

Evolving Judicial Approach Towards Right To Private Defence Against Body

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Abstract

It is said that "necessity knows no law," which implies that a necessity action is exempt from legal requirements. It is the first duty of man to help himself. Today every democratic society recognized right to private defence in its statutory provisions. The prime object of every welfare state is to achieve social justice. Self-help is part of social justice. Self-defence is a no longer only confined to self-preservation because it is also part of social justice, thus it also responsibility of every individual to safeguard the social interest also. In the Indian legal system, the right to private defence is recognised as a valuable defence and is listed in the Indian Penal Code's section 96 through 106 under the subject of "General Exceptions." This right must be interpreted in light of the state's obligation to safeguard its citizens' lives and property. Every Indian citizen has the right to self-defence; however this right is frequently abused by a large number of persons who use it as a justification for committing crimes or other offences. Therefore, there are several limitations and constraints on this right to private defence. The right to self-defence was given to Indian citizens as a tool for self-defence, yet it is frequently used for corrupt or illegal purposes by a large number of people. The court now has the duty and obligation of determining whether the right was exercised in good faith or not.

The underlying object of this research work is to analysis and study the concept of right of private defence of body under Indian criminal law and the circumstance under which right of private defence of body extends to causing death of an aggressor with help of judicial approach.

Keywords: Right to private defence, self defence, Social justice, Judicial, Law.

A. INTRODUCTION

In the olden days, when the civilization had not dawned, only one law had its effective play and that was 'might is right'. With the advancement of society the State took up the task of protecting the person and property of its subject, but it was found that State was unable to guarantee such protection to its subjects. Therefore subjects were given right to protect their person and property by causing injuries, simple and grievous, within their reasonable restrictions, to them who intended to pose such danger to person and property.¹

In India from ancient time right to private defence have been recognised. According to the ancient law-givers, homicide was permitted, if it was committed when danger to life was feared. Self-help is the one of the basic rule of criminal law which is accepted by universally. It is principle through which a person may protect themselves from any force or violence harm under appropriate circumstances, even the act of that person or the behaviour of person constitutes a crime. Self defence is a right to prevent oneself from any violence or force which is harmful for body of person or property of person. Criminal Law is body of rules and a statute which prohibit crime. Crime is the act of person which is forbidden by law for which punishment is given. The right to private defence based on the general principle that where a crime is to be committed by force, it is lawful to repel or stop that force in self defence. Right to self defence is being an inherent natural right. Right to life is one of the fundamental rights of every person which is given by our Constitution under Article 21, which provides very wide scope of right to life, it not

¹Raghunath Prasad, *Right of Private Defence and Effect of Non-Explanation of Injuries*, J.T.R.I. Journal – Second Year, 1996, Available At <http://ijtr.nic.in/articles/art39.pdf>.

includes only protection of life of person but it also includes protection of life, liberty and property of person. Thus, right of private defence is absolutely necessary for the protection of one's life, liberty and property.

In criminal Law right to private defence form a valuable defence and it is well explained under the caption 'General Exceptions' of the Indian Penal Code under Section 96 to 106. In this research article researcher described the concept of right to private defence in the light of the judicial view of Court of law through different case laws.

Meaning Of Right To Private Defence

a. Self – Defence Meaning:

Self-defence is a dynamic concept. That means the legal framework of self defence is not fixed, it become varies from country to country and time to time depending upon the circumstances of each case. From ancient time till today the concept of self-defence undergone a marked changed. In earlier time the law was might is right and the concept of exception to criminal liability is no place in criminal law. But after civilization of society the concept of State came in to existence and it being a responsibility of State to protect life and property of individuals, for these purpose statutory provisions enumerated in criminal code.

Ordinarily in a democratic society, the state retains the monopoly of violence in the sense that only the state can use force against and punish wrong doer. However, sometime circumstances may arise when the aid of state machinery is not available or rather it is not possible to get help from any authority because situation is such that there is imminent danger to a person or his property. In such situations, a person is allowed to use force to ward-off the immediate threat to his or someone else's person or property. This is the right of private defence.

