



RIGHT OF PRIVATE DEFENCE: WAY FORWARD

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ABSTRACT

While the term ‘private defence’ in the Indian Penal Code, 1860,¹ has not been described, it occurs elsewhere in the code, which is often considered unfair. This right, therefore, rests solely in the hands of the judges, who have had the opportunity to build a system that works to implement this right. As per India is concerned, the right of having private defence² is the right to use power to secure one's individual or property from a threat posed by another person. If the force that was used in the act of private defence was not argued in court, the initial offence would have constituted. The consequence of this action is that it establishes an exemption to criminal culpability. Private defence rights under the IPC are extensive and are granted in the event of a life-threatening event with no one else present. Additionally, there is no individual right of self-defence against an unarmed and harmless person, and the right is only available in the instance of a life-threatening attack. Additionally, if no help from the state is forthcoming, just the individual who is in inevitable peril of personal or property harm is entitled to seek private defence. In this article, I will try to analyze the evolution, essentials, and laws related to the right of private defence in India.

Keywords: *Private Defence, Proportional force, Imminent Danger.*

INTRODUCTION

Tort, in its broadest sense, is concerned with apportioning blame for losses that are unavoidable in society. Tort law governs actions for damages for injury to a person's private civil rights, such as the right to land, the right to personal protection, the right to reputation, and so on. Every person on the planet has the right to defend himself against any assault or damage that will injure him. The same is true of all statutes, including tort law. When a person is accused of committing an act, he has the right to defend himself against the plaintiff's accusation. In tort law, several

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¹ The Indian Penal Code (Act No. 45 of 1860)

² IPC (Act No. 45 of 1860), s 96-106.

general defences are recognized, one of which is the right of private defence. It is man's first responsibility to assist himself. The state's primary responsibility is to protect citizens' lives and property, yet, no express, regardless of how wealthy, can bear to assign a police officer to track down every criminal in the country. As a result, the state has granted each resident of the country the option to take law into his own hands to ensure their protection. The utilization of sensible power to guard one's individual or property is lawful. The respondent would not be held responsible for any damage caused if he uses the force that is needed for self-defence. Only in the case of self-defence is the use of force justified. The most fundamental criterion is that there must be an immediate danger to personal safety or property. Ram, for example, will not be justified in using force against Mohan simply because he believes Mohan will threaten him at any point in the future. It is also required that only the force important to repulse the attack be utilized, i.e., in case Ram hits Mohan, Mohan can't legitimize taking out his sword and cutting Ram's hand. Excessive power ought to be kept away from. The amount of force required is determined by the circumstances of each case.

In the case of *Bird v Holbrook*³, after his garden was robbed, the defendant set up a spring gun trap to deter trespassers. The defendant had put no note of the trap. The complainant, who was aware of the trap, went into the garden to chase down a fowl and set it off by mistake. He was severely injured and filed a lawsuit against the defendant. The Court decided that setting up a trap without first giving notice was an unfair response, and the defendant was found liable. The Court observed that posting a warning would have served as a strong deterrent to trespassers, but since the defendant intended for the gun to be fired, his response was not proportional to the threat posed.

EVOLUTION OF THE RIGHT OF PRIVATE DEFENCE⁴

As per Roman law, there were two types of murder that did not carry a penalty: justified and excusable murder. Self-defence has been classified as justified murder. Violence was legal in self-defence: '*Vim enim vi defendere omnes leges emniaque jure permittunt*'⁵(A man brings about no blame on the off chance that he murders another's the slave who attacks him.) The Justinian Code and the Twelve Tables both reaffirmed this right to self-protection, with the Code expressing that no more power than was needed to avert the compromising peril, as well as the Tables, then again,

³ *Bird v. Holbrook*, [1823] 4 Bing 628; 130 B R 91

⁴ IPC (Act No. 45 of 1860)

⁵ Gaines Post, 'Two Notes On Nationalism In The Middle Ages' (2021).

permitting executing in such a case without limitations as admissible self-defence instead of self-preservation.

Over these years, the standing of the right to self-defence in English law has shifted several times. In the old society, even for murder performed *se defendendo*, there was absolute culpability. In today's era, murder performed in self-protection is deemed permissible since it is understood that such an act is not motivated by malice.

