

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 23 (2016-2017)  
Issue 2 *William & Mary Journal of Women and  
the Law*

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Article 4

1-15-2017

## To Kill or Not to Kill: (When) That Is the Question? A Legislative Treatise on Battered Israeli Women Facing a Dead End Road

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### Repository Citation

Hava Dayan, *To Kill or Not to Kill: (When) That Is the Question? A Legislative Treatise on Battered Israeli Women Facing a Dead End Road*, 23 Wm. & Mary J. Women & L. 219 (2017), <https://scholarship.law.wm.edu/wmjowl/vol23/iss2/4>

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TO KILL OR NOT TO KILL: (WHEN) THAT IS THE  
QUESTION? A LEGISLATIVE TREATISE ON BATTERED  
ISRAELI WOMEN FACING A *DEAD* END ROAD

HAVA DAYAN\*

ABSTRACT

This Paper seeks to examine the legal framework in which the self-defense exception is applied in Israel in circumstances of domestic violence. The Paper scrutinizes the issue with reference to recent amendments to the Israeli Penal Code pertaining to the ‘castle-defense’ which grants a person defending his home and property-wide protection from criminal liability. In light of these amendments, the lack of legislative harmony between the exception to criminal liability applied when defending property and the deficient protection afforded to victims of ongoing, severe domestic violence, is striking. Aside from a critical review of Israeli legislation on the issue, this Paper suggests an appropriate legal framework to apply the self-defense exception in circumstances of domestic abuse. The proposal creates legal harmony within the self-defense exceptions in Israeli criminal law, taking the path of legislative amendments enacted recently in the Australian state of Victoria, as well as several states in the United States.

INTRODUCTION

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I would like to thank Professor Emanuel Gross and my colleagues in the Faculty of Law, University of Haifa, for their insightful comments. An earlier draft of this Paper was published in the Hebrew language, in *Law Watch—The Haifa University Law Faculty’s Online Journal*.

## INTRODUCTION

On the afternoon of February 18, 1994, shots were heard in the northern town of Kiryat Shmone. It emerged that Carmela Bukhbut, a town resident, had killed her husband Yehuda.<sup>1</sup> Thirteen years later, at the other end of Israel, gun shots were heard in the early hours of the morning of January 13, 2007.<sup>2</sup> At his solitary southern ranch, Shai Dromi had killed Khalad Abu Trash.<sup>3</sup>

Despite the geographical distance and the passage of time, the two cases demonstrate many similarities: Shai Dromi and Carmela Bukhbut were both charged with manslaughter and unlawful possession of a firearm (Shai Dromi used a Remington rifle that belonged to his father while Carmela Bukhbut used a Glilon rifle assigned to her son, a soldier).<sup>4</sup> Both parties were accused of firing the entire magazine.<sup>5</sup> It was noted in both cases, however, that the accused did not empty the magazine and reload, rather, they performed a continuous, single shooting sequence that was over in an instant (in the *Bukhbut* case, the rifle was set to automatic while with Dromi, the shooting lasted about 1.5 seconds).<sup>6</sup>

In both cases, the prosecution argued that the accused did not face a deadly threat to themselves or others (in Dromi's case, nor to his property) and that the decedents were, at the time of their demise, attempting to flee the scene (or in Bukhbut's case, a hiatus in the confrontation).<sup>7</sup> The courts attributed emotional turmoil, not the homicidal intent needed to support a murder conviction, to both instances, and noted that the decedents were not themselves innocent. Dromi killed Abu Trash amidst Abu's attempt to burglarize and steal a flock of sheep, and Bukhbut killed her husband following an instance of physical, verbal, emotional, and psychological abuse.<sup>8</sup> On the other hand, the accused were described positively: Dromi was called the "salt of the earth," and the decedent's brother and father testified to Bukhbut's noble character in light of the violence

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1. CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM (1994) (Isr.).

2. CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

3. *Id.*

4. See CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM (1994) (Isr.); CrimA 6353/94 Carmela Bukhbut v. State of Israel PD (1995) (Isr.); CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

she sustained.<sup>9</sup> In mitigation, the courts also noted that the accused were both victims of repeated acts of violence,<sup>10</sup> and the society and police helplessness in uncovering preventative measures.<sup>11</sup>

Another similarity between the two cases is that they both stirred public emotion and legal debate, which ultimately translated into legislative proposals (Bill No. 41 and Bill No. 99) and amendments to the Criminal Code (Nos. 44 and 98, respectively).<sup>12</sup> Amendment No. 44—approved following the *Bukhbut* incident—at best reduces the sentence of women convicted of murder, but does not afford any relaxation of case law requirements in the event that they resort to self-help measures.<sup>13</sup> Amendment No. 98, on the other hand (the amendment adopted following the *Dromi* incident), grants the individual an extended right to self-defence of his property at his residence or place of business (on which grounds Dromi was acquitted of the manslaughter charge brought against him).<sup>14</sup> Despite the similarities, one tragic and disturbing difference exists between the two verdicts: Dromi was acquitted of manslaughter and went home.<sup>15</sup>

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9. CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM (1994) (Isr.); CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

10. In Shai Dromi's case, the affair was yet another break-in following many previous ones, though not necessarily perpetrated by Abu Trash, as the identities of the perpetrators in the previous burglaries were unknown. Also, with the Carmela Bukhbut affair, this was one additional violent episode in a long and continuous saga of aggression on behalf of her husband, Yehuda Bukhbut. See CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.); CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM (1994) (Isr.).

11. The Supreme Court Justices said of Carmela Bukhbut: "[I]n the small settlement in which she lived it was an open secret. Her husband's parents, his brother, sisters and the environment, all knew of it but remained silent. She walked around like a shadow, carrying the marks of abuse on her body and face, never smiling." CrimA 6353/94 Carmela Bukhbut v. The State of Israel PD 647 (1995) (Isr.). In the case of Shai Dromi, the District Court Justices said: "[T]o understand the occurrence of the event which is the subject matter of these charges, I find it appropriate to start with the testimony of the Accused, in so far as it relates to the story of the 'Shem Farm' and life there . . . the realisation of the dream wrapped up in significant daily existential hardship, taking account of the war of survival and continuous confrontation with waves of violent intrusions that only got worse over time. The Accused further related, that above and beyond this suffering he was forced to deal with the executive authority's—the Israeli Police Force—inability, according to his claim, to eradicate or minimise this wave of violence, being helpless." See CrimA (BS) 1010/07 State of Israel v. Dromi PD 19 (2009) (Isr.).

12. Draft Bill Amending the Penal Code, 5755-1995, HH No. 41 (Isr.); Draft Bill Amending the Penal Code, 5786-2008, HH (Knesset) No. 99 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98 (Isr.).

13. Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.).

14. Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH No. 98 (Knesset).

15. See CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

Bukhbut, on the other hand, was convicted of manslaughter and sentenced to seven years in prison.<sup>16</sup>

The empirical comparison of the two incidents in this Article is intended principally to illustrate the extant difficulties in the application of the doctrine of self-defence to the cases of battered women. For this reason, this Article shall not deal with circumstances in which the state fails to adequately fulfill its role to defend the life and property of its citizens,<sup>17</sup> even though the issues are likely deserving of a separate discussion. Similarly, and for argumentative reasons, the comparison of the legislative amendments brought about by these two cases, with specific references to Amendment No. 98 (the castle-defence), is principally intended to illustrate the present willingness of the legislator to relax the traditional requirements for applying the self-defence exception in unique circumstances and to infer from that the requisite comparable relaxation in the context of domestic abuse. Though the comparison of the two cases raises additional, general questions in relation to exceptions to criminal liability, this Article shall focus on self-defence and particularly the self-defence of battered women as an exception to criminal liability in Israel. The second part of the Paper will offer a draft proposal to amend the Criminal Code and to adapt the self-defence exception appropriately to the circumstances surrounding domestic violence.

## I. THE SELF-DEFENCE EXCEPTION IN THE CRIMINAL CODE

The right of the individual to defend himself in certain circumstances by action taken to repel an assault is ingrained in the origin of the doctrine of self-defence in Israel.<sup>18</sup> Such defence is labeled as “self” defence because the action is not taken by the authorities charged with the protection of public order, but rather by a defendant himself.<sup>19</sup> The general legislative anchor is to be found in Basic

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16. Following appeal to the Supreme Court, the sentence was reduced to three years imprisonment. CrimA 6353/94 Carmela Bukhbut v. The State of Israel PD (1995) (Isr.) (Justice Kedmi, dissenting, that the seven-year sentence should not be reduced).

17. See JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 8–9 (G.D.H. Cole trans., Dover Publications, Inc. 2003) (1762) (regarding the social compact between the individual and the state).

18. As with the defence of necessity, a person acts in this defence “not out of a fighting spirit but because the action was forced upon him.” A. Anker & R. Kanai, *Defence and Necessity Following Amendment No. 37 of the Penal Code*, Plilim C’ 8 (1993). See S.Z. Pheler, Punitive Law Foundations Part B 372, 414–21 (1987).

