

## THE RIGHT OF PRIVATE DEFENCE

**BACKGROUND:** Unlike Constitutional and other statutory laws, criminal law is not right-facilitating. It is mostly penal or rarely remedial in nature. But self-help is the first rule of every remedial law. The right of private defence is absolutely necessary for the protection of one's life, liberty and property—a right inherent in every person. But the kind and amount of force required/justified in repelling the force by another force is minutely regulated by law. Criminal law, although a law of penal standards which does not supplant rights like other law, assumes that every individual must stand his ground in the face of danger and not hesitate to defend his own body or property or that of another. He would respond with defensive force to prevent certain crimes, even to the extent of causing death. As a general idea, the right of private defence permits individuals to use defensive force which otherwise be illegal, to fend off attacks threatening certain important interests. Like the defence of necessity, the right of private defence authorises individuals to take the law into their own hands. However, the most important principle in this context is that the right of private defence requires that the force used in the defence should be necessary and reasonable in the circumstances. But, in the moments of disturbed mental condition, this cannot be measured in golden scales. Although law presumes that the force used in defence must either be proportionate to the force intended to be repelled or sufficient to repel it and avoid the apprehension thereof, it does not bind an individual exercising the right to weigh in golden scales the magnitude of force to be used. Specific limitations are also been provided for when the right cannot be validly exercised and also the provision specifies clearly the cases in which the right can extend to the causing of death of the aggressor. English Law is not oblivious to this right. However, under that law this right. Jeremy Bentham, an English Jurist and proponent of Utilitarianism, has remarked, “This right of defence is absolutely necessary. The vigilance of the Magistrates can never make up for vigilance of each individual on his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total to individual resistance.” Some commentators have even gone to the extent of saying that take away this right and you become, in so doing, the accomplice of all bad men.” This right is based on two principles,

- It is available against the aggressor/assailant only, and
- The right is available only when the defender entertains reasonable apprehension.

Hence, the right of private defence serves a social purpose and needs to be guardedly resorted to, liberally construed and cautiously allowed to plead. Such a right is not only a coercive influence on corrupt characters but also encourages manly spirit in a law abiding citizens. The need for it narrow construction (application to various cases) lies also in the fact that it necessitates the occasions for the exercise of this right as an effective means of protection against wrong doers. Therefore, it might have a pulverising effect to the purpose of criminal thereby being susceptible to usage as an instrument of vengeance by unscrupulous people under the guise of law. Law, therefore, has devised three primary approaches (tests) to check and validate the claims of this defence—the objective, subjective and expanded objective tests. While objective test emphasises as to how in a similar circumstance an ordinary, reasonable, standard and average person will respond, the subjective test examines the mental state of each subject (individual) placed in the circumstances before the court in that case and based on individual attitude possessed by that person (educational, societal and mental background, etc.). However, expanded objective test, being a combination of aforesaid two tests, bases its inquiry to ascertain and determine whether or not the individual acted as a reasonable person. This right is, therefore, aptly described as a shield and not a sword as law does not equip an individual with it for the purpose of meeting his passions of vengeance or using it as a tool to resort to criminality.

### **RIGHT OF PRIVATE DEFENCE IN THE INDIAN PENAL CODE, 1860.**

**INTRO:** The right of private defence has been recognised in the Indian Penal Code, 1860 under General Exceptions in the last 11 sections of Chapter IV starting with Section 96 and up to Section 106. Section 96 recognises this right in a way too general sense while the remaining sections make provisions for varied forms of this right. Section 96 provides that nothing is an offence, which is done in the exercise of the right of private defence. Right of private defence has been clearly incorporated in the Penal Code with a purposive scheme in mind and cannot be said to be an offence in return; rather it must proceed on the presence of a reasonable apprehension of harm to person or property. The reasonable apprehension can only be justified if the accused had an honest belief that there is danger and that such belief is reasonably warranted by the conduct of the aggressor and the surrounding circumstances. The right of self-defence under Section 96 is not exhaustive. It is actually extended by the succeeding provisions of the code (Section 97-106) with varying degrees of circumstances. This defence is clearly qualified by **Section 99** which says that the right in no case extends to the inflicting of more harm than it is necessary for the purpose of defence and forbids the application of this defence to certain circumstances. The right is available against an **offence** (affecting human body or property, in certain

cases) and can be exercised by a person either himself or by any other person on his behalf (**Section 97**). However, if the act is harmful in nature, but not an offence by reason of a mistake, infancy, insanity, intoxication, etc. the right shall still remain available in the same manner as if it were an offence (**Section 98**).