In modern times, there is a belief that murders committed in self-defence may not involve men's *rea*, and as a result, it has become a legitimate general safeguard in law. As a result, the accused is no longer held criminally liable in such cases. This is following the European Convention on Human Rights' Article 2 provisions. As a result, every advanced legal system in modern times recognizes the right to self-defence as a fundamental right.

ESSENTIALS FOR RIGHT OF PRIVATE DEFENCE⁶

To utilize private defence there requires main conditions to be fulfilled i.e.

1. **Imminent threat**– There should be an immediate or imminent threat to a person's life or property damage. For example, A witnessed B attempting to rape C. A struck B in the head with a stone when he saw C was at imminent risk. A used private defence in this case because of the danger that was present at the time of the use of private defence. Also, this can be understood using the case of *Morris Vs. Nugent*⁷, where A's dog attacked B and bite him but when after the attacking dog stepped back and started running away, B stood and shot the dog. In this case, the court determined that if B had shot the dog when it was threatening him, he would have been able to successfully assert the defence; however, the facts of the case show that he shot the dog while there was no imminent or immediate danger present, and therefore he would not be able to claim the defence. As a result, it can be deduced that when the danger is receding, there is no case for private defence.
2. **Proportional force** – According to this, the force used in the face of a threat to a person's life or property must be proportionate to the actual threat. To prevent injury, the force used must be fair and not exceed the dangerous act. For example, if a thief enters one's home but is apprehended, he threatens the person with a knife while

⁶ IPC (Act No. 45 of 1860), s 96-106.

⁷ *Morris Vs. Nugent*, [1836] C&P 572.

standing far away from him, and the owner of the house becomes enraged and shoots him dead. The owner may have shot him in his cleg or somewhere else to just hurt him, but the private defence would not apply if the individual was killed where there was no just grave danger to life. As a result, if A hits B in the head, B cannot defend himself by drawing his sword and cutting off A's head. Another important consideration is that the force used must be completely sufficient to repel the attack, and the defendant must not be allowed to contact the authorities.

When it comes to property security, the individual must have custody of the property at the time of the incident. It means that if a person is renting a home, he or she has the right to protect the property in which he or she is living. The property owner has the same right, but he must be in control of it. An individual who does not own the land has the privilege to utilize reasonable power against the individuals who forestall him from performing his duties.

LAWS FOR PRIVATE DEFENCE IN INDIA

Given advantage as per this protection is extended by the Indian Penal Code even when causing death in such circumstances. In India, Sections 96 to 106 of the Indian Penal Code⁸ recognize this right of having private defence as a legal duty. The following are some of the most critical sections:

IPC Section 99: Act against which no one has a right of private defence⁹

If executed, or attempted to be done, an act that doesn't sensibly cause the trepidation of death or horrifying mischief any right of private defence,

- 1) “a public official acting in good faith under the colour of his office, even though the act is not strictly legal.
- 2) by the order of a public official acting in good faith under the colour of his office, even though the order is not purely legal.
- 3) and in cases in which there is time to have recourse to the protection of the public authorities.”

IPC Section 100: When the right of private defence of the body stretches out to causing death¹⁰

⁸ 'Right To Self-Defense In India - Law Times Journal' (Law Times Journal, 2021) <https://lawtimesjournal.in/right-to-self-defense-in-india/#:~:text=In%20all%20the%20Sections%20mentioned,so%20situated%20that%20he%20cannot> accessed 13 June 2021.

⁹ IPC (Act No. 45 of 1860), s 99

Cases in which,

- “1) An attack that may fairly cause the fear that death would result as a result of the assault;
- 2) An attack that may fairly cause the fear that serious bodily harm will result as a result of the attack;
- 3) Assault with the intent of committing rape;
- 4) Assault with the intent of gratifying unnatural lust;
- 5) Assault with the intent of kidnapping or abducting;
- 6) Assault with the intent of wrongfully confining a person under circumstances that may reasonably cause him to believe he will be unable to seek relief from the public authorities.”

IPC Section 105: Commencement and continuance of the right of private defence of property¹¹

At the point when a real dread of risk to the property emerges, the right to private property protection kicks in. If there isn't enough time to go to the authorities, this right can be exercised. When the trespass is effectively finished, the genuine proprietor of the land loses their right to private defence to secure the property.

IPC Section 106: Right of private defence against dangerous attack when there is the hazard of damage to an innocent individual¹²

If the defender is in a position where he cannot effectively exercise his right of private defence against an attack that fairly causes the apprehension of death without endangering an innocent individual, his right of private defence applies to the running of that danger.

