

The Right of Private Defence in India: Jurisprudential aspect

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Self – preservation is the 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. 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. 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. The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

Sir Hari Singh Gour aptly observed that self-help is the first rule of criminal law. It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order. According to Bentham, in his book ‘Principles of Penal Laws’ has observed “the right of defence is absolutely necessary”. It is based on the cardinal principle that it is the duty of man to help himself.¹

Meaning of Right of Private Defence in India

Private defence means, defence of the body and property which belongs to you and or of any other person, because law does not makes you coward and does not mean that you always depend upon the state to enforce such right.

The rule as to the right of private defence has been stated by Russel thus:

¹ Hari Singh Gour, Penal Law of India 107 (Law publishers Private Limited, Allahabad, 11th Edition 1998-99).

“..... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable.”²

Literally speaking, Private defence means the defending of one’s own person. But in the modern time its scope has widened. It is justified to cause harm on another person on the ground that the harm was caused to as a means of protecting oneself.

James Wilkinson extended its meaning as defending not only of one’s own person but also one’s right etc.³ This seems to be wider than the earlier one because it not only covers the human being but also the rights of individual. It connotes the almost same meaning which is attributed to “self-defence” at present day. However, it has been defined from another perspective in Jowitt’s dictionary as “Self-Defence – life and limb are of such high value in the estimation of the law that it pardons even homicide if committed *se defendendo*, or in order to preserve them”.⁴

David M. Walker gave a more descriptive account of self defence by saying:

“It is permissible in cause harm or even death in order to defend oneself or another person from unlawful violence that the person causing the harm or death did what he could to avoid the violence, as by retreating where possible, and inflicts to greater injury than he, in good faith and on reasonable grounds, believes to be necessary to protect himself or the other. If the defence is made out, the accused escape liability entirely, the injury or death being justified, if not he may be guilty of assault, or even murder. The defence of his own life, but extends to defence against rape, possibly against sodomy, and defence of another whom one reasonably should protect, such as a child.”⁵

² J.W. Cecil Turner, Russel on Crime, 491 (Stevens & Sons Limited, London, 12th edn., 1964)

³ James Wilkinson III, “Self-defence in Louisiana” Tulance Law Review, Vol. XVI (1941-42), p. 609.

⁴ John Burke, Jowitt’s Dictionary of English Law, Vol. II (London), (1977) p. 1629.

⁵ David M. Walker, The Oxford Companion to Law, Oxford, (1980), p. 1128.

Originally, self-defence was the protection of one's own person against some injury threatened or caused by another. Later on, it was extended to the protection of one's property within its ambit.⁶ Subsequently, it was extended to the safety of one's habitation and the other members of his family. This view is fortified in the Alexander's writings.

“It is the right of a man to repel force by force even to the taking of life in defence of his person, property or habitation, or of member of his family against anyone who manifests, intends, attempts or endeavours by violence or surprise to commit a forcible felony”.⁷

Thus, in the modern time, the right to defend is not limited to the family members but it is extended to any other person and even to a stranger.

Nature of the Right of Private Defence

The right of private defence is a right and not a privilege. Basically, it is a natural right which is evidenced from the circumstance. It is given to every human being and not to a particular person or class. The right flows in particular situations and everybody in that situation has that right. It is not a special gift of law but a natural right of human being given reorganization by law, so it is a right pure and simple, and not a privilege which is expected to be possessed by particular person or classes.⁸

The law of self-defence requires that the force used in self-defence should be necessary and reasonable in the circumstances. The requirements of necessity place two limitations:

First, there should be “duty to retreat”, while using necessary forces for self-protection. This duty is subject to certain exceptions. The duty to retreat does not exist in cases of justifiable homicide or justifiable self-defence at the common law.⁹

⁶ Galville Williams, Text Book of Criminal Law, London, (1978), p. 449

⁷ Alexander, Law of Arrest, Vol. I, Section 319, (1914), p. 1059.

⁸ Carol Harlow, “Self-defence: Public Right or Private Privilege”, The Criminal Law Review, (1974), p.528.

⁹ Bishop's New Criminal Law, Vol.I, (1892), pp. 849-51.

Second, the amount of force should have been no more than necessary for the purpose of self-defence. But in the moments of excitement and disturbed mental condition, this cannot be measured in fine scales.¹⁰ Thus, in order to avert an impending danger, if the right of self-defence is used in an excessive manner, it is forfeited.

The Right of private defence is a public right and not a private privilege. The right is available in case of necessity with certain restrictions to everybody for the prevention of crime on one hand and protection of person and property of the individual on the other.

Concept of the Right of Private Defence

Self-defence is a dynamic concept. It varies from country to country and time to time depending upon the circumstances of each case. The concept of self-defence has undergone a marked change over the last few centuries. Prior to 1267 a man was hanged in cases of self-defence just as if he had acted feloniously because such killing was not justifiable homicide. The party indicated was not entitled to an acquittal by the jury. He was sent to prison and was placed at the king's mercy for a pardon.¹¹ There was no concept of exceptions to criminal liability.

With the advancement of society and coming into operation of the concept of welfare state the responsibility of protecting the person and property of individuals was taken over by the states. The judiciary has recognized the right of self-defence and the legislature has given its approval by specifically providing and enacting the statutory provisions in the criminal Code. The root of the concept of self-defence may be found even in Anglo-American jurisprudence.¹² It is now almost well settled that a man who kills another or even causes serious bodily harm in necessary self-defence may be justified and should be acquitted when indicated.¹³ Even modern lawyers can hardly deny the need for providing right of private defence.

¹⁰ Deo Narain v. State of U.P., (1973) 1 SCC 347.

¹¹ James Bar Ames, "Law and Morals", Harvard Law Review, Vol. XXII (1908-1909) p.98.

