

---

## CONTENTS

---

<i>Author's Note</i>	vii
<i>Acknowledgements</i>	ix
INTRODUCTION	1
1 THE RATIONALE OF PRIVATE DEFENCE	11
1.1 The Distinction between Justification and Excuse	11
1.2 The Distinction between an Offence and a Defence	19
1.3 The Rationale of Private Defence from a Historical Perspective	30
1.4 Private Defence as an Excuse	36
1.5 Private Defence as a Justification	40
1.5.1. General; and the right to life	40
1.5.2 The Aggressor's Culpability as the Crucial Factor	44
1.5.3 The Test-Case of the Innocent Aggressor	49
1.5.4 The Autonomy of the Attacked Person as the Crucial Factor	60
1.5.5 Protection of the Social-Legal Order (In Addition to Protection of the Legitimate Interest of the Person Attacked)	67
1.5.6 Balancing Interests and Choice of the 'Lesser Evil'	73
1.5.7 The Right of the Person Attacked—Against the State— to Resist Aggression	77
1.5.8 Additional Approaches	81
1.5.8.1 General	81
1.5.8.2 Punishment of the Aggressor	82
1.5.8.3 The Duty of the Attacked Person Towards Society	83
1.5.8.4 Random Chance	84
1.5.8.5 The Attack as a Sufficient Factor	85
1.5.8.6 Personal and Limited Justification	87
1.5.8.7 The Consent of the Aggressor	88
1.5.8.8 'Moral Specification' and 'Factual Specification'	89
1.5.8.9 Theories of Justification (In General) and the 'Object Theory' (In Particular)	89
1.6 The Proposed Rationale	90
1.6.1 General	90
1.6.2 Cases that Should not be Included within the Justification of Private Defence	91
1.6.3 The Proposed Rationale	93

*Contents*

2 PRIVATE DEFENCE: A COMPARATIVE ANALYSIS	107
2.1 General	107
2.2 Private Defence in English and American Law	108
2.2.1 The English Law	108
2.2.2 The American Law	112
3 THE ELEMENTS OF PRIVATE DEFENCE	117
3.1 General	117
3.2 The Scope of Application of the Defence	117
3.3 Which Values may be Justifiably Defended?	122
3.4 The Source of Danger and the Character of the Attack	128
3.4.1 General	128
3.4.2 The Scope of the Attack	131
3.4.3 Resistance to Illegal Arrest	132
3.4.4 The Consent of the Victim	137
3.4.5 Holding Property by Force with a Bona Fide Claim of Right	138
3.4.6 An Attack by Omission	139
3.5 The Severity of Danger	140
3.5.1 General	140
3.5.2 The Probability of the Occurrence of Danger	142
3.6 The Necessity Requirement	143
3.6.1 General	143
3.6.2 Considerations in the Evaluation of Necessity and Secondary Requirements Derived from Necessity	147
3.6.3 The Suitable Rule	150
3.7 The Immediacy Requirement	150
3.7.1 General	150
3.7.2 The Content of the Immediacy Requirement	153
3.7.3 Resistance to the Immediacy Requirement	157
3.7.4 The Issue of Human Traps	163
3.8 The Proportionality Requirement	166
3.8.1 General	166
3.8.2 The Content of the Proportionality Requirement	173
3.8.3 The Nature and Significance of the Proportionality Requirement in Anglo-American Law	176
3.8.4 Deadly Defensive Force	178
3.8.5 A Threat by the Attacked Person to Use Force	186
3.8.6 Mutual Influences between Defensive Force and Punishment?	188
3.9 The Duty to Retreat	192
3.9.1 General	192