19. See Pheler, *supra* note 18.

Law: Dignity and Freedom of the Individual.<sup>20</sup> More specifically, the doctrine of self-defence is codified in Section 34 of the Israeli Penal Code,<sup>21</sup> which pretty much follows the wording and legal interpretation of the doctrine in common law. A review of the past legislative proposals (Bills Nos. 45, 41, 38 & 99) and Penal Code amendments (Nos. 37, 39, 44 & 98) reveals a growing tendency of the Israeli legislator to extend the exceptions to criminal liability insofar as they relate to the self-defence privilege.<sup>22</sup>

This expansionary tendency of the self-defence exception was expressly stated in Amendment 37 of the Penal Code,<sup>23</sup> which refers to self-defence as an important sociopolitical value<sup>24</sup> worthy of a complete lack of apologetic tone.<sup>25</sup> Therefore, in circumstances of individual defence, “one does not require an exemption from criminal liability,”

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20. The law states in Section 2 that “[t]here shall be no violation of the life, body or dignity of any person as such”; Section 3 states that “[t]here shall be no violation of the property of a person”; and Section 4 states that “[a]ll persons are entitled to protection of their life, body and dignity.” Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391, § 2 (Isr.).

21. Penal Code, 5737-1977, SH No. 5737 § 34 (Isr.) (“No person shall incur criminal liability for an act that was immediately required to repel an unlawful attack that carried real danger to his own life, limb or property or to that of another; however, a person does not act in self-defence where he brought about the attack by his own misconduct foreseeing the possibility of how events may unfold.”).

22. Draft Bill Amending the Penal Code 5755-1995, HH No. 45 (Isr.); Draft Bill Amending the Penal Code, 5755-1995, HH No. 41 (Isr.); Draft Bill Amending the Penal Code 5751-1991, HH No. 38 (Isr.); Draft Bill Amending the Penal Code, 5786-2008, HH (Knesset) No. 99 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5754-1994, HH No. 39 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.); Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH No. 98 (Knesset).

23. Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 (Isr.); Draft Bill Amending the Penal Code, 1571-1991, No. 232 (Isr.). The Bill was proposed in 1991 by a group of parliamentarians from right wing parties in the background of the *Intifada* during which the Arab population of the territories occupied by Israel in 1967 rose up in rebellion. The Amendment was approved in 1992. *Id.*

24. On this matter, member of parliament MK Levin argued: “Exercising the right to self-defence is a prime social value, and one cannot start from the premise that the person bares [sic] criminal liability from which he may be excused. Instead, one must state clearly: he bares [sic] no criminal liability.” MK Oriel Lin, Israeli Member of Parliament, Parliamentary Debate (Mar. 16, 1992). Moreover, he added: “The whole approach as if he is liable and committed a criminal offence and that he is being treated here with mercy and exempted from punishment is utterly wrong. He is a person who did something of great value to society, for without the right to self-defence, no [society] in the world may exist.” *Id.*

25. A tone which accompanied the retrospective excuse given only once the criminal classification of the attack was removed by the court in recognition of the act as a defending act, namely as “Self-Defence.” The amendment therefore replaced such legal approach of ‘retrospective excuse’ with an approach that considers the idea of self defence as ‘justified’ in principle. See Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 (Isr.).

but rather “one does not incur criminal liability at all.”<sup>26</sup> Moreover, Amendment 37 extended the scope of the exception,<sup>27</sup> relaxed the requirements for its application,<sup>28</sup> and granted the courts authority to reduce the mandatory sentence prescribed by statute.<sup>29</sup>

However, notwithstanding the Israeli legislator’s expansionary trend, the courts continue to carefully examine the existence of six requirements prior to excusing a defendant from criminal liability<sup>30</sup>:

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26. See Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 (Isr.).

27. Application of the self-defence exception was extended so that it applies not only to a person’s right to save those “who are under his protection” but also to a person’s right to defend any other person, be they who they may. Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 (Isr.). For that reason, the original version: “injury to his person, dignity or property, or to the person of others who are under his protection” was replaced with: “danger to his own life, limb or property or that of another.” *Id.* This approach, which exists in Hebraic law in the duty “nor shall you stand by idly when your neighbor’s life is at stake” was extended and codified following Penal Code Amendment Bill No. 45. *Leviticus* 19:16 (The New American); Draft Bill Amending the Penal Code 5755-1995, HH No. 45 (Isr.); Thou Shall Not Stand Aside When Mischief Befalls Thy Neighbour Act, 5758-1998, SH No. 1670 § 1(A) (Isr.) (containing a duty to rescue and assist in these words: “A person is under a duty to assist another who, in front of his very eyes, owing to a sudden event, is in severe and immediate danger to his life, his bodily integrity or his health, when such assistance is within his power, without taking any risk himself or endangering another.”).

28. From the Knesset (Israeli Parliament) debates it seems that they probably felt there was no need to elaborate especially on the requirements for the application of the self-defence privilege, both by reason of the desire to extend the defence and to grant the courts a zone of discretion. See MK Dan Meridor, Israeli Member of Parliament, Knesset Debate (March 3, 1992), <http://main.knesset.gov.il/Activity/plenum/Pages/SessionItem.aspx?itemID=160518> [<https://perma.cc/9BMH4JQ2>] (“[S]uch a proposal can certainly fit in the approach taken by the Supreme Court.”). Also, the defence applies by definition only in the event that an active attack already took place. *Id.* (using the term “to repel an attack”).

29. The amendment granted the courts the authority to reduce the sentence in cases in which the defence could not be applied by reason of the accused having “deviated from the confines of reasonableness in the circumstances.” See Draft Bill Amending the Penal Code (Legislative Amendments), 5752-1992, HH No. 37 § 22 (B) (Isr.). This amendment in fact incorporated the idea that was earlier proposed in the Penal Code Amendment No. 38. Draft Bill Amending the Penal Code 5751-1991, HH No. 38 (Isr.). Penal Code Amendment 249 granted the Courts “discretion as to the appropriate punishment, when a person acts subjectively to defend himself . . . but objectively it is held that his conduct did not meet the requirements of the law.” Draft Bill Amending the Penal Code 5451-1991, HH No. 249 (Isr.). The proposal gave the judges authority to weigh subjective and substantive facets that were unique to the circumstances and that would justify deviation from the principle of mandatory punishment. Draft Bill Amending the Penal Code 5751-1991, HH No. 38 § 22(B) (Isr.) (“If the Court concludes that a person committed an offence that carries a mandatory sentence pursuant to Sections 22 & 22A, but that he must be criminally liable for having exceeded in his conduct the confines of reasonableness in the circumstances to prevent danger or because the damage or injury which he inflicted were out of proportion vis-à-vis the damage or injury which he sought to prevent, the Court is entitled to not impose the mandatory sentence, but rather a more lenient one.”).

30. See *CrimA (BS) 1010/07 State of Israel v. Dromi* PD 5–7 (2009) (Isr.); see also *CrimA 8133/09 Shahar Mizrachi v. State of Israel*, PM 5771 669, 676 (2010) (Isr.).



1. Lack of aggression in the actor's defending action;
2. The defending action being immediate;
3. Danger to the defending actor being tangible;
4. Reasonableness of the defending action (the consequences of the defending action cannot outweigh the consequences they were intended to prevent);
5. The defending action being the less harmful alternative, including the duty to retreat whenever possible;
6. Lack of prior misconduct on behalf the defender.<sup>31</sup>

## II. THE SELF-DEFENCE EXCEPTION—THE CASE OF CARMELA BUKHBUT

The rationale underlying these requirements seems to ensure the preservation of law and order, but an operative gender-based examination reveals that laying down these requirements creates a depressing, exasperating reality for women in general, and battered women in particular.<sup>32</sup> Five out of the six requirements do not fit the social-cultural-educational foundation that defines the typical behaviour of women, let alone women in circumstances of domestic abuse.<sup>33</sup>

For instance, abused women react uniquely at a stage of quiet appeasement or when the immediate danger has subsided.<sup>34</sup> Such delayed reaction does not correspond to case law requirements of immediacy and repelling an attack, even though a requirement to react to the aggressor immediately is impossible or would intensify the violence perpetrated against her.<sup>35</sup> A narrow, legalistic, concrete examination of the events surrounding the murder (detached from

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31. *Id.*

32. See, e.g., Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. REV. 623, 623, 629 (1980); see also Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1797–98 (2000); see also R. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988); see also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMAN'S DEVELOPMENT 5 (Harvard Univ. Press 1982); see also CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34 (Harvard Univ. Press 1987).

33. See Schneider, *supra* note 32, at 629–31, 633–36 (describing social stereotypes about women, particularly misconceptions regarding battered women, and traditional requirements of self-defense, including reasonable defensive force and risk of imminent harm).

34. M.J. Willoughby, Comment, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?*, 38 U. KAN. L. REV. 169, 184, 191 (1989).

35. Therefore, "[t]he woman chooses to defend herself at a time she feels less threatened, in the intervals between the cycles of violence." See Emanuel Gross, *The Battered Wife—Is It Not Time For The Criminal Law To Protect Her?*, The Praklit 112 (1998); Barak-Erez, *The Reasonable Woman*, Plilim F 124 (1997); Schneider, *supra* note 32, at 634.



the cumulative, cyclical and fatal dynamic of domestic violence) leads to the erroneous conclusion that it was neither reasonable nor justifiable to respond with deadly force because the woman faced no immediate, objective danger.<sup>36</sup> The legal consequence of such a conclusion is that the woman's reaction is categorised as an act of aggression, and therefore, a criminal offence.<sup>37</sup>

Especially disturbing is the requirement to retreat.<sup>38</sup> This requirement causes many to question why battered women do not leave.<sup>39</sup> Sadly, a woman remaining with an abusive partner testifies more to the difficulties associated with the option to abandon (*inter alia*, concern for children, economic dependency, lack of alternatives, the authorities' helplessness and more), than it does to a woman's positive choice to remain.<sup>40</sup> It is also surprising that retreat is a requirement even though it is known that the abused woman's retreat from the scene does not prevent a continuation of the attack. Rather, it only postpones it,<sup>41</sup> and at times at the price of exacerbating it.<sup>42</sup> Moreover, it is important to remember that the requirement to retreat when directed at battered women is at odds with the fact that the "scene" is her home. Such a requirement in itself constitutes an affront to a woman's basic right to live in a home of her own as of right and not by the grace of others; it is therefore inappropriate to revoke this right, even though the scene is property shared with the same person attacking her.<sup>43</sup> Since a similar recognition of such legal right already has been expressed in Israel, there, nothing is to

36. Schneider, *supra* note 32, at 634.

37. Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Woman Who Kill*, 36 AM. U. L. REV. 11, 31 (1986).