¹² Jack Lowery, "A Statutory study of self-defence and defence of others as an excuse for homicide", University of Florida Law Review, Vol. V (1952), p. 58.

¹³ Foster, Crown Law, (1792), p. 273.

Historically speaking a person accused of a crime at one time was condemned and considered to be an evil, even though the crime was committed *se defendendo*. The moral sense of community could not tolerate it for a long time.¹⁴ As a result, theory of pardon appeared on the scene and the king began to grant pardon to the accused for such act but his goods were forfeited to the government treasury. During this period, the homicide committed *se defendendo* was categorized as “excusable homicide” because some fault was attributed on the part of accused. With the march of time homicides committed in self-defence were termed as “Justifiable homicide”.

Sections 96 to 106 of the Indian Penal Code 1860, codifies the law relating the right of private defence against certain offences and acts. Section 96 provides that nothing is an offence which is done in the exercise of the right of private defence. In terms of section 97, every person has a right to defend his own body and the body of other person against any offence affecting the human body and to defend the property of himself and of any other person if an offence of theft, robbery, mischief or criminal trespass is committed or attempted. This is subject to the restrictions in section 99. Section 98 makes it clear that this right is available even against an act of a person of unsound mind, even though it is not an offence. Section 99 enlists the situations under which this right is not available. It also provides that the right of private defence in no case extends to inflict more harm than is necessary for the purpose of defence. Section 100 enumerates the situations under which the right of private defence of the body extends to the causing the death of the assailant. This is also subject to section 99. Section 102 deals with the commencement and continuance of the right of private defence of the body. Sections 103 and 104 specify respectively the situations under which the right of private defence of property extends to causing death or causing any harm other than death, as the case may be. Section 105 deals with the commencement and continuance of the right of private defence can be exercised even at the risk of harm to an innocent person if the defended assault reasonably causes the apprehension of death. In other

¹⁴ James Bar Ames, “Law and Morals,” Harvard Law Review, Vol. XXII, (1908-1909), p. 98.

words section 96 of the Indian Penal Code provides that nothing is an offence, which is done in the exercise of the right of private defence and the fascicle of sections 97 to 106 thereof lays down the extent and limitation of such right. From a plain reading of the above sections it is manifest that such a right can be exercised only to repel unlawful aggression – and not to retaliate. To put it differently the right is one of defence and not of requital or reprisal.¹⁵

On a plain reading of the above sections it is patently cleared that the right of private defence, be it to defend person or property, is available against an offence.

The plea of the Right of Private Defence and burden of proof

The right of private defence is an exception to the general rule of criminal liability. The act which would, otherwise be an offence, will cease to be an offence if it is done in self defence. The right of self defence is, therefore, required to be pleaded by the person, who claims to have committed the act in exercise of such right. But, even in the right is not pleaded; the Court may *suo moto* judge whether the act was done in private defence.

The Supreme Court has favored a trend of treating the right of private defence on a different footing from other general exceptions on the question of proof. It has been repeatedly observed that a one where the right of private defence was not specifically pleaded, the Court of its own can explore the possibility of giving advantage of the right to the accused.

Such a wide availability of this right will almost favor the accused who has not been for any reason able to raise specific plea of right of private defence. This would make reference to law of private defence vital for every instance of criminal liability. The Indian Penal Code does not deal with the question as to “burden of proof” and “duty of the Court” where the plea of private defences taken. However, the treatment of the subject seems necessary in order to determine the practical limits of the private defence. Section 105 of the Indian Evidence Act, 1872 provides:

¹⁵ Rajesh Kumar v. Dharamvir, AIR 1997 SC 3769: (1997) 4 SCC 496.

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances.”

From the aforesaid provision it is evident that the burden of proving a defence or any of the exceptions is upon the accused. It is obligatory on his part to prove the existence of circumstances in order to bring the case within any of the exceptions in the Indian Penal Code and the Court shall presume the absence of such circumstances.

The general principles with respect to burden of proof in criminal cases are to fold; (i) that the Court presumes that the accused is innocent and therefore prosecution must prove that he is guilty, and (ii) that one's the prosecution has proved beyond a reasonable doubt that the accused is guilty and if he takes any defence the burden of proving that fact lies on him. A plea of right of private defence cannot be based on surmises and speculations must be some evidence to establish the circumstances which necessitated the exercise of such a right.¹⁶

A survey of decided cases revealed that the onus of establishing the right of private defence is upon the accused but a person taking the plea of private defence may not call evidence on his side he may establish that plea by reference to circumstances transferring from the prosecution evidence itself.

The burden of the accused under section 105 of the Indian Evidence Act is discharged, as and when the Court is brought to a point where a doubt with respect to the facts of the case is created. Where an accused person is called upon to prove that his case falls under an exception, law treats the onus as discharged, if the accused person succeeds in proving a preponderance of probability. As and when preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remember that basically the original onus never shifts and the prosecution has at all stages of the case to prove the guilt of the accused beyond a reasonable doubt.¹⁷

¹⁶AIR 1915 Mad. p. 532

¹⁷Rishi Kesh Singh v. State of U.P. AIR 1970 All. 51 at 66.

Conclusion

The law of private defence embodied in the Indian Penal Code is based upon the English Law, but has been adopted with slight changes suited to the requirements of the Indian society. The right of private defence cannot be claimed merely because an unlawful or wrongful act has been done. The right of private defence can be exercised not only when any of the specified offences is being committed but also when an attempt is made to commit the same or reasonable apprehension of the same is there.

The right of private defence has come to stay through legislative and judicial process. The denial of unqualified right of private defence does not however, necessarily mean denial of the right where there is reasonable apprehensions of danger to the person or property and an excess to state help may not be easily