LANDMARK CASES

Ramanuja Mudali v. M. Gangan¹³, the defendant, a landowner, had strewn live electric wire across his property. The plaintiff was injured after receiving a shock from the wire when inventing that at 10 p.m. to get into his territory. The defendant had made no visible indication that such wire was present. As a result, he was held responsible for the plaintiff's injury because the force used was greater than the occasion required.

¹⁰ IPC (Act No. 45 of 1860), s 100.

¹¹ IPC (Act No. 45 of 1860), s 105.

¹² IPC (Act No. 45 of 1860), s 106.

¹³ *Ramanuja Mudali v. M. Gangan*, (1984) AIR 1984 Mad 103: Also see *Cheruben Gregory v State of Bihar*, (1964) AIR 1964 SC 205

“Collins v. Renison¹⁴ is simply one more illustration of exorbitant power. In that situation, the offended party ascended a stepping stool in the defendant's garden to nail a board to a wall.” The defendant threw him off the ladder and when sued for assault, he took the pleas that he had “gently shaken the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff, on the ground, thereby doing as little damage as possible to the plaintiff,” when the offended party refused to come down.” The use of force in the defence of land ownership was deemed unjustifiable. To protect the herd, even shooting a dog can be justified.¹⁵

“The Court of Appeal in *Creswell v. Sirl*,¹⁶ where the defendant shot the plaintiff's dog which was chasing and attacking the defendant's sheep and pigs, laid down the following rules. The onus of proof is on the defendant to justify the preventive measure of shooting by showing” that the dog was either targeting the animals in question at the time of the shooting or that if it was at large, it would resume the attack.; and that the defendant, in light of all the circumstances in which he found himself, behaved appropriately regarding the shooting as appropriate; that the defendant, in light of every one of the conditions wherein he got himself, acted sensibly as to the shooting as important.

CONCLUSION

The right to private defence has evolved and continues to expand as new cases come to light. Every person has the privilege to utilize sensible power to protect his or her person, property, or possession from unlawful harm. The right to private defence has been established to allow the plaintiff to protect himself from imminent risk, threat, or unreasonable use of force by the defendants by using appropriate force in self-defence. The amount of force used must be proportional to the apparent urgency of the situation.¹⁷ It is necessary to demonstrate the need.¹⁸ Injuries to an innocent third party caused by a lawful act of self-defence must be treated as accidental damage caused by a lawful act. Every individual has the right to protect his or her belongings. He cannot, however, do so in a way that is harmful to his neighbour. For example, an agricultural landowner can protect his land from locust infestations and drive the pest away without being liable for the consequences to other landowners.¹⁹ A person's right to protect his land from pests applies to doing whatever is reasonably possible to save his lands, but he cannot

¹⁴ *Collins v. Renison*, [1754, K.B.] 1 Sayer, 138.

¹⁵ *Miels v Hutchings*, [1903] 2 K B 714 and *Bannard v Evans*, [1925] 2 KB 794

¹⁶ *Creswell v. Sirl*, [1948] 1 K B 241

¹⁷ *Reece v. Tylor*, [1835] 4 N & M 469 ; *Cockcroft v. Smith*, (1705)-11 Mod 43 (HOLT CJ)

¹⁸ *Janson v. Brown*, [1807] 1 Camp 41; *Wells v. Head*, (1831) 4 C & P 568

¹⁹ *Greyvensteyn v. Hattingh*, (1911) AC 355 : 80 LJPC 158 : 104 LT 360

deliberately pursue a path that has the effect of diverting the mischief from his land to another person's land that would otherwise be protected. And the means used to secure one's property must be fair, that is, proportionate to the potential for injury.²⁰

From Section 96 to Section 106 of the Indian Penal Code, 1860, people have the right to private defence, demonstrating how important it is to them. It is an effective tool in the hands of any person who wishes to protect himself. This right does not pertain to vengeance, but rather to the threat and imminence of an assault. However, this right can be abused. It can be difficult for courts to determine whether or not this right was exercised in good faith. Although provisions exist to deal with the subject, there is still room for improvement. The difference in outcomes of private defence cases that can be seen in the law of torts and IPC is because of the role of intention which most of the time changes the outcomes in criminal law cases.

²⁰ *Sarch v. Blackburn*, [1830] 4 Q & P 297