38. *Id.* at 29 n.106 (noting that escape may not be a realistic option).

39. ELIZABETH M. SCHNEIDER, BATTERED WOMAN & FEMINIST LAWMAKING 77 (2000).

40. *Id.* at 77-79; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 15 (1991); see, e.g., Bilski Leora, *Battered Women: From Self Defence to Defending The Self*, Philim F, 5, 23-24 (5759-1997).

41. See, e.g., R. A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batters*, 71 N.C. L. REV. 371, 392-93 (1993) (noting one victim's lack of a realistic alternative to killing her batterer); see also Gross, *supra* note 35, at 120. In the general context of such a requirement Pheler argues that retreat cannot be demanded where it may increase the exposure of the attacked person to the assailant's attack, or when such a requirement "only shifts the location of the assault with the retreat from the scene, and perhaps its timing, (but) does nothing to prevent the assault itself." See Pheler, *supra* note 18, at 430.

42. See Mahoney, *supra* note 40, at 58 (noting that a woman threatening to leave a relationship can be extremely dangerous for the battered woman).

43. Thomas Katheder, Case Note, *Criminal Law—Lovers and Other Strangers: Or, When Is A House A Castle?—Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants—State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), 11 FLA. ST. U. L. REV. 465, 473 (1983) (explaining that a preponderance of states find the "privilege of non-retreat available regardless of" co-occupancy of a residence by the victim and batterer).

prevent such aligned recognition from being applied in the context of defensive acts of abused women.<sup>44</sup>

Sadly, in Carmela Bukhbut's case, the District Court ruled out self-defence and held: "we are not dealing with a case of self-defence during an aggressive incident, neither should this case be viewed as provocation, objectively or subjectively, as that term is defined in law."<sup>45</sup> Somewhat differently, when hearing the appeal against the sentence, the Supreme Court held that the case could be viewed as one of "ongoing provocation."<sup>46</sup> Supreme Court Justice Dalia Dorner, who recognised the legal doctrine of "ongoing provocation," noted in her judgement:

First of all, the special severity and unnumbered incidents of abusive acts perpetrated by the decedent on his wife, the Appellant, cannot be ignored. There was apparently an intensive sequence of beatings, including injuring of the Appellant with various implements, and terror, intimidation and humiliation, worse than which can barely be imagined . . . the beatings that the husband inflicted on the Appellant adjacent to the shooting do not support provocation of themselves. However, in legal literature and English common law, the concept of provocation based upon the cumulative affect of violence, which causes the victim to erupt, is recognised.<sup>47</sup>

Though the recognition of "ongoing provocation" did not excuse Carmela from criminal liability, it is appropriate for its poetic justice. Such recognition exposed and displayed Yehuda Bukhbut's violent deeds in the court's proceedings, thus turning the spotlight somewhat to a more proper discussion of the deceased's actions' cardinal contribution to the unfortunate result before the courts (which resulted in his absence from the legal hearing in his matter).

The District Court Justices also claimed that Bukhbut "deviated in her actions beyond the bounds of reasonableness."<sup>48</sup> One of the most difficult problems often faced by applying the exception from criminal liability to the actions of a battered woman is her use of a deadly weapon against the husband who usually hits and injures her with his fists or with the use of non-deadly home instruments.<sup>49</sup>

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44. See Prevention of Domestic Violence Act § 2, 5751-1991 (Isr.) (allowing for an injured partner to be protected in their home even if the aggressive partner has rights in the same property).

45. CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM 277 (1994) (Isr.).

46. CrimA 6353/94 Carmela Bukhbut v. State of Israel PD (1995) (Isr.).

47. *Id.*

48. CrimA (Nz) 29/49 State of Israel v. Carmela Bukhbut, PM 277 (1994) (Isr.).

49. *Id.*

Though case law's reasonableness requirement aims to prevent the further escalation of violence, it is inappropriate to strictly demand such a requirement within circumstances of predetermined inequality, in which the attacked woman is not only weaker but also lacks experience in exchanging blows.<sup>50</sup>

The requirement that the accused make out a case of tangible life-threatening circumstances is highly problematic in the context of abused women. The threat to their lives does not emanate from a single or incidental transient event, but rather from a permanent subjective feeling fixed by reason of the unique, violent circumstances in which they live.<sup>51</sup> Also, from an objective point of view, the tangible danger is not necessarily to be found in the events surrounding the killing (which are deemed relevant to the judicial decision). Rather, the tangible danger is in the gradual escalation and the endless cycle of violence.<sup>52</sup> Thus, even though it is not always possible to pinpoint a critical, acute event leading to the battered woman's reaction, the view that this is a passing danger that may not materialize must be doubted and disputed, to say the very least.<sup>53</sup>

Ultimately and lamentably, the abovementioned incongruence between the current law (along with the traditional requirements of precedent) and the characteristic response of battered women, carries obvious fateful legal consequences. Women who carry out the characteristic reaction in such circumstances shall be convicted of manslaughter (if not murder) and be imprisoned for lengthy custodial sentences in spite of the saga of torment which afflicts their lives.<sup>54</sup>

### III. SELF-DEFENCE IN THE SHAI DROMI CASE

The Israeli legislator has, of late, significantly relaxed the requirements set down by case law in relation to the defence of property

50. Gross, *supra* note 35, at 114; Barak-Erez, *supra* note 35, at 122 (arguing that when dealing with a predetermined power imbalance "the use of a deadly weapon may be a necessary default option"); see also A. McColgan, *In defence of Battered Women Who Kill*, 13 OXFORD J. OF L. STUDIES, 508, 524 (1993).

51. See L. WALKER, *THE BATTERED WOMAN* 55 (1979) (describing the cycles of outburst and escalation of violence to female spouses.).

52. On the necessity to view the entire saga of abuse and violence as relevant to the examination of the immediate background of the assault event; see also D. Nicolson & R. Sanghui, *More Justice for the Battered Woman*, 146 NEW. L. J. 1122 (1995).

53. Since "paying attention to past experience [from which] it must be learnt that the opposite is in fact true, meaning, the probability of the threat being exercised is absolute and certain." Gross, *supra* note 35, at 110; see also McColgan, *supra* note 50, at 508-29.

54. Even if they receive a more lenient sentence under Section 300a(c), which allows for the imposition of a lighter sentence than life imprisonment for murder. See *infra* Section IV.

in one's residence.<sup>55</sup> Penal Code Amendment Number 98,<sup>56</sup> also known as "The Dromi Act" or the "castle-defence," expressly prescribes special treatment for a residence and extends the right of a person to defend his property not only in his home but also at his business or agricultural farm.<sup>57</sup> The Amendment constitutes part of a trend by the Israeli legislator to broaden the right to self-defence in general,<sup>58</sup> and to protect the agricultural sector in particular.<sup>59</sup>

When we incorporate the judicial interpretation given in the *Dromi* case into the words of the castle-defence amendment, it is apparent that the amendment in its entirety (including the judicial interpretation) only left three of the six traditional legal requirements for exemption from criminal liability on a claim of self-defence. The remaining legal requirements include: the defending action being immediate and of a repelling nature and there having been no prior misconduct on the defender's behalf.<sup>60</sup> On the other hand, the Amendment relaxed (or repealed) the defender's requirement to have been in tangible danger, to have attempted to avoid the attack by retreating, and to have chosen a reasonable defending action.<sup>61</sup> It should be emphasised that the legislator ultimately

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55. Draft Bill Amending the Penal Code, 5768-2008, HH (Knesset) No 98 (Isr.).

56. *Id.* (adding the self-defence of a residence, known as the "castle-defence," as a separate clause) ("34J (1) (a) No person shall incur criminal liability for any act that was immediately required in order to repel an intruder or person who entered a residence, business or fenced agricultural farm, belonging to him, or to another, with the intention of committing a crime, or a person attempting to so intrude or enter. (b) The provisions of the forgoing subsection (a) shall not apply if—(1) the act was clearly unreasonable, in the circumstances, to repel the intruder or enterer; (2) the person brought about the intrusion or entry by his own misconduct, foreseeing the possibility that events would unfold. (c) For these purposes, 'Agricultural Farm', including pasture and area used to store equipment and vehicles on an agricultural farmstead.").

57. See Boaz Sangero, *Shall the Justification Turn into an Excuse by Favour? Defending a Residence ("The Dromi Act" and Judgement in the Dromi Case) as a Test Case of the Rationale Justifying Self-Defence and Israeli Case Law*, *Mishpat VeMimshal* 13, 93, 121 (2011) (critiquing this expansion of self-defence).