The word "self-defence" comes from the Latin phrase "se defendendo" which means "to defend oneself" or "private defence". It acts as a type of justificatory defence in circumstances where a person lacks the resources to invoke the protection of the governmental machinery to defend themselves or their property.²

b. Private defence Meaning:

In India the expression 'private defence' has not been defined in the Indian Penal Code. In the absence of any statutory definition judiciary was invited to describe the expression of private defence. Right to private defence means defend the body of one or other with the use of private means i.e. without help of state machinery. That means when the circumstances is such that recourse or help from State machinery is not possible to take then it is privilege of person to defend himself or other from any attack or harm which may caused to him or other death or grievous hurt. And such self defence is exception to criminal liability by which a defender is not guilty of any crime.

In *Mohammad Khan v State of Madhya Pradesh*³

It was observed by the Supreme Court that there is nothing more degrading to the human sprite than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.

The self-help is the basis of right to private defence. According to Bentham, 'The right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men.'⁴

The law of private defence is founded on two cardinal principles:

² Available at: <https://lexforti.com/legal-news/self-defense-in-criminal-law>

³1973 M.P.LJ. 194

⁴Dr. H.S. Gour's, *Penal Law of India* 797 (11th ed., 2006).

- a. Everyone has the right to defend one's own body and property, as also another's body and property. The law does not require him to be cowardly.
- b. This right cannot be used as a pretence for justifying aggression, i.e. for causing harm to another person, nor for inflicting mere harm than is necessary to inflict for the purpose of defence.⁵

B. SCOPE AND NATURE OF PRIVATE DEFENCE

Right to private defence is natural right which is come by inherently. The exercise of such right is not measure by any golden scale that means the exercise of right to private defence is differ from situation to situation and society to society. Section 96 of IPC lays down that it is not offence if it is done in exercise of right to private defence and Section 97 provides two types of right to private defence first is right to private defence of person and second right to private defence of property. Section 97 also recognizes such right to person not only to defend his own body and property but body and property of other person also, in such way it widen the scope of right to private defence.

The right to private defence is not absolute but law imposed certain restriction on it. Section 99 of IPC provide certain restriction for use of right to private defence which may essential for restricting unlawful use or misuse of right to private defence.

Nature of right to private defence

Basically, right to private defence is a natural right which is based on circumstances of the case. It is right which belongs to every human-being and it is not restricted to a particular person or class, it is public right. Because of certain flow of situation such rights come into existence i.e. any person if fall any danger situation which became harmful to his body or property then he try to repeal such situation by using reasonable force. The law of self-defence requires that the force used in self-defence should be necessary and reasonable in the circumstances. Thus in short this right is available to everybody for prevention of crime on one hand and protection of person and property of the individuals on the other hand, but with some certain restrictions.

C. PRIVATE DEFENCE IN THE INDIAN LEGAL SYSTEM

In the Indian legal system right to private defence is form a valuable defence which is mention in Indian Penal Code under the heading of 'General Exceptions' which are mentioned under Section 96 to 106. Such right to private defence is based on two principles, that right to private defence is available against the aggressor only, means against a person who tried to assault to other person, such right is not available to against lawful acts and second when such aggression or assault of other person create reasonable apprehension in the mind of the defendant.

Section 96 of IPC run as, "Nothing is an offence which is done in the exercise of the private defence."⁶

That means if any act is done for protection and preservation of body or property of individuals then it is not amount to crime, even in general such act of defender amount to crime. The right to private defence is a defensive one that is only permissible under certain conditions. It cannot be argued that the offence was committed with anger, violence, or revenge in mind. The right to self-defence provided by Section 96 is not absolute. It is actually made more extensive by the code's subsequent provisions (Section 97-106) under a variety of circumstances.

Section 97 said that, every person has right to defend, his own body and the body of any other person against any offence affecting the human body; the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass; Subject to the restrictions contained in Section 99.⁷

⁵ Ibid.

⁶ PSA Pillai, Criminal Law, 151 (9th ed., 2000).

⁷ Ibid

Thus as per Section 97 right to private defence is divided into two types:

- i. Right to private defence of body and
- ii. Right to private defence of property.