The extent of this right to be exercised in respect of body is covered from section 100 to 102; there are **seven** circumstances when a person can exercise this right to the extent of voluntarily causing death of the assailant (**Section 100**); or any other harm other than causing death if the act is not of any description as specified under section 100 (**Section 101**). In the mode the commencement and continuance of this right is regulated by **Section 102**. Accordingly, the extent and nature of this right to be exercised in respect of property is covered from section 103 to 105; in **four** types of offences against the property this right can be exercised to the extent of causing death of the assailant (**Section 103**), or any other harm other than death in other situations (**Section 104**) whereby the commencement and continuance of the right is exhaustively dealt under **Section 105**. There are some extremely rare but likely possible situations where a person is so situated that he cannot exercise this right without running the risk of harming an innocent individual, who is neither the assailant nor an abettor. **Section 106** takes into account such circumstances and does not deprive a person so placed from exercising the right and running such risk. The following diagrams have been illustrated with the purpose of making it easier to comprehend the scheme of provisions and get an overview of the provisions covering this defence in the Indian Penal Code, 1860.

# 96 Nothing is an offence which is done in the exercise of the right of private defence

**97** Every person has right to defend:

1. His own body or body of any other person
2. His or any others property, movable or immovable.

**98** Carves out a special case out of Section 97 wherein the act done is not an **offence** by reason of infancy(82), immaturity(83), insanity(84), intoxication(85) or mistake (77-79)

Private Defence of Body Against:  
any **offence affecting the Human Body** (See Chapter XVI of the IPC)

Private Defence of Property Against:  
Any act which is the commission or attempt of an offence falling within the definition of **Theft(378)**, **Robbery(390)**, **Mischief(425)** or **Criminal Trespass(441)** (See Chapter XVII of the IPC)

## RIGHT OF PRIVATE DEFENCE OF BODY

**100**

The right extends to the extent of causing death or any harm under seven circumstances

**101**

The right extends to causing any harm other than death in case of the act of the assailant is not of any description as enumerated in 7 clauses of section 100

**102**

Commencement and continuance of the right . Commences as soon as the apprehension of danger arises and continues till the danger persists

## RIGHT OF PRIVATE DEFENCE OF PROPERTY

**103**

The right extends to the extent of causing death or any harm under four circumstances

**104**

The right extends to causing any harm other than death in case of the act of the assailant is not of any description as enumerated in 4 descriptions of section 103

**105**

Commencement and continuance of the right .

## 96 Nothing is an offence which is done in the exercise of the right of private defence

Serves as an Exception to the defence. Sections 97, 100, 101, 103 and 104 are subject to the restrictions contained in this section. There is no right of private defence in **THREE** situations.

### 99

1. An act done or attempted to be done by a public servant in good faith under the colour of his office, though not strictly justifiable by law, if it does not cause reasonable apprehension of **Death** or **Grievous Hurt**

2. An act done or attempted to be done by the *direction* of a public servant in good faith under the colour of his office, though not strictly justifiable by law, if it does not cause reasonable apprehension of **Death** or **Grievous Hurt**

3. In cases in which there is time to have recourse to the protection of public authorities

### 106

This covers a special case wherein the person exercising the right is situated that he cannot exercise the same without harming an innocent person. He is allowed to run the risk of causing such harm.

## Key Concepts and Keywords:

**Section 99:** Serves as a precondition to this defence and specifically so mentioned in Sections 97, 100, 101, 103 and 104 as the right of private defence cannot be applied as a pretence for justifying aggression or causing harm to any other person or inflicting disproportionately more harm than is required under the circumstances to repel a force which does not fit in the canons of legality. Every person has the right, subject to the restrictions contained in Section 99. The obvious reason for not mentioning this section in the language of section 98 is that the provision is class specific as is based on the assumption of the legality of this right in such situation i.e. the provision proceeds by assuming that this right would have ordinarily been available if the act had been done by a person capable of committing an offence and thereby carves out a special case to deal with the paradox of the act not being an offence by reason of insanity, infancy, intoxication, etc.