58. See *infra* Section V.

59. A trend which received expression in the bills and amendments intended to assist the agricultural sector in coping with repeated thefts. See Draft Bill Amending the Penal Code, 5756-1995, HH No. 46 (Isr.) (containing a stiffening of punitive measures for cattle and livestock theft); Draft Bill Amending the Penal Code, 5728-2008, HH (Gov.) No. 100 (Isr.) (aggravating the classification of the offence of theft above a certain value from a misdemeanour to a crime, *inter alia*, in order to provide "adequate response to the theft of agricultural equipment and infrastructure."); Draft Bill Amending the Penal Code, 5768-2007, HH (Knesset) No. 97 (making an attempt to cope with the thefts in the agricultural sector by doubling the fixed sentence set down by law for theft of agricultural produce and equipment from two to four years, thus equalizing the punishment with the rate set in Amendment No. 46 in relation to theft of cattle and livestock).

60. Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98.

61. *Id.*

chose to explicitly relax only one of the case law requirements for the application of the castle-defence: the “element of reasonableness.” Therefore, the legislator was willing to apply the exception from criminal liability to those who also exceeded the boundaries of reasonableness in their reaction, provided that the act was not “clearly unreasonable in the circumstances.”<sup>62</sup> However, viewed in light of its concomitant judicial interpretation, the Amendment eventually relaxed the requirements of such self-defence over and above that which were precisely and expressly intended and approved by the legislator.<sup>63</sup> In this context, the *Dromi* court softened and relieved the castle-defence requirements, while further relaxing the reading of two other requirements in Amendment Number 98. The following requirements appeared in the first version of the bill,<sup>64</sup> but were not adopted by the legislator: the repeal/relaxation of the duty to retreat (in so far as the attack takes place in the defender’s residence),<sup>65</sup> and the legal determination of an irrebuttable presumption of real risk of injury to life and limb in the case of a residential intrusion.<sup>66</sup>

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62. *Id.*

63. *Id.*

64. Note that Amendment No. 98 ultimately approved the less radical version of the original Bill. See Draft Bill Amending the Penal Code, 5768-2008, HH (Knesset) No. 99, Version B. Even though Amendment No. 98 creates a new self-defence in connection with the self-defence of the home and business (the castle-defence), it does not state anything expressly in relation to the repeal of two requirements of case law: the requirement to retreat and the requirement of being in imminent danger. *Id.* The first version of the bill (that later was not approved), proposed that Section 34(J) be marked (a), and after it shall be inserted: “(b) in the event that the assault was an intrusion or entry to a residence with the intention to commit an offence, the person being attacked shall be deemed as he, or anyone with him, were facing a real threat to their life or limb, unless proven otherwise.” Draft Bill Amending the Penal Code, 5768-2008, HH (Knesset) No. 99, Version A. Section 2 of that same version proposes an amendment pursuant to which Section 34O will be marked (a) and after it shall be inserted: “(b) in the application of Section 34J, a person’s deeds shall not be construed as unreasonable in the circumstances, solely for the reason that he failed to retreat from his residence.” *Id.*

65. See CrimA (BS) 1010/07 State of Israel v. Dromi PD 9–10 (2009) (Isr.) (“It is true that in the Bill . . . when two versions of the proposed legislation were presented, eventually version A was not approved . . . but it is still possible to deduce from the version enacted, that broadened the protection of a person being attacked in his own home, the legislator’s intention to fortify a person’s status in his own home, not only by not requiring the person to retreat from his home . . . but that he would be entitled . . . to commit action to repel the intruder . . . even though the Israeli legislator did not literally and explicitly void or null the duty to retreat under circumstances of repelling an intruder in his home, the intention of the legislator is clear and unequivocal from the wording of the Act and from the purpose of the Amendment as it transpires from the Bill’s explanatory remarks, and its professional parliamentary discussions in the Constitution, Law and Justice Parliamentary Committee.”).

66. It is possible that the judicial interpretation of the presumption of real danger relies not only on the unapproved version of the bill, but also on the wording of the amendment itself, which applies the claim of self-defence also to the mere attempt to

Combining the legislator's wording of the castle-defence both with its judicial interpretation and with its abovementioned predominant inclination to male behavioural patterns, we may consequently and bitterly conclude that Israeli self-defence doctrine corresponds almost exclusively with male behavioural patterns.<sup>67</sup> Indeed, current requirements extensively exempt men from criminal liability in general, and men defending their property in particular, but do not afford similar considerable exemptions when addressing women in general, and battered women in particular.<sup>68</sup> If only for the sake of legal harmony, a parallel and somewhat similar doctrinal flexibility is justified. Therefore, it is necessary to formulate a justified adaptation of the self-defence doctrine, with regard to the unique and excruciating circumstances of domestic violence.

#### IV. SELF-DEFENCE LEGISLATION IN DOMESTIC VIOLENCE CIRCUMSTANCES

The original Bill (Amendment Number 41 to the Penal Code) set forth limitations to the determination of homicide in circumstances of diminished responsibility, and in fact actually removed certain acts from the ambit of the offence of murder.<sup>69</sup> The proposed legislation suggested the imposition of reduced criminal liability on anyone committing homicide under circumstances of extreme distress close to, but not coincident with, insanity, self-defence or necessity, or in other situations of extreme hardship.<sup>70</sup> Thus, rather than imposing complete and absolute liability on a person who committed murder, the Bill offered partial and limited excuse.<sup>71</sup> Especially relevant to our issue is the clause that permits diminished responsibility "in

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enter the residence. See Draft Bill Amending the Penal Code, 5768-2008, HH (Knesset) No. 98 (adding as a requirement: "with the intention to commit an offence, or a person attempting to so intrude or enter."). See *CrimA (BS) 1010/07 State of Israel v. Dromi PD 12 (2009) (Isr.)* ("The legislator saw fit to further and broaden the right of a person to defend his body and property in his home from burglars or persons attempting to break into his premises. Thus, even if the burglary was not accompanied by an assault on the homeowner, the action would be deemed as if it were an assault, even if the burglary itself did not constitute a real threat to the life of the person possessing . . . it can therefore be deduced, from this provision, that the actual break in to his home exposes the possessor to the possibility of real danger to his life and property, all the more so should he seek to defend his property, since then he could be exposed to danger to his person, even though initially the burglar did not intend to injure the body of the person attacked.").

67. See Schnieder, *supra* note 32, at 635–36 (discussing the conceptually masculine foundation of the legal doctrine of self-defence).

68. *Id.*

69. Draft Bill Amending the Penal Code, 5755-1995, HH No. 41 (Isr.).

70. *Id.*

71. *Id.*



circumstances of severe emotional distress, owing to severe abuse, directed at him or a member of his family, by the victim of the offence.”<sup>72</sup> MP Libai, who presented the Bill on behalf of the government to the Israeli Parliament, said in this context:

The Bill expresses a principled opinion, that a person who is caught up in one of the very difficult circumstances detailed in it and as a result kills another, does not stand in the same moral category as a murderer. That's why justice demands that he not be convicted of murder, with all the social stigma accompanying such a conviction, and the Court passing sentence upon him being required of necessity to impose a life sentence . . . diminished responsibility applies, under the proposed Bill, also to killing under circumstances of emotional distress, in which a person is trapped as a result of abuse suffered at the hands of a relative, whom he killed. Our intention is mainly directed at the abused partner who reaches, in extreme despair, a point where he kills the abusing partner. In relation to women, the literature used to name their emotional condition “Battered Wife Syndrome”. The law does not currently deal with those types of circumstances . . . the legislative proposal expresses a social stance according to which, even though the relative should not be absolved of liability for killing his relative, even when he seriously abused him, justice, as mentioned, senses that he should not necessarily be convicted of murder, and the Court should be allowed, when passing sentence, to take into consideration the grave circumstances that brought him to do the terrible deed which he did.<sup>73</sup>

Lamentably, the original bill that was intended to grant diminished criminal responsibility to Carmela Bukhbut and other hard-pressed battered women in similar circumstances was not enacted. In its place, the legislator adopted Penal Code Amendment Number 44 which prescribes, by Section 300(a)(c), that:

Notwithstanding the determination of Section 300, a lighter sentence may be imposed from the sentence prescribed therein, if the offence was committed whilst the accused was under conditions of severe emotional hardship, owing to severe and ongoing abuse committed upon him or a member of his family, by the person whose death the accused had caused.<sup>74</sup>

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72. *Id.* § 301.a(4).

73. MP Libai, Minister of Justice, Parliamentary debates of Amendment Bill No. 41 (Diminished Responsibility), Address Before Israeli Parliament (Knesset) (Aug. 1, 1995).

74. Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.).