Thus, right to private defence is available only against the aggressor; it is not available to criminal. The person who is in imminent danger of person or property and where no state help is available is entitled to exercise the right of self-defence. Section 97 widens the scope of right to private defence by including not only the right to protect person and property of oneself but also person and property of others against aggressor by private means. Therefore in eye of law person and property is very valuable, so there is need to protect it with the help of right to private defence. But it is to be noted that such right is not absolute but it has some restrictions which imposed by under section 99 of IPC. The reason behind this may be restrict persons from misusing the same.

Section 98 Right of private defence against the act of a person of unsound mind, etc. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.⁸

Thus, section 98 provide right to private defence also against such attackers who are not mentally stable i.e. Such persons who does not know the grievance of their act which are insane, intoxicated persons. Thus in short right to private defence not only available against normal persons but also against other persons who may not be liable for their acts i.e. abnormal persons.

Section 99 deal with acts against which there is no right of private defence: This section contained the restrictions or limitations which are as important as the right itself. Section 99 provides, there is no right of private defence against

- a) An act which does not reasonably causes apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant or a public authorities who acting in good faith for discharge of his duty though the act is not strictly justifiable by law.
- b) There is no right of private defence in cases where there is time to take protection from State machinery or recourse from public authority.
- c) The right to private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence.⁹

That is the harm inflicted must be no more than is necessary to avert the danger. It may even by deterrent, but must not be excessive.

Sections 100-106 of Indian Penal Code explain in detail the right of private defence of body and property in detail. Section 100-102 and 106 deals with right to private defence of body and Section 103-105 deals with right to private defence of property. The focus of this case study mainly based on private defence of body.

Right of private defence of body under Section 100-102 and 106

Section 100-Section 100 declares that the right of private defence of body extends to the causing of death to the assailant, if the offence which occasions the exercise of the right is an assault of apprehension of causing death; or of causing grievous hurt; or of committing rape; or of gratifying unnatural lust; or of kidnapping or abducting, or of wrongfully confining a person which may reasonably cause the apprehension that the man may not be able to contact public authorities for help.¹⁰

Section 101- When such right extends to causing any harm other than death - If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under

⁸ Id

⁹ Supra 3, at 160.

¹⁰ KD Gaur, *Criminal Law: Cases and Materials* 170 (6th ed., 2009).

the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.¹¹

As per the section 101 right to private defence of body will extend to causing death of the person only if the situation which are mentioned under section 100 are existed and in all other situations, the right the right of private defence of body will only extend to causing 'harm' not death of assailant. It means section 101 give limitation to the right of private defence of body extends to causing death.

Section 102- Commencement and continuance of the right of private defence of the body: The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.¹²

Section 106- Right to private defence against deadly assault when there is risk of harm to innocent persons: Section 106 provides that when there is a deadly assault on a person which causes a reasonable apprehension of death and his right of private defence cannot be effectively exercised without causing harm to an innocent person, then in such situations, any harm caused to innocent persons is also protected by law.¹³

That means a person while exercising right to private defence killed or injured some innocent person then the law protect the man exercising right to private defence by exempting him from criminal liability.

D. JUDICIAL VIEW IN PRIVATE DEFENCE

JUDICIAL VIEW ON PRIVATE DEFENCE The phrase "private defence" is not adequately defined in the provisions of Indian Penal Code and there is no any fixed legal frame work for the exercise of right to private defence. The law relating to private defence is build up according to different view of judiciary in relation to different cases. The use of right to private defence is mostly depending upon the circumstances of cases or as per the need or necessity of the movement. Thus, for developing law relating to private defence judiciary performed very important role.

In order to maintain the principle of fairness while delivering justice to the citizens of our country, the provisions of the code were created in such a way that they could be interpreted, examined, and modified by the judiciary in light of various situations and cases. In other words, they left the code in a flexible state. In a number of important instances, the Court interpreted and examined the right to private defence.

*In Ranveer Singh v. State of Madhya Pradeh,*¹⁴

In this case Apex Court dismissed the appeal held that, whether in a particular set of circumstance, a person legitimately acted in the exercise of the right of private defence is question of fact to be determined on the facts and circumstances of each case. No test for determining such a question can be laid down. The court must consider all the surrounding circumstances. In order to find whether right of private defence is available or not, the injuries caused by the accused and whether the accused had time to have recourse to public authorities are all relevant factors to be considered.

