right of private defence extends

[45]Kalimuddin A.I.R. 1963 (5) Orissa 297. Compare however, example of cases where unnecessary harm were caused, exceeding the right of defence under the Indian Penal Code which include - (a) assault by defender after offender has fallen or is disabled or disarmed: Harbans 47 Cr. L.J. 358; Nga Tun 18 Cr. L.J. 284; (b) chasing the offender and attacking him: Saddhu A.I.R. (1939) Lah. 393; 40 Cr. L.J. 904; (c) use of excessive violence/use of deadly weapons when not necessary: Ramprasad A.I.R. (1919) Pat. 534; Nathan Singh EA.I.R. (1927) Lah. 730; 28 Cr. L.J. 487.

[46]86 I.C. 218; (1925) Lah. 514; 26 Cr. L.J. 730.

[47]Halsbury's Laws of England at p. 630; Marudochela Goundan, In re, (1931) M.W.N. 646.

to the voluntary causing of death, if the offence against which such right is exercised is one of those enumerated in section 100.[48] [The term "voluntarily" is defined in section 39. A person is said to cause an effect "voluntarily" when he causes it by means, whereby be intended to cause it, or by means, which at the time of employing those means he knew or had reason to believe to be likely to cause it].

Four conditions must be fulfilled under section 100 before the taking of the life of a person is justified on the plea of self-defence: (1) the accused must be free from fault in bringing about the encounter; (2) there must exist an impending peril to life or of grievous hurt, either real or apparent so as to create an honest belief of an existing necessity; (3) there must be no reasonable mode of escape by retreat; and (4) there must have been a necessity for taking life. These restrictions, it must be noted, are in addition to and not instead of those laid down in section 99 (discussed above). So even if the offence against which the right of private defence is exercised is one of those enumerated in section 100, one must not use more force than is necessary.

More specifically, section 300 Exception 2 merely mitigates the offence and reduces the homicide to one not amounting to murder:

> "Culpable homicide is not murder if the offender in the exercise, in good faith, of the right of private defence of person or property, exceeds the power given to him by law, and course the death of the person against whom he is exercising such light of the defence without pre-meditation, and without any intention of doing more harm than is necessary for the purpose of such defence." The illustration given to this provision is follows - "Z attempts to whip A, not in such a manner as to cause grievous hurt; A draws out a

[48]Namely, assault with its different compounds. What amounts to an "assault" is defined in section 457: "Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that be who makes that gesture or preparation is about to use criminal force (section 350) to that person, is said to commit as assault." Explanation - "Mere words do not amount to an assault. But the words which a person uses may gives to his gesture or preparations such a meaning as may make those gesture or preparations amount to an assault."

pistol. Z persists in the assault A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide."[49]

The above section however, does not operate as a complete defence but only a partial one. There are a number of requirements under this exception: (a) the offender must act in good faith, (b) in the exercise of the right of private defence of person or property, (c) exceed the power given to him by law (i.e. exceeded the right of private defence): (d) there must be no premeditation for causing the death; (e) there must be no intention of doing more harm than is necessary for the purpose of such a defence.

The framers of the Penal Code have designated homicide committed in excess of the right of private defence as voluntary culpable homicide.[50] They state: "Wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, it will always be expedient to make a separation between murder[51] and what we have designated as voluntary culpable homicide in defence. The chief reason for making this separation is that the law invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence. It prohibits such homicide indeed; but it authorises acts which lie very near to such homicide and this circumstance, we think, greatly mitigates the guilt of such homicide. It is to be considered also that the line between those aggressions which it is lawful to repel by killing and those which it is not lawful so to repel, is in our Code and must be in every

[49]See Semali A.I.R. (1960) Mad. 240; Lachmi A.I.R. (1960) Pat. 162. Cf. *Palmer* v. *The Queen* [1971] 1 All E.R. 1077 (P.C); *R.* v. *McInnes* [1971] 3 All E.R. 295. The Criminal Law Revision Committee in England recommended the introduction of a partial defence: Offences Against The Person, 14th. Report, Cmnd. 7844 (1980), para 288.