In fact, the approved amendment rejected the notion of “diminished responsibility” and settled for “reduced sentence,” for which the court could impose a lighter sentence than the punishment prescribed by law.<sup>75</sup> The Chairman of the Constitution, Law, and Justice Committee explained during the parliamentary debates why the notion of “diminished responsibility” was rejected, saying:

The Committee was unanimous in its decision, exclusively from a moral point of view, that, firstly, we do not accept the notion of diminished responsibility . . . a situation of diminished responsibility gives the wrong signal, one unwanted by society. When a person kills another, when he takes his life, we are unwilling to accept the notion of diminished responsibility, but we all accepted the idea of reduced sentence . . . all of us, religious and secular, right and left, who participated in the drafting of the law, were unwilling to deviate from this moral-cultural-educational statement, according to which for murder a person be sentenced to life imprisonment.<sup>76</sup>

The compromised amendment that was eventually enacted does make it possible to impose a lighter sentence on such female defendants than those prescribed by law.<sup>77</sup> Alongside the reduction in sentence, however, such an amendment leaves intact the accompanying disgrace of a murder conviction. The difference between “diminished responsibility” and “diminished sentence” is therefore not a semantic one but a perplexing and troubling one. An act that only allows for a reduced sentence means a conviction for murder, with all that that entails: a lengthy sentence, social stigma, and criminal disgrace.<sup>78</sup>

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75. The amendment ultimately approved was harsher also in the context of the appropriate circumstances for imposing a lighter sentence. *See* Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.). It did not settle for circumstances of “severe abuse,” as was proposed in the earlier draft of the law Draft. Bill Amending the Penal Code, 5755-1995, HH No. 41 (Isr.). Instead it adopted a stricter requirement of a double test consisting of “severe and ongoing abuse.” Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.).

76. MK David Zucker, Words of the Chairman of the Constitution, Law & Justice Parliamentary Committee, Address Before the Israeli Parliament (Knesset) Following Approval in the Committee (Aug. 1, 1995).

77. A recent narrowing judicial trend can be discerned from a recent judgement requiring the addition of an immediate causal link (at the level of motive), between the ongoing abuse and the murder itself, in order to apply Amendment No. 44 that allows imposition of a lighter sentence. *See* Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.). The Supreme Court rejected a petition for an additional hearing of this new requirement in the context of domestic abuse. CrimA 1855/05 Frishkin v. State of Israel, PM 5768 (2008) (Isr.).

78. Indeed in the context of the criminal disgrace which these woman are left with, Member of Parliament MK Yael Dayan (who served at that time as a member of the

Even if the proposals of the Team to Reform Homicide Offences in Israel were to be accepted,<sup>79</sup> the distressing legislative state of affairs with regard to battered women would still remain. The team's proposals in the context of domestic violence suggest the restoration of the original legislative bill from 1995 (which, for example, settles for the diminished criminal responsibility of such defendants).<sup>80</sup> The proposals relate to a homicide performed "under severe emotional distress owing to severe and ongoing abuse inflicted upon him or a member of his family, by the person whose death the accused had caused."<sup>81</sup> The team's recommendation as it pertains to battered women relates homicide under circumstances of diminished responsibility<sup>82</sup> to a clause which describes situations that, though they fall under the definition of murder, are worthy to be treated as homicide under diminished responsibility<sup>83</sup> because they encompass a lesser degree of guilt. In fact, such recommendations would change the title from diminished sentence to diminished criminal liability, while leaving untouched the current wording of Section 300(a)(c) as was enacted by a compromise following the 1995 Bill.<sup>84</sup>

This means that the core improvement offered in the team's proposal pertains, at most, to a semantic change while leaving the

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Constitution, Law and Justice Committee in the Israeli Parliament) sought to circumscribe the position presented by the chairman of the committee. MK Yael Dayan, Israeli Member of Parliament, Parliamentary Debates (Aug. 1, 1995) ("I want to remind the committee chairman that I was in the minority. We were not unanimous in deciding on diminished responsibility as opposed to reduce [sic] sentence. I agree that murder is murder is murder, but I nevertheless was of the opinion that there are cases in which the stigma of a murderer is inappropriate and I refer to the example given over and again of Carmella Bukhbut. Under the new statute, in similar cases of prolonged abuse, they shall receive a lighter sentence, but since diminished responsibility was not approved in the committee, they shall remain murderers as the judge will have discretion only with regard to imposing a lighter sentence. I was, and still am, of the opinion that diminished responsibility does exist in cases of extreme distress and therefore also the stigma of a murderer should correspond to the lighter sentence.").

79. See REPORT OF THE TEAM FOR THE EXAMINATION OF THE FOUNDATIONS OF HOMICIDE OFFENCES, JERUSALEM (2011) [hereinafter REPORT OF THE TEAM] (proposing, in relation to the offences of murder and manslaughter, *inter alia*, to create two categories for the offense of murder—basic murder and murder in aggravated circumstances—and three offences of homicide: homicide in circumstances of diminished responsibility, reckless homicide and homicide at the request of the victim).

80. Which, as mentioned, was raised in the Carmella Bukhbut incident but was not approved. See Draft Bill Amending the Penal Code, 5755-1995, HH No. 41 (Isr.).

81. REPORT OF THE TEAM, *supra* note 79, at 34.

82. REPORT OF THE TEAM, *supra* note 79, at 30–39.

83. A lesser degree of guilt, owing to circumstances relating to the act or the perpetrator. This section includes five acts of homicide determined as worthy of a lesser liability: homicide under provocation, while mentally disturbed, while slightly deviating from the standard of reasonableness, with indifference, and as mentioned in this Article's case: with severe emotional distress owing to abuse.

84. REPORT OF THE TEAM, *supra* note 79.

overall essential legal position almost untouched,<sup>85</sup> or at best, slightly improved. After all, both legal extenuations offered by the mentioned reform already exist within the prosecution's routine handling of such legal cases<sup>86</sup> (no murder convictions<sup>87</sup> and no mandatory life sentences, for example).<sup>88</sup> Hence, the proposed reform delivers no significant message of hope to battered women. Furthermore, even according to the extenuated reform recommendations, a criminal conviction shall continue to be recorded with both its lengthy sentence of twenty years and its criminal disgrace, alongside its emotional and social consequences.<sup>89</sup> After all is said and done, such proposals would do nothing to rectify the irritating flaws in the doctrine of self-defence in circumstances of domestic violence. Nor do the proposals address the lack of legislative harmony between the different requirements applied in the castle-defence exception and the exemption of criminal liability on the ground of self-defence in circumstances of domestic violence.

Indeed, the juristic query of exceptions to criminal liability in this context is undoubtedly complex, but a more appropriate legal

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85. The slight improvement is due to the legal proposal to classify the offense as manslaughter (with diminished responsibility), instead of murder (with reduced sentence).

86. The prosecution usually finds it difficult to prove in such circumstances premeditation (the element necessary in order to convict for murder pursuant to the Israeli criminal code), and therefore tends to charge with the offense of manslaughter from the outset. Similarly, with mandatory life imprisonment for murder: current legal conditions in Israel (made possible, as mentioned, following Penal Code Amendment No. 44) enable deviation from mandatory life sentence for the offence of murder in circumstances of prolonged severe abuse, so that in actual fact such defendants do not face the risk of life imprisonment. Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44 (Isr.).

87. As mentioned, according to the reform recommendations there will be two categories for a murder conviction: murder with *mens rea* of intent or indifference for which the maximum punishment of a life sentence will be imposed, and the offence of murder in aggravated circumstances on account of which the court may, in certain circumstances, exercise discretion not to impose a mandatory life sentence.

88. The reform team was aware of the criticism passed on the inflexibility of a mandatory life sentence for murder, especially in cases "and in actions that existed in special circumstances that do not morally fit the same degree as typical acts of murder." REPORT OF THE TEAM, *supra* note 79, at 30. The reform team was of the opinion that a mandatory life sentence for murder offences that almost cannot be deviated from is punishment that does not allow for flexibility and decision making according to the specific circumstances of the case, and thus at times does not fit the level of guilt of the deed. *Id.* The team recommended, therefore, to untie the judges' hands in relation to the appropriate punishment for murder. *Id.*

89. The reform team was split on the issue of the maximum sentence appropriate for homicide in circumstances of diminished responsibility. The Prosecution Service and representatives of the legislation and advisory department were of the opinion that the appropriate maximum sentence is 20 years, whereas the Public Defender's Office was of the opinion that the appropriate maximum sentence would be 15 years. One way or the other it is a lengthy custodial sentence. REPORT OF THE TEAM, *supra* note 79, at 37-39.

arrangement is worth striving for. Battered women, in their somber and tragic life tale, face their destiny bare-handed, while their own reactions entail potentially catastrophic legal consequences. Hence, this Paper prescribes a new defence: self-defence in circumstances of domestic violence. This criminal liability exemption will more properly address the extreme circumstances whereby the accused act in cases of ongoing, serial, domestic abuse. The proposed amendment would allow defendants to plead self-defence in circumstances of domestic violence and receive the protection of criminal law. The requirement of retreat, reasonableness, and immediacy in the suggested defence will more appropriately answer and address the unique circumstantial characteristics of domestic violence.

Before the details of the proposal are elaborated, it is worth mentioning that the wording of the proposal uses the masculine form solely for reasons of fairness and equality. In spite of the fact that statistically the majority of victims of domestic violence are women, the defence should, in all fairness, be applied to anyone acting under such circumstances, regardless of gender. The suggested amendment is in line with the current trends of the Israeli legislator (the broadening of the self-defence doctrine), and legislative reforms in developed nations that relate to the application of self-defence in circumstances of abuse and domestic violence.<sup>90</sup>

#### V. PROPOSED AMENDMENT TO THE PENAL CODE

Penal Code Bill (Amendment—Self Defence in Circumstances of Domestic Violence), 2011-5770.<sup>91</sup>

Inserting Section 34(J)(2):

1. In the Penal Code, 1977-5737, after Section 34(J)(1) insert:

“Self Defence in Circumstances of Domestic Violence”

34(J)(2). (a) No person shall be criminally liable for an act necessary to repel an attack in circumstances of domestic violence.