*Contents*

3.9.2	A Theoretical Examination in Light of the Rationale of Private Defence	193
3.9.3	The Duty to Retreat in Anglo-American Law	198
3.9.4	Special Cases	202
3.9.4.1	Attacks in the Dwelling	202
3.9.4.2	Attacked Person is a Law Enforcement Officer	202
3.9.4.3	Agressor who is Not Responsible	203
3.9.4.4	Circumstances of Self-Defence Caused by Own Fault	203
3.9.4.5	Defence of Another Person	205
3.9.5	Proposals for Reform	205
3.9.6	The Suitable Arrangement for the Issue of Retreat (In Light of the Rationale of Private Defence in General and The Principle of Proportionality in Particular)	207
3.9.7	Duties in Addition to the Duty to Retreat	215
3.10	The Mental Element	217
3.10.1	General	217
3.10.2	The Requisite Mental Element in Light of the Distinctions between Justification and Excuse, and between the Definition of the Offence and Justification	218
3.10.3	The Requisite Mental Element in Light of the Rationale for Private Defence	226
3.10.4	The Mental Element as Reflected in Comparative Law	227
3.10.5	The Content of the Requirement for a Mental Element: Awareness versus Purpose	231
3.10.6	An Impossible Attempt?	235
4	INTERNAL DISTINCTIONS IN PRIVATE DEFENCE	239
4.1	General (and Self-Defence)	239
4.2	Defence of Another Person	240
4.2.1	General	240
4.2.2	The Defence of Another Person and the Classification of Private Defence as a Justification	241
4.2.3	The Defence of another Person and the Rationale of Private Defence	243
4.2.4	Defence of Another Person in Anglo-American Law	245
4.2.5	Summary	250
4.2.6	A Duty to Rescue	251
4.3	Defence of Property	252
4.3.1	General	252
4.3.2	Repossession of Property	257
4.4	Defence of Another Person's Property	263
4.5	Defence of the Dwelling	266

*Contents*

4.5.1	General	266
4.5.2	Definition of ‘The Dwelling’	273
4.5.3	Resistance to Dispossession of the Dwelling and Repossession of the Dwelling after Dispossession	275
4.5.4	Putative Defence of the Dwelling	277
4.5.5	Conclusions	277
5	ADDITIONAL ISSUES IN PRIVATE DEFENCE	279
5.1	General	279
5.1.1	External Issues	279
5.1.2	General Issues	280
5.1.3	Special Issues	281
5.2	Putative Private Defence	282
5.2.1	General	282
5.2.2	The Mistaken Inclusion of Putative Private Defence within Actual Defence	283
5.2.3	The Reasonability Requirement	285
5.2.4	A Mistake that Stems from a State of Intoxication	293
5.2.5	A Mistake of Law	294
5.2.6	Unreasonable Mistakes—Full Criminal Responsibility?	295
5.3	Deviation from the Conditions of Private Defence	296
5.3.1	General	296
5.3.2	The Australian Case Law	298
5.3.3	The English Case Law	302
5.3.4	The American Case Law	304
5.3.5	Existing and Proposed Legislation	306
5.3.6	The Proposed Arrangement	307
5.4	Situation of Private Defence Caused by the Actor Bearing Guilt	310
5.4.1	General	310
5.4.2	Examination in Light of the Rationale for Private Defence	312
5.4.3	‘Solutions’ that do not Solve the Problem	315
5.4.4	The Case of the ‘The Grand Scheme’	316
5.4.5	Arrangements in Different Legal Systems	318
5.4.6	The Israeli Case Law	323
5.4.7	The <i>Actio Libera in Causa</i> Doctrine	327
5.4.8	Establishment of a Specific Offence as an Alternative Arrangement?	337
5.5	The Defensive Action of Battered Women	339
5.5.1	General	339
5.5.2	The Conditions of Private Defence and the Issue of the Battered Woman	342

*Contents*

5.5.3	Expert Testimony Regarding 'The Battered Woman Syndrome'	345
5.5.4	The Rationale of Private Defence and the Issue of the Battered Woman	348
5.5.5	The Suitable Solution for the Issue of the Battered Woman	350
	EPILOGUE: THE PROPOSED LAW	355
	<i>Bibliography</i>	361
	<i>Index</i>	369