Strikingly the section recognises the fundamental principle of proportionality in the exercise of the right of private defence by laying down that the *right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence*. The section categorically denies this right in **three situations**; two being related to the acts by or by the direction of a public servant under the colour of his office (though not strictly justifiable by law) provided the act does not cause a reasonable apprehension of death or grievous hurt. However, the person cannot be deprived of his right of private defence under such circumstances unless he knows or has a reason to believe that the act is done by the public servant or under the directions of a public servant, as the case may be. [**Explanations 1 and 2 to section 99**]. The third one is related to those cases in which there is time to have recourse to the protection of public authorities.

**Section 96:** This section is too vague in application that it has necessarily to be read in tandem with the sections following it especially section 97. It formally recognises the right of private defence by providing that nothing is an offence which is done in the exercise of the right of private defence.

### **Section 97—What Can a Person Defend and Against What?**

This section answers these two questions by delineating the nature and application of this right. It divides the right of private defence into two parts—the first part deals with the right of private defence of **person**, and the second part with the right of private defence of **property**. Answering the above questions, find that the section provides that a person can defend through the exercise of the right of private defence:

- i. His own body or body of any other person. As such he can defend any human body including his own *against* any offence affecting the human body (**Chapter XVI** of the Penal Code deals defines and penalises offence affecting the human body).

- ii. His own property or the property of any other person, whether movable or immovable, against and act which is either the commission or an attempt of an offence falling under the definition of any of the four offences listed below:
  - A. Theft (378)
  - B. Robbery (390)
  - C. Mischief (425)
  - D. Criminal Trespass (441)

All these offences are listed under Chapter XVII of the Penal Code under the head “Offences against Property” and the offences themselves serve as a threshold or head of species of offences which, naturally, get included in the definition of the offence itself listed in the second clause of section 97 by the usage of expression “any act which is an offence falling under the definition of”. As such, this right extends, not only to the cases of theft under section 378 but, also other forms of theft like theft in a dwelling house under section 380. Similarly, same applies to the rest of the offences listed above like *Dacoity* under Section 391, *Dacoity with murder* under Section 396, offences enumerated after the definition of *Mischief* under Section 425 i.e. offences from Section 426 to Section 440 and *House-Trespass* under Section 442, *Lurking House-Trespass* under Section 443, etc.

**Section 98:** This section carves out a special case which would normally have been left out from the scope and operation of the preceding section for the reason that Section 97 enables a person the right of private defence in respect of body of property only against the acts which qualify as *offences*. However, there are certain acts which may be intimidating or life-threatening in nature, but still do not qualify as offences for the reason of legal justifications or excuses. The first part of the Chapter, from Section 76 to Section 86 covers such acts. This section is remedial to this conundrum as law cannot deprive person of this right only for the reason that the other person lacks mens rea or subsists protected. Despite the act of the aggressor/assailant being protected by the law and not an offence by reason of infancy, immaturity, intoxication, mistake or insanity, every person has the same right of private defence against that act which he would have if the act were that offence.

### **Section 100-102: Private Defence of Body**

This section covers the right of private defence of body, which means a human body. Section 100 recognises this right in the **seven** most brutal form of acts to the extent of even causing death of the assailant but subject to the restrictions contained under Section 99. It specifies those seven offences as assault with reasonable apprehension of (1) Death, (2)

apprehension of Grievous Hurt, or an assault with intention of (3) Rape, (4) Gratifying Unnatural Lust, (5) Kidnapping or Abduction, (6) Wrongful Confinement with reasonable apprehension of deprivation from recourse to the assistance of public authorities for release and (7) act or attempt of Administering Acid which causes reasonable apprehension of grievous hurt (**2013 Amendment** after the recommendations of **Verma Committee**).