(b) When attacked under circumstances of domestic violence, the person attacked shall be

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90. See *supra* notes 75–102 and accompanying text.

91. Penal Code, 5737-1977, § 34(J)(1) (Isr.).

deemed to have been in real and tangible danger to life or limb, unless proven otherwise.

(c) No person's action shall be deemed unreasonable in circumstances of domestic violence, for failing to retreat from his place of residence.

(d) The provisions of subsection (a) shall not apply if the act was clearly unreasonable, in circumstances of domestic violence, to prevent the injury.

(e) For these purposes, "Domestic Violence" shall mean—violence directed at a person by a family member.

(1) "Family Member"—as defined in the Prevention of Domestic Violence Act, 1991-5751.

(2) (a) "Violence"—A serial and continuous act which includes, but is not limited to, one of the following:

- i. Sexual Abuse
- ii. Physical Abuse
- iii. Psychological Abuse, which includes, but is not limited to, one of the following:

- a. Verbal Abuse
- b. Intimidation
- c. Threatening Harassment
- d. Injury to Property
- e. The exposure of a minor or helpless person to violence upon a member of his family

(b) Notwithstanding subsection (2)(a) a single act of violence could be deemed "Domestic Violence" by reason of its extreme and degrading nature.

## VI. EXPLANATORY REMARKS REGARDING THE PROPOSED AMENDMENT

Section 34(J)(2)(a) proposes to not impose criminal liability on a person who committed an act to repel an attack in circumstances of domestic violence. This proposition is in line with the current legislative trend as expressed by Amendment No. 37 (which broadened the Israeli doctrine of self-defence).<sup>92</sup> It is also in line with the "justification"<sup>93</sup> approach, according to which a person does not incur criminal liability at all in circumstances in which he did not perform an illegal act, but rather, performed a moral and justifiable act.<sup>94</sup> This approach differs from the "excuse" approach in the context of battered women, whereby the mere defensive act is deemed as unlawful.<sup>95</sup>

Though at the end of the judicial proceedings the defendant will be excused from criminal liability for her "unlawful acts,"<sup>96</sup> such acquittal in practice leaves the conviction standing with all the social and emotional implications that go along with such, even when sentenced to no actual punishment. The acquittal is intrinsically intertwined with attributing flaws to the battered women's morality and reasonableness.<sup>97</sup> Thus, though it is true that the doctrine of

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92. See *supra* notes 9–11 and accompanying text.

93. See Boaz Sangero, *Self Defence in Criminal Law*, Jerusalem, 29–50, 58–66 (2000) (explaining the differences between the approach of justification and excuse).

94. See, e.g., B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense By Battered Women*, 1 DUKE J. COMP. & INT'L L. 169, 177–82 (1991).

95. On the advantages of the doctrine of "excuse" in relation to abused women accused of attacking their husbands, see Giora Fletcher, *Self Defence Of Abused Woman*, Plilim F, 1997, 65, 86–88; Leon Shelef, *From Criminal Killing To Legal Defence*, Plilim F, 1997, 89, 110–13; Sangero, *supra* note 93, at 403–05; Rosen, *supra* note 37, at 31.

96. The excuse approach deals with the question of whether the abused women are indeed responsible for the unlawful act they committed. According to this approach, the excuse is ingrained in the claim that the unlawful acts committed by these women are not attributable to them but to the special condition in which they were placed when they committed them. See Sangero, *supra* note 93, at 30, 59.

97. The attribution of a primary flaw to the battered woman is intertwined with the basic assumption that her act of self-defence was not justified and appropriate under the circumstances. Hence, the application of the "excuse" doctrine to these women intrinsically attributes to them a pathological deviation from the standard of the reasonable person. Though this attributed deviation does not go as far as mental illness, it is certainly perceived as a temporal or permanent harm to their ability to make a rational and reasonable decision. In fact, the justification approach contains a latent claim with regard to circumstances of domestic violence as causing a permanent and fundamental flaw in the ability to perform autonomous and intelligent choices (as opposed to reasonable people that can be responsible for their actions and choose appropriate and rational behaviour even in cases of extreme distress). See A.M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 20, 37–47, 55–57 (1994); R.F. Schopp et al., *Battered Woman Syndrome, Expert Testimony*,

“excuse” sets abused women free, their escape from physical incarceration is at the price of being tagged and bound in the stereotype of a flawed human being.<sup>98</sup> Concomitantly and inadvertently, such acquittals entrench stigmatic gender-based perceptions which further fabricate the subordination and discrimination of women in general, and of battered women in particular.<sup>99</sup> An additional disadvantage should be added to these shortcomings: an acquittal by reason of excuse has a limited scope of application since it can only be personal, and can only be granted to the victim of the abuse himself. Such limited scope of application could spell grave legal consequences for anyone rushing to help a battered woman whilst risking a murder conviction and a lengthy custodial sentence.

The doctrine of “justification,” on the other hand, does not attribute any guilt, unreasonableness, or wrongdoing,<sup>100</sup> and obviously no unlawfulness to the abused woman’s defending actions. Under the approach of this proposal, a repelling act in circumstances of domestic violence is *a priori* justifiable and does not require an exemption from criminal liability or punishment.<sup>101</sup> As such, the doctrine of justification would allow the application of an appropriate criminal defence to third parties who rush to the aide of the victim,<sup>102</sup> as well as appropriate protection to the likes of Shuki Baso and Shakhar Hadad, who were sentenced to ten years in prison for killing their father who abused their mother over an extended period of time.<sup>103</sup>

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*and the Distinction between Justification and Excuse*, UNIV. OF ILL. L. REV. 45, 92–93, 95–97 (1994); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 219 (2002).

98. See Coughlin, *supra* note 97, at 2 (“Though actors who do not possess the capacity for responsible conduct may not be punished criminally, the decision to *excuse* them constitutes a negative statement about their status as moral agents, which may expose them to supervision by civil authorities.”) (emphasis added).

99. See *id.* at 7, 14, 28, 54, 62, 67, 87–88, 92 (regarding the article’s elaborate discussion).

100. See Burke, *supra* note 97, at 250–54 (regarding an approach that analyzes and defines the behaviour and choices of an abused woman as rational and reasonable behaviour both subjectively and objectively).

101. *Id.*

102. See Burke, *supra* note 97, at 232–33.

103. CrimA (TA) 416/93 State of Israel v. Shuki Beso, PM 54(3) 281, 282–83 (1994) (Isr.); CrimA 4419/95 State of Israel v. Shachar Hadad 752(2) PD (1995) (Isr.). It is true that under the existing legislation (adopted as mentioned following these cases) the sentence of a family member can be reduced but this is just a reduced sentence and not an acquittal. Even if the proposed reform of homicide offences is to be adopted (according to which the criminal liability of victims of prolonged abuse shall be reduced), these defendants would still be convicted of manslaughter and sent to lengthy custodial sentences. Moreover, the reform (that bases the suggested clause on the doctrine of excuse) applies this defence solely to the victim himself or to a family member of the victim, but does not extend such defence to everyone else.



Some would claim that such a polemic on the question of the appropriate doctrine ("excuse" or "justification") is meaningless, as under both the accused is acquitted and freed.<sup>104</sup> However, since the difference between the two kinds of acquittals has dire legal and practical consequences, the distinction between the two is worthy in both the academic sphere, as well as in practical, legal, and moral.

Secondly, Section 34 (J)(2)(b) suggests a presumption that in circumstances of domestic violence a real and deadly threat exists. As stated, a similar non-rebuttal presumption was suggested in Version A of the Bill that became Amendment 98<sup>105</sup> (the castle-defence), and was included in the legal interpretation undertaken by the Court when applying this defence in the *Dromi* case.<sup>106</sup> This proposal suggests a milder approach which affords an opportunity to rebut the presumption by use of the wording: "unless proven otherwise."<sup>107</sup>

Thirdly, the proposal suggests that the "immediacy"<sup>108</sup> requirement be repealed from the version of self-defence in circumstances of domestic violence. The present burden imposed on female defendants to prove that the attack had an element of immediacy as a precondition for the application of the exemption, set down in Section 34(J) of the Penal Code, is far divorced from the actual realities of the lives of victims of domestic abuse.<sup>109</sup> Therefore, the proposed version creates a negative arrangement in relation to the immediacy component. Accordingly, the absence of this element is not a legal lacuna, but rather an intentional silence on behalf of the legislator. The immediacy component not being required under these circumstances

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104. See R.A. Rosen, *supra* note 41, at 408–09 (claiming, for example, that the insistence on distinguishing between justification and excuse in this context is: "[M]uch ado about very little."). Similarly, Kit Kinports claims: "[A]lthough the distinction between justification and excuse may have some academic or theoretical importance, it makes no practical difference to the defendant whether the jury determines that her use of defensive force was justified or excused. In either case, she is acquitted and goes free." Kit Kinports, *Defending Battered Women's Self Defence Claims*, 67 OR. L. REV. 393, 460, (1988).

105. In the relevant clause of version A of Amendment No. 98 it was proposed: (b) "In the event that the assault was an intrusion or entry to a residence with the intention of committing an offence, the person assaulted, and any person with him, shall be deemed to have been in real danger of injury to life or limb, unless proven otherwise." Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98 (Isr.).