[50]Section 299 provides: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

[51]Section 300 provides: "Except in the cases thereinafter excepted, (There are seven exceptions) culpable homicide is murder -

(a) if the act by which death is caused is done with the intention of causing death; or

Code, to a great extent an arbitrary line, and that many individual cases will fall on one side of that line which, if we had framed the law with a view to those cases alone, we should place on the other .... We are, therefore, clearly of the opinion that the offence which we have designated as voluntary culpable homicide in defence ought to be distinguished from murder in such a manner that the Courts may have it in their power to inflict a slight or nominal punishment on acts which though not within the letter of the law which authorises killing in self-defence, are yet within the reason of that law."[52]

An important requirement under Exception 2 is the element of "good faith"[53] which section 52 defines as an act done with "due care and attention." "Good faith" is used both in connection with something done and in connection with something believed. So long as the accused honestly (although unreasonably) believe to be necessary, the doctrine of excessive self-defence should be available to the accused. This proposition finds growing support in England viz. *R.* v. *Gladstone Williams*;[54] *R.* v. *Ashbury*[55] and must recently the Privy Council decision in *Beckford* v. *R.*[56] (hearing an appeal from Jamaica). Questions of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. If he acted with due care and attention such as ought to be expected from a person in his position,

(b) if it is done with the intention of acausing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such without any excuse for incurring the risk of causing death, or such injury as aforsaid."

[52]Macaulay, Notes on Indian Penal Code (1898) Vol. I at p. 216. *Bhawoo Jivaji* v. *Mulji Dayal*, 12 Bom. 377.

[53]H. Singh A.I.R. (1960) Raj. 213.

[54](1983) 78 Cr. App. R. 276 overruling *Albert* v. *Lavin* (1981) 72 Cr. App. R. 178.

[55][1986] Crim. L. R. 258.

[56][1987] 3 W.L.R. 611. *Cf R.* v. *Williams* [1987] 3 All E.R. 411; *R.* v. *Whyte* [1987] 3 All E. R. 416; *R.* v. *O'Grady* [1987] 3 All E.R. 420.

in the circumstances in which he is placed, then he acted in good faith and not otherwise. A perfect judgment is not required; it does not similarly require any logical infallibility. As was observed by Twomy J. of the Rangoon Court, "leniency may be shown where the accused has acted in good faith, for the protection of the person or property, and has erred only in the degree of force or violence used or in acting too hastily."[57] The reason for this is that human nature, constituted as it is cannot be expected in an hour of peril to show unerring judgment and all that can be expected is that the person should have acted bona fide and without malice.

It is only if there is a right of private defence, which however, is exceeded that the offence of murder is reduced to culpable homicide provided the other requirements of Exception 2 are satisfied. If murder is committed and there is no right of private defence, the offence is not thus reduced. Of course, if a person who possesses a right of private defence in fact does no more than exercise it, he commits no offence. But if he exceeds the right; if, in other words, it was in fact unnecessary to kill, it is still a lesser offence than murder if his intention was to do no more harm than he believed necessary in the exercise of his right. The exception deals, in the concluding words, not with fact but with intention, and refers to circumstances in which a person does not take advantage of the right of private defence to kill with a vengeful motive but exceeds that right by inflicting fatal injuries where their infliction was in fact unnecessary.

The clause "without any intention of doing more harm than is necessary for the purpose of such defence" in the exception is a necessary corollary of section 99 which provides that the right of private defence in no case extends to the inflicting of more harm that it is necessary. The difference between these two provisions is that in order that the exception might apply injury actually inflicted must be more than was necessary - otherwise, the right of private defence would not be exceeded - but there must be no intention of inflicting more harm than is necessary for defence.

[57] *Nga Tun* v. *Emperor*, 17 Cr. L.J. 335; 35 I.C. 511.

Of course, if there is premeditation the exception does not apply.