If the offence is not of any of the descriptions listed above, this right extends to the extent of causing any harm to the assailant other than death (Section 101). The **commencement and continuance** of this right is regulated by Section 102, which lays down the point of time when a person is enabled of this right of private defence of property and the time for which he is entitled to exercise it for the reason that law cannot allow a person to chase an offender after the attack or attempt is over, find him and inflict harm to him even after the situation has been averted or has materially altered giving way for the law to take its usual course. The right 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 actually committed; and it continues as long as such apprehension of danger to the body continues. The apprehension of danger must be reasonable, not fanciful. For example, one cannot shoot one's enemy from a long distance, even if he is armed with a dangerous weapon and means to kill because the danger must be present and imminent, proximate, real and based on substance.

### **Section 103-105: Private Defence of Property**

This part follows the similar scheme as discussed above with **Section 103** specifying the circumstances when this right extends to the voluntary causing of death, **Section 104** lays down when this right can be exercised for causing any harm other than death and **Section 105** delineating the contours of this right—commencement and continuance. The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, in the commission or attempt of any offence in the description of **1. Robbery (390) 2. House-breaking by night (446 read with 445) 3. Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property (436 and other sections) or 4. Theft, Mischief, or House-Trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised (390, 425 or 442 read with any other section covering any offence of the description of apprehension of death or grievous hurt).** If a person does not have possession over the property, he cannot claim any right of private defence regarding such property. Right to dispossess or throw out a trespasser is not available to the true owner if the trespasser has been successful in accomplishing his possession to his knowledge.

**Section 104** provides when such right extends to causing of any harm other than death. If the offence occasions the right of private defence of property but is not of any of the descriptions enumerated in section 103, that right does not extend to the voluntary causing of death, but does extend to the voluntary causing of any harm other than death to the wrongdoer and the same shall be subject to the restrictions contained in section 99. This section cannot be said to be giving a concession to the accused to exceed their right of private defence in any way. If anyone exceeds the right of private defence and causes death of the trespasser, he would be guilty under Section 304, Part II. This Section is corollary to Section 103 as Section 101 is a corollary to Section 100.

**Section 105** prescribes the *commencement and continuance* of the right of private defence of property. The Right of private defence of property with respect to all the offences against property (mentioned either in section 97 or section 103) i.e. *theft, robbery, mischief, criminal trespass* and *house-breaking by night* commences when a reasonable apprehension of danger to the property commences. Regarding the continuance of the right, this section specifies separate time points of time.

- In **theft**, it continues till the offender has *affected his retreat* with the property or either the *assistance of the public authorities* is obtained, or the property has been *recovered*.
- In **robbery**, the right continues **as long as the offender causes or attempts** to cause to any person death or hurt or wrongful restraint or as long as the **fear** of instant death or of instant hurt or of instant personal restraint **continues**.
- In **criminal trespass** or **mischief** it continues **as long as the offender continues in the commission** of criminal trespass or mischief.
- In **house-breaking by night** continues as long as the house-trespass which has been begun by such house-breaking continues.

### **Section 106:**

Section 106 lays down the provision for the right of private defence against a deadly assault when this right cannot be exercised without running the risk of harm to innocent person. If in the exercise of this right, whether in case of body or property, against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person his right or private defence extends to the running of that risk.

## Judicial Approach/Case Laws:

The protection of life and property of an individual is axiomatic in every civilised society because it is impossible for the State to do so on every occasion for the reason that law enforcement agencies cannot be omnipresent to step in the situation being confronted by an individual and thereby come to his/her rescue—that is why law gives the individual the right of private defence. Notably, on the execution of the private defence provisions in the Penal Code, the framers said **“we leave it still in a very imperfect state...we are inclined to think that it must always be one of the least exact parts of every system of criminal law.”** This suggests that they recognized the necessity for latent ambiguity to allow judges the flexibility to read and apply the provisions so as to achieve fairness.

### 1. **Sukumaran v. State Rep. by the Inspector of Police AIR 2019**

The Supreme Court, in this case, acquitted the Tamil Nadu forest ranger who was accused of killing a sandalwood smuggler in a certain forest area by shooting him. The trial court had sentenced him to life imprisonment for murder. However, the Madras High Court reduced the term to five years. In appeal to the Apex Court, the accused contended that he had threat to his own life and that of his driver from the deceased smuggler. Acquitting the accused the Court observed, “The right embraces the protection of property, whether one’s own or another person’s, against offences like theft, robbery, mischief and criminal trespass...mere a reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be actual commission of the offence in order to give rise to the right of private defence.” The appellant having seen the suspicious movements of the deceased party in the forest area rightly formed an opinion that the deceased party was moving around in the forest to smuggle the sandalwoods. Therefore, he was entitled to chase the deceased party and apprehend them for being prosecuted for commission of offence punishable under the forest laws. Indeed, that was his duty; also there was no motive attributed to the appellant towards any member of the deceased party.