106. In the judicial interpretation of Amendment No. 98, the court read in to the words of the amendment also the presumption of real danger, even though it was not expressly approved by the Israeli legislator. See CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

107. See *supra* Section V.

108. The requirement of immediacy appears as follows: "an act that was immediately necessary," current wording of the Penal Code Section 34(J) (current self-defence clause) and Section 34(J)(1) (castle-defence as per *Dromi* Amendment); Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98 (Isr.).

109. Penal Code, 5737-1977, § 34(J)(1) (Isr.).

would mean that the legislator pondered the immediacy requirement and decided to waive it in circumstances of domestic abuse. Under the proposed version, the courts will be impeded from applying the traditional case law requirements in relation to the element of immediacy in circumstances of domestic violence. A similar approach was also taken by the State of Victoria, Australia (there the requirements of immediacy and proportionality for the application of the self-defence privilege in domestic violence circumstances were repealed),<sup>110</sup> and by several states in the United States (such as Utah<sup>111</sup> and Kentucky) that legislated that evidence of an abusive relationship is sufficient to prove the existence of immediacy in the context of domestic violence.<sup>112</sup> Compatible provisions exist in other states: Arkansas determined that the mere threat of the continuation of the pattern of abuse in circumstances of domestic violence was sufficient to justify the use of force in self-defence;<sup>113</sup> Georgia determined that evidence of domestic violence can be admitted in support of a claim to self-defence;<sup>114</sup> and Maryland<sup>115</sup> and

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110. Victoria Crimes (homicide) act, 9AH, (2005) (“ . . . for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary . . . even if—(c) he or she is responding to a harm that is not immediate; or (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.”).

111. UTAH CODE ANN. § 76-2-402(5) (West 2010) (“*In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors: . . . (d) the other’s prior violent acts or violent propensities; and (e) any patterns of abuse or violence in the parties’ relationship.*”) (emphasis added).

112. KY. REV. STAT. ANN. § 503.010(3) (West 2006) (“*‘Imminent’ means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.*”) (emphasis added).

113. ARKANSAS CODE ANN. § 5-2-607 (West 2015) (“*imminently about to victimize the person . . . from the continuation of a pattern of domestic abuse.*”).

114. GA. CODE ANN. § 16-3-21(d) (West 2001) (“In a prosecution for murder or manslaughter, if a defendant raises as a defense a justification provided by subsection (a) of this Code section, the defendant, in order to establish the defendant’s reasonable belief that the use of force or deadly force was immediately necessary, may be permitted to offer: (1) *Relevant evidence that the defendant had been the victim of acts of family violence or child abuse committed by the deceased*, as such acts are described in Code Sections 19-13-1 and 19-15-1, respectively; and (2) [r]elevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those *relevant facts and circumstances relating to the family violence or child abuse* that are the bases of the expert’s opinion.”) (emphasis added).

115. MD. CODE ANN. § 10-916 (West 1996) (“(a)(1) In this section the following words have the meanings indicated. (2) ‘Battered Spouse Syndrome’ means the psychological condition of a victim of repeated physical and psychological abuse by a spouse, former spouse, cohabitant, or former cohabitant which is also recognized in the medical and scientific community as the ‘Battered Woman’s Syndrome’. . . . (b) Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, *when the defendant raises the issue that the defendant*

Louisiana<sup>116</sup> promulgated that the mere presentation of testimony of an abusive relationship (between the defender and the person against whom force was used) suffices for the application of the self-defence exception.<sup>117</sup>

Other states in the United States adopted a similar approach by minimizing the requirement of immediacy so that the self-defence exception could be granted in cases whereby the danger is not immediate (and possibly less certain), as “imminent” danger.<sup>118</sup> Thus, states in the United States such as Louisiana,<sup>119</sup> Illinois,<sup>120</sup> Kansas,<sup>121</sup>

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*was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense: (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and (2) Expert testimony on the Battered Spouse Syndrome.”* (emphasis added).

116. LA. CODE EVID. ANN. ART. 404(2) (2009) (“provided further that when the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible; or . . . (2) *In the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of the victim's prior threats against the accused or the accused's state of mind as to the victim's dangerous character is not admissible; provided that when the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible.*”) (emphasis added).

117. Even in the absence of testimony as to a concrete act that necessitated the use of force in self-defence. See MD. CODE ANN. § 10-916(3) (West 1996); LA. CODE EVID. ANN. ART. 404(2) (2009).

118. See, e.g., Burke, *supra* note 97, at 226; Schopp et al., *supra* note 97, at 64–70.

119. LA. STAT. ANN. § 14:20 (2014) (“A homicide is justifiable: (1) When committed in self-defense by one who reasonably believes that he is in *imminent danger* of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.”) (emphasis added).

120. 720 ILL. COMP. STAT. 5/7-1 (West 2014) (“Use of force in defense of person[:] (a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such *other's imminent use of unlawful force.*”) (emphasis added).

121. KAN. STAT. ANN. § 21-5222 (West 2011) (“[D]efense of a person; *no duty to retreat.* (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such *other's imminent use of unlawful force.*”) (emphasis added).

Utah,<sup>122</sup> and Georgia<sup>123</sup> moderated the requirement of immediacy in the self-defence doctrine in general (and not solely within the context of domestic abuse) by replacing the requirement of immediate danger with “imminent” danger.<sup>124</sup> Some states (such as Idaho,<sup>125</sup> Washington,<sup>126</sup> New Mexico,<sup>127</sup> and Nevada<sup>128</sup>) even reduced the requirement of immediacy further by converting it into a requirement that some kind of a plan to commit an offence or injury to the person, exists.<sup>129</sup>

Fourthly, in Section 34(J)(2)(c) it is proposed to set a rule that a person attacked in circumstances of domestic violence is not required to retreat.<sup>130</sup> The amendment states that, in so far as it is an attack perpetrated in circumstances of domestic violence, non-retreat shall not detract from the evaluation of whether reasonableness is met, as required by Section 34(O) of the Penal Code.<sup>131</sup> Such a rule exists in various states in the United States, under which there is no

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122. UTAH CODE ANN. § 76-2-402 (West 2010) (“(1)(a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person’s *imminent use of unlawful force*.”) (emphasis added).

123. GA. CODE ANN. § 16-3-21 (West 2001) (“(a) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such *other’s imminent use of unlawful force*.”) (emphasis added).

124. LA. STAT. ANN. § 14:20 (2014); 720 ILL. COMP. STAT. 5/7-1 (West 2014); KAN. STAT. ANN. § 21-5222 (West 2011); UTAH CODE ANN. § 76-2-402 (West 2010); GA. CODE ANN. § 16-3-21 (West 2001).

125. IDAHO CODE ANN. § 18-4009 (West 1972) (“Homicide is also justifiable when committed by any person in either of the following cases: . . . 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to *apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished*.”) (emphasis added).

126. See WASH. REV. CODE ANN. § 9A.16.020(3) (West 1986) (“Whenever used by a party *about to be injured*, or by another lawfully aiding him or her, *in preventing or attempting to prevent* an offense against his or her person . . . in case the force is not more than is necessary.”) (emphasis added).

127. N.M. STAT. ANN. § 30-2-7 (West 1963) (“Homicide is justifiable when committed by any person in any of the following cases . . . when committed in the lawful defense of himself or of another and when there is a reasonable ground to *believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished*.”) (emphasis added).

128. NEV. REV. STAT. ANN. § 200.160 (West 1993) (“Homicide is also justifiable when committed . . . [i]n the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his or her presence or company, when there is reasonable ground to *apprehend a design* on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of *such design being accomplished*.”) (emphasis added).

129. IDAHO CODE ANN. § 18-4009 (West 1972); N.M. STAT. ANN. § 30-2-7 (West 1963); NEV. REV. STAT. ANN. § 200.160 (West 1993); see WASH. REV. CODE ANN. § 9A.16.020(3) (West 1986).

130. See *supra* Section V.

131. Penal Code, 5737-1977, § 34(O) (Isr.).

requirement of retreat for any unlawful attack whatsoever, whether committed in private and/or closed spaces (i.e., home and car), or in public and open spaces.<sup>132</sup>

As mentioned, the repeal of the duty to retreat already exists in Israeli case law, as held in the *Dromi* case.<sup>133</sup> Thus, the insertion of such a rule in the context of domestic violence would be in line with the requirements of justice, the judicial interpretation in the *Dromi* case, and relevant legislation in the field of domestic abuse.<sup>134</sup>

Fifthly, Section 34(J)(2)(d) proposes to broaden the condition of reasonableness when applying the privilege of self-defence, so that in circumstances of domestic abuse only an act that was clearly unreasonable would pull the rug from under the application of the defence.<sup>135</sup> In circumstances of domestic abuse, perhaps it would be appropriate to mold the interpretation of the “clearly unreasonable” criterion not only to the length and patterns of violence, but also to evidence of authorities’ (social services and/or enforcement) helplessness to save the accused, who was the victim of continued abuse.<sup>136</sup> This way, the abused woman’s choices, perceptions, and conduct may be weighed and examined vis-à-vis the specific and general functioning of the social services and enforcement authorities.<sup>137</sup>

132. See FLA. STAT. ANN. § 776.013 (West 2014) (“... A person [who is not engaged in an unlawful activity and] who is attacked [in any other place named by the statute where he or she has a right to be] *has no duty to retreat and has the right to stand his or her ground and use or threaten to use force*, including deadly force if he or she [reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony].”) (emphasis added). Similar legislation exists in other states in the U.S. that specifically determine that there is no duty to retreat in order to apply the self-defence privilege. These are termed: “stand your ground laws” and exist in states such as Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, Oklahoma, Tennessee, Texas, and Utah. See Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides* 1, 4 n. 4 (Nat’l Bureau of Econ. Research, Working Paper No. 18187, 2012), [http://www.flgov.com/wp-content/uploads/citsafety/20120913\\_secondchance1.pdf](http://www.flgov.com/wp-content/uploads/citsafety/20120913_secondchance1.pdf).