It has been contended that this qualified defence of self-defence is an important concept in criminal liability. The rationale behind this rule is based on the argument that the moral culpability of a person who kills another in defending himself and who in good faith believes the force was necessary (although it was not) and who loses the plea of self-defence due to excessive force falls short of the moral culpability normally associated with murder. Those who support the doctrine of excessive self-defence argue on the basis that the moral culpability of an accused who over-reacts and kills in self-defence is more akin to manslaughter (culpable homicide under our Code) than murder[58] where the accused in good faith believes that the killing was necessary in his defence although from an objective standpoint his response was not reasonable. This is also founded on the legal consideration that an accused who uses excessive force to kill an assailant genuinely believing this action to be necessary in effecting self-defence lacks the requisite *mens rea* for murder. As Aickin J, in *R.* v. *Viro*[59] puts it, "[there is] a real distinction in the degree of culpability of an accused who has killed having formed the requisite intention without any mitigating circumstance, and an accused who, in response to a real or a reasonably apprehended attack, strikes a blow in order to defend himself, but uses force beyond that required by the occasion and thereby kills the attacker."

Mason J. in the same Australian case of *R.* v. *Viro* explains the rationale thus,

> "The notion that a person commits murder in these circumstances should be rejected on the ground that the result is unjust. It is more consistent with the distinction which the criminal law makes between murder and manslaughter that an error of judgment on the part of the accused which alone deprives him of the absolute shield of self-defence results in the offence of manslaughter."[60]

[58] *Cf. Zecevic* v. *D.P.P.* (1987) 71 A.L.R. 641 (Australian case) and see also, Nakafodi A.I.R. (1958) Ori. 113. Thomas A.I.R. (1957) Ker. 53.
[59] (1978) 141 C.L.R. 88 at p. 180; Cf. *Albert* v. *Lavin* [1981] 3 W.L.R. 955.
[60] (1978) 18 A.L.R. 257 (H.C.A.), at p. 297.

Similarly Smith points out that:

> "The moral culpability of the man who honestly believes that he needs to use lethal force to defend himself - no matter how mistaken his belief - is surely very much less than that of the man who kills deliberately and in cold blood. It is submitted that society ought to reserve its major condemnation for the cold-blooded killer, and to have the mistaken victim of an attack convicted of the same crime tends to weaken this condemnation."[61]

Furthermore under this partial or qualified defence, it will be open to the judge (or jury where there is one) to convict on the lesser offence of culpable homicide not amounting to murder, which may avoid a complete acquittal where it is felt that there is some culpability requiring punishment. Conversely, the doctrine of excessive self-defence may also avoid a "perverse" conviction for murder when culpable homicide not amounting to murder would be more just. And from the point of view of criminal punishment, such a "middle ground" approach as opposed to the "murder or nothing" verdict would permit the court to reflect the gravity of the culpability in the sentence it imposes.

There appears therefore considerable merit in having such a concept in criminal law. This aspect of the doctrine of self-defence recognises human reaction in much the same way as provocation which, as a partial defence recognises a verdict of culpable homicide not amounting to murder under Exception 1 to section 300 (i.e. manslaughter) notwithstanding an intent to kill. In other words, such recognition would avoid the anomaly of allowing a concession to an accused who acts on provocation but denying it to another who exercises the right to use some force for self-defence in circumstances

[61] Peter Smith, Excessive Defence - A Rejection of Australian Initiative [1972] Crim. L.R. at p. 533-4. See also Stanley Meng-Heong Yeo, The Demise of Excessive Self-Defence in Australia, [1988] I.C.L.Q. 1.

which make the precise measuring of his blows extremely difficult.[62]

Commencement and Continuance of Right of Defence

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues (section 102). In other words, the right of defence arises when a reasonable apprehension of danger commences such as would justify the particular kind of defence employed.

A man who is attacked by another who wears a sword is not justified in killing him on the chance that he may use the weapon, but if he sees him about to draw it, it is not necessary to wait till he does draw it.[63] The test in section 102 is invoked "as soon as a resasonable apprehension of danger to the body arises from an *attempt* or *threat* to commit the offence,"[64] i.e. the right of private defence comes into being only when some act is apprehended which amounts to an offence. Such right continues as long as such apprehension of danger to the body continues and ceases when there is no more danger. Thus, where a person shoots an assailant after the latter has thrown away his weapon and is turning away, he cannot justify his shooting on the ground of self-defence. Similarly, after the deceased had struck the accused with his fist and had been seized by a bystander and others interfered to stop the quarrel, the accused produced a pistol and shot at the deceased, he was held not to be entitled to plead the right of self-defence.