### 2. **Darshan Singh v. State of Punjab (2010) 2 SCC 333**

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.
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.

### **3. Kesho Ram vs Delhi Administration AIR 1974 SC 1158**

The appellant was convicted u/s 353/332/333 of the Indian Penal Code and was sentenced accordingly. The prosecution case was that the appellant obstructed 3 inspectors and a peon of the Delhi Municipal Corporation, when they went to seize the appellants' buffalo in the discharge of their duty to realise the milk tax from him and struck one of the officers on the nose with the result that it bled and was found fractured. The main contention of the appellant was that the attempt to realise the arrears of milk tax and recovery charges was illegal because no demand noticed under Sec. 154 of the Act was served on the appellant, and therefore, he had the right of private defence. The prosecution relied on Sec. 99 Indian Penal Code which provides that there is no right of private defence against an act of a public servant, done in good faith under colour of his office, though that act may not be strictly justifiable by law. Further according to the prosecution, Sec. 161 of the Act empowered the Inspector of the Corporation to seize and remove the appellant's buffalo for non-payment of tax and the section gave them an over-riding power to resort to seize and detention of the animal. Therefore, according to the prosecution, the appellant was guilty of the offences charged. The Court held that an immunity under Section 99 of the IPC can be claimed by a public servant, if he acted in good faith under the colour of his office even though the legality of the act could not otherwise be sustained.

### **4. Yogendra Moraji v. State AIR 1980 SC 660**

The Supreme Court discussed in detail the extent and the limitations of the right of private defence of body. One of the aspects emphasised by the Court was that there must be no safe or reasonable mode of escape by retreat for the person confronted with an impending peril to life or of grave bodily harm except by inflicting death on the assailant. This view seems in contradiction to the principle that the law does not encourage cowardice on the part of one who is attacked. But another viewpoint is that this retreat theory in fact is an acceptance of the English common law principle of defence of body or property under which the common law courts always insisted to look first as to whether the accused could prevent the commission of crime against him by retreating.

### **5. Nand Kishore Lal v. Emperor AIR 1924 Patna 789**

Accused who were Sikhs, abducted a Muslim married woman and converted her to Sikhism. Nearly a year after the abduction, the relatives of the woman's husband came and demanded that she return. The accused refused to comply and the woman herself expressly stated her unwillingness to rejoin her Muslim husband. Thereupon the husband's relatives attempted to take her away by force. The accused resisted the attempt and in so doing one of them inflicted a blow on the head of the woman's assailants, which resulted in the latter's death. It was held that the right of the accused to defend the woman against her assailants extended under this section to the causing of death and they had, therefore, committed no offence.

### **6. Mohinder Pal Jolly v. State of Punjab AIR 1979 SC 577**

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.

### **Conclusion**

In general, private defence is an excuse for any crime against the person or property. It also applies to the defence of a stranger, and may be used not only against culpable but against innocent aggressors. The defence is allowed only when it is immediately necessary-against threatened violence. A person who acts under a mistaken belief in the need for defence is protected, except that the mistake must be reasonable. In principle, it should be enough that the force used was in fact necessary for defence, even though the actor did not know this; but the law is not clear. There is no duty to retreat, as such, but even a defender must wherever possible make plain his desire to withdraw from the combat. The right of private defence is not lost by reason of the defender's having refused to comply with unlawful commands. The force used in defence must be not only necessary for the purpose of avoiding the attack but also reasonable, i.e. proportionate to the harm threatened; the rule is best stated in the negative form that the force must not be such that a reasonable man would have regarded it as being out of all proportion to the danger.

**Note: The above material is not intended for research purposes or references. It has been developed as a reading material for the students of law owing to the lockdown due to the global pandemic spread. The students are advised to look up for text books as well and also go religiously through the provisions in the bare act throwing heavy weight behind and placing due attention on the illustrations appended thereto.**

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{We will meet again}**