133. See *supra* notes 35–37 and accompanying text.

134. See, e.g., The Prevention of Domestic Violence Act 1991-5751 (specifically Section 2 under which restraining orders may be issued to family member assailants, seen in circumstances of communal residence and shared property).

135. See *supra* Section V.

136. Concerning the necessity to consider the authorities’ shortcomings in handling and preventing domestic violence as objective evidence with regard to the reasonableness of the conduct of abused women, see Shelef, *supra* note 95, at 92–94; Burke, *supra* note 97, at 216–17, 269; Schopp et al., *supra* note 97, at 105–07.

137. Within this context, taking no action such as complaint to the welfare or enforcement authorities (for protection and assistance in the face of continuing violence), could be perhaps interpreted as a “clearly unreasonable” conduct which could pull the rug from under the application of the proposed criminal exception. Even though the castle-defence (Dromi Amendment) did not expressly relate to complaining to the state authorities (or to their shortcomings) as evidence of objective reasonableness required to uphold a claim of self-defence, such recognition is implied from the legislative proposal in relation to the

As mentioned, the proposed moderation of the reasonableness requirement relieves the current provisions in Section 34(O) of the Penal Code which determine that an unreasonable act suffices to deny any application of the defence.<sup>138</sup> Such reduced requirement of reasonableness with regard to domestic violence already exists in states such as Arizona.<sup>139</sup> In circumstances of domestic violence, an objective test is used to measure reasonableness for self-defence, but is subjected to the perspective of the person who is under such circumstances.<sup>140</sup> As already noted, such moderated requirements already exist in the Israeli Penal Code (in the context of the castle-defence Amendment),<sup>141</sup> and there is no reason to avoid a similar approach in circumstances of domestic violence (if only for reasons of legislative harmony).

Sixthly, Section 34(J)(2)(e) proposes a definition of circumstances of domestic violence. The proposal allows for two optional versions: a version which includes subsection (e) which contains a legal definition of domestic violence (with reference to the various different components of abuse which have not heretofore been formally

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protection of the agricultural sector which preceded this Amendment, as it is from the debates in the context of the Amendment itself. *See* Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98 (Isr). In the debates concerning the Amendment, claims were heard both by supporters of the amendment and by those opposing it, regarding the absence of the state and its authorities from enforcing the law in the protection of the agricultural sector. *See* The Parliamentary Debates regarding Amendment Bill No. 98 (June 24, 2008). Recognition of the relevance of such evidence for granting the objective reasonableness required to uphold a claim of self-defence was clearly expressed in the Dromi case verdict. Intentionally, the verdict starts with a circumstantial description of a saga of 'survival', whereby the accused stood barehanded against and amidst consecutive and repetitive daily larceny and robbery in his solitary ranch. A literal reading of the verdict eventually implies that the narrative of "a long chain of repetitive violent events that were not eradicated by the law enforcement authorities despite many complaints by the accused" was in fact the legal anchor for the application of reasonableness to actions, which culminated with his acquittal on the grounds of the castle-defence exception. *CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.)*.

138. Penal Code, 5737-1977, § 34(O) (Isr.).

139. ARIZ. REV. STAT. ANN. § 13-415 ("If there have been past acts of domestic violence as defined in § 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person under §§ 13-404, 13-405 and 13-406 shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.")

140. *See, e.g.,* Burke, *supra* note 97, at 220–21. Unlike the general standard of "the reasonable man," accepted in Israeli statute and case law.

141. Draft Bill Amending the Penal Code (Legislative Amendments), 5768-2008, HH (Knesset) No. 98 (Isr.) (Subsection B states that the defence would apply even if the accused committed an action that was unreasonable in the circumstances, provided that it was not a "clearly unreasonable" action, or (b) "The provisions of subsection (a) shall not apply if—(1) the act was clearly unreasonable, in the circumstances, to repel the intruder or person so entering.").



and literally expressed in legislation), and a version without subsection (e) which would in practice leave the definition and interpretation of domestic violence to case law, as has been done in Israel thus far.<sup>142</sup> The proposed optional clause defining domestic violence is based on the version of the Act adopted by the Australian state of Victoria,<sup>143</sup> and takes a similar expansionary view on the definition of domestic violence. Thus, the section includes not only physical and sexual abuse, but also psychological abuse in its many forms (intimidation, harassment, verbal abuse, damage to property, etc.). The definition also includes the mere exposure of a minor to violence directed at a family member (even if the violence was not directed specifically towards the minor).<sup>144</sup> Under the proposed clause, such exposure to violence constitutes direct and severe emotional injury to the minor, and is therefore regarded as domestic violence for all intents and purposes. Thus, the proposed self-defence would have also applied to defendants such as Shachar Hadad and Shuki Baso, who were not only beaten up themselves, but also witnessed their father's horrendous abuse of their mother for many excruciating years.<sup>145</sup> Such a broadened definition of domestic violence is all the more needed in Israel since current Israeli legislation is especially harsh on such defendants as under Section 300(a)(1). There is no requirement of "premeditation" in order to convict a descendant for the murder of his ancestor.<sup>146</sup> Such an approach would therefore do appropriate justice to these unique circumstances of domestic abuse.<sup>147</sup>

142. See, e.g., CrimA 4596/98 Mrs. X (Plonit) v. State of Israel (25)(1) PD (2000) (Isr.).

143. Crimes (homicide) act 2005, 9AH ("family violence", in relation to a person, means violence against that person by a family member; Violence means—(a) physical abuse (b) sexual abuse (c) *psychological abuse (which need not involve actual or threatened physical abuse), including but not limited to—(i) intimidation; (ii) harassment; (iii) damage to property; (iv) threats of physical abuse, sexual abuse or psychological abuse (v) in relation to a child—(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.* (5) Without limiting the definition of 'violence' in sub-section (4)-(a) a single act may amount to abuse for the purposes of that definition; (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.").

144. *Id.*

145. See note 103 *supra* and accompanying text.

146. Draft Bill Amending the Penal Code (Legislative Amendments), 5755-1995, HH No. 44, § 300 (Isr.).

147. According to the wording of this section, which originated in the Ottoman legal code enacted in Israel prior to the British conquest, then Palestinian, a person shall be convicted of murder: "who maliciously caused the death of his father, mother, grandfather or grandmother by a prohibited act or omission . . ." Penal Code, 5737-1977, § 300(a) (Isr.). On this aggravating circumstance, see, for example, the words of the Justices at paragraph five of the Shachar Hadad verdict, who was charged with killing his father after long years of the latter's abusing his mother. CrimA 4419/95 State of Israel v. Shachar Hadad 752(2) PD ¶ 5 (1995) (Isr.) In the verdict, the Justices noted that formally Shachar



## CONCLUSION

This Article argues for a change of the socio-legal stance in relation to the right to self-defence of family members exposed to severe and ongoing abuse. Israeli society has lately shown its willingness to change the doctrine of self-defence with regard to the castle-defence (as expressed recently in the “Dromi Act” Amendment).<sup>148</sup> Therefore, a corresponding change is called for in order to give people whose spouses abuse them with all cruelty the right to fend for themselves. In light of the fact that the physical scene of abuse is none other than the victim’s home (as well as their own symbolical, mental and emotional “castle”) such harmonizing legal change is all the more called for. The change argued for is admittedly an immense legal challenge in light of the remarkably fundamentally masculine model built into the current doctrine of self-defence in the Israeli Penal Code, but all the more so, it is a just and a fair one.

As hinted by the title of this Article and to paraphrase Woolf’s landmark inquiry into women’s position in society, *A Room of One’s Own*, the time has come to accommodate a similar socio-legal space for a doctrine of self defence for abused women in their homes.<sup>149</sup> Such legal space would literally and practically demand the adjustment of the current requirements set forth for the application of the self-defence exception, to women in circumstances of domestic abuse. Aligning with the current castle-defence doctrine introduced to the Israeli legal scene, it is time to let women feel safe and secure in their own premises and defend themselves in their own “castle.” In other words, the time has come to afford women with “a castle” that is “of their own” not only literally and symbolically, but first and foremost, legally and figuratively. As has been argued herein, amendments similar to the proposed amendment already exist in certain western nations, and there is no reason why Israel, of all places, should avoid this important, just, and required change.

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committed the offence of murder for all intents and purposes. *Id.* (“This is the place to mention, that according to the facts as related by the Accused himself in his testimony to us, the offence the Accused committed is murder. In the case of patricide, not only does one not need prove premeditation and the mere intentional killing of a father constitutes the offence of murder (see Section 300a(1) of the Penal Code 1977-5737), but in this case, the Accused testified to us that he committed the act of killing, knowing full well what he was doing and understanding the consequences thereof.”).

148. CrimA (BS) 1010/07 State of Israel v. Dromi PD (2009) (Isr.).

149. VIRGINIA WOOLF, *A Room of One’s Own*, in THE VIRGINIA WOOLF READER 168, 169 (1984).