[62]See *R.* v. *Shannon* (1980) 71 Cr. App. R. 192; it is interesting to note that in an earlier case, the Crown Prosecutor was seeking the approval of the House of Lords of the qualified defence of excessive self-defence in Reference under s. 48A Criminal Appeal (New Zealand) Act 1968 (No. 1 of 1975) [1976] 2 All E.R. 937 exactly for this very reason. Also, see Law Reform Commission of Canada, Working Paper 33, Homicide (1984) at p. 71; N. O'Brien, Excessive Self-Defence: A Need for Legislation (1982-1983) 25 Crim. L. Q. 441, 451.
[63]*Queen* v. *Moizuddin* 11 W.R. Cr. 41.
[64]*Narain Das* v. *Crown* 3 Lah. 144; (1922) 23 Cr.L.J. 513.

However, in the exercise of this right a man is not only entitled to repel force by force, he is also allowed to pursue his assailant till, he finds himself out of danger and if in a conflict between them, he happens to kill his adversary, this is justifiable. Thus, in the case of *Musa bin Yusuf* v. *P.P.*[65] a man was attacked by another with a piece of iron, and in the course of the struggle the iron changed hands and the man first attacked struck his assailant on the head with the piece of iron and killed him. It was held by the Court of Appeal that the accused was not deprived of his right of private defence merely because the initial attack had been repelled. The Court observed that "the law in this country gives greater latitude to a person who is attacked than does the law in England. In England, if self-defence is to be successful, the attacked must attempt to disengage himself from the attack, and his killing the assailant is only excusable if there was no other way of saving his life."[66] The converse must necessarily be true *viz.* that no right of private defence can be exercised against an adversary who has been totally disabled or disarmed and from whom therefore there can be no reasonable apprehension of danger to body.[67] The rationale for this is that the right of private defence is for protection and not for punishment or retaliation; it is defensive not offensive. It is a limited right and must not be converted into a right of reprisal.[68] Thus it has been held that, if when all danger is past a man strikes a blow which is not necessary for his defence he is guilty of assault and battery.[69] Indeed, nothing that is done by way of punishment or chastisement is ever justifiable under law.

[65][1953] M.L.J. 70, at p. 71; See also, *P.P.* v. *Yeo Kim Bock* [1971] 1 M.L.J. 204.
[66]Cf. a more restrictive view by the Federal Court of Malaysia in *Lee Thian Beng* v. *P.P.* [1972] 1 M.L.J. 248 at p. 252 where Ong Hock Sim F.J. state, "It is clearly the law, there must be no alternative to its recourse."
[67]*Kunja Bluniyan* v. *Emperor*, 13 Cr. L.J. 481; 15 I.C. 281; *Abu Zar* v. *Emperor*, 36 Cr. L.J. 283; In re Nga Tun, 18 Cr. L.J. 284; 38 I.C. 316; *Harbans Singh* v. *Emperor*, 47 Cr. L.J. 358.
[68]*Sitaram* v. *Emperor*, 85 I.C. 731 (Nag.)
[69]*R.* v. *Driscolt*, Car. & M. 214.

Harm to Innocent Person(s)

Thus far we have dealt with the right of private defence against an aggressor or an offender. However, occasions may arise when this right of defence cannot be effectively exercised without risk of harm to an innocent person. This is acknowledged under the Codes. Hence, if in the exercise of the right of private defence against a deadly assault, the defender is so situated that he cannot effectually exercise that right without risk of harm to an innocent person, this right of private defence (under section 106) extends to the running of that risk. The illustration to this section is clear on this point: A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children. This situation should not however be confused with cases like *R.* v. *Dudley & Stevens.*[70] In that case there was no offence committed by the boy or anyone else, and consequently there could be no right of private defence. In cases envisaged in section 106 there is already a murderous assault and the innocent person(s) is accidentally killed while the right of private defence is being exercised.

The rule in section 106 justifies the taking of human life by accident, misadventure or misfortune while in the performance of a lawful act, exercising due care and without murderous intent.

Section 106, like the earlier sections 100 and 103, is also subject to section 99 - one must not use more force than is necessary.

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[70](1884) 14 Q.B.D. 273.