*State of Orissa v. Rabindranath Dalai & another*¹⁵

A Full Bench of the Orissa High Court in summarized the legal position with respect to defence of person and property thus: "In a civilized society the defence of person and property of every member thereof is the responsibility of the State. Consequently, there is a duty cast on every person faced with apprehension of imminent danger of his person or property to seek the aid of the

¹¹Ratanlal and Dhirajlal, The Indian Penal Code, 126(Reprint., 2001)

¹²Ibid

¹³Id

¹⁴AIR 2009 SC 1658.

¹⁵1973 Cr CrI LJ 1686 (Orissa) (FB)

machinery provided by the State but if immediately such aid is not available, he has the right of private defence.

***Jagtar Singh v. State of Punjab*¹⁶**

This court held that “the accused has taken a specific plea of right of self-defence and it is not necessary that he should prove it beyond all reasonable doubt. But if the circumstances warrant that he had a reasonable apprehension that death or grievous hurt was likely to be caused to him by the deceased or their companions, then if he had acted in the right of self-defence, he would be doing so lawfully.”

***Darshan Singh v. State of Punjab*¹⁷**

The Supreme Court laid down Guidelines for Right of Private Defence for Citizens. It observed that a person cannot be expected to act in a cowardly manner when confronted with an imminent threat to life and has got every right to kill the aggressor in self-defence. While acquitting a person of murder, the court said that by enacting Section 96 to 106 of the IPC, the Legislature clearly intended to arouse and encourage the spirit of self-defence amongst the citizens, when faced with grave danger.

“The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this court, there is nothing more degrading to the human spirit than to run away in face of danger. Right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limit”

The Court laid down ten guidelines where right of self-defence is available to a citizen, but also warned that in the disguise of self-defence, one cannot be allowed to endanger or threaten the lives and properties of others or for the purpose of taking personal revenge. The Apex court concluded by saying that, a person who is under imminent threat is not expected to use force exactly required to repel the attack and his behaviour cannot be weighed on “golden scales.”

The Court declared the legal position under the following 10 guidelines:

1. Self-preservation is a basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.
2. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
3. A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.
4. The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.
5. It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.
6. In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.
7. It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.
8. The accused need not prove the existence of the right of private defence beyond reasonable doubt.

¹⁶AIR 1993 SC 970.

¹⁷(2010) 2 SCC 333

9. The Indian Penal Code confers the right of private defence only when the unlawful or wrongful act is an offence.
10. A person who is in imminent and reasonable danger of losing his life or limb may, in exercise of self-defence, inflict any harm (even extending to death) on his assailant either when the assault is attempted or directly threatened.¹⁸

Mohinder Pal Jolly v. State of Punjab¹⁹

Workers of a factory threw brickbats from outside the gates, and the factory owner by a shot from his revolver caused the death of a worker, it was held that this section did not protect him, as there was no apprehension of death or grievous hurt.

Thus the right of private defence is not available who try to take any revenge of past injury, but it is available to those who suddenly faces such situation which is harmful or danger to his body or property and to repeal such danger it is necessary to use reasonable force that is right to private defence. So, right to private defence is essential for defence and not for retribution.

E. CONCLUSION

In criminal law self defence is a rule and the state gives people the right to ensure and protect themselves. In India the expression 'private defence' has not been defined in the Indian Penal Code. In fact the legal framework of right to private defence was not fixed it depend upon circumstances of the cases. The law relating to private defence is changed from society to society and situation to situation. The privilege of Private Defence of the body goes under the reasonable defence where the attention is more on the demonstration of the person. The right to a body's private defence falls under the category of a justifiable defence, where the focus is mostly on the individual's performance. In India law of self- defence is shaped by judiciary. Actually judiciary plays very important role in shaping the right to private defence. Supreme Court provides certain guideline for the use of right to private defence which becomes helpful for use of right to private defence.

In short, right to private defence is a weapon in the hand of the citizen which if not misused and subject to certain restrictions, help them to protect their and other's lives and property.

¹⁸AIR 1979 SC 577

¹⁹ AIR 1979 SC 577