



The Right to Private Defence: Has the Bharatiya Nyaya Sanhita, 2023 Witnessed a Change?

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ABSTRACT

The Bharatiya Nyaya Sanhita (BNS), 2023, has been introduced to replace the Indian Penal Code, which had served as the primary criminal law in India since 1860. The main objective behind this move was to replace the out dated provisions of the British-era penal code with modern, updated provisions that are relevant to contemporary times. The BNS has replaced many provisions of the Indian Penal Code, modified others, and enhanced the nature and quantum of punishment for certain offences; it has also excluded certain acts from the category of crimes, aligning with judicial precedents that had previously decriminalized them. However, it is also true that there was an expectation for the legislature to amend certain other provisions in keeping with changing times, changes that were ultimately not made. While the Bharatiya Nyaya Sanhita, 2023, has largely met expectations, there remain some areas here it falls short.

In the Indian Penal Code, 1860, provisions regarding the right of private defence were contained in Sections 96 to 106 of Chapter, which dealt with 'General Exceptions'. Similarly, the currently applicable Bharatiya Nyaya Sanhita includes provisions regarding private defence in Sections 34 to 44. The objective of this research paper is to analyse whether the new Code of 2023 has introduced any changes or amendments to the provisions concerning private defence compared to the old Code of 1860, or if they have been retained as they were. To achieve this objective, the study conducts a comparative analysis of the provisions of both the old and new Codes and examines landmark judgments delivered by the Indian judiciary regarding the application of the right of private defence.

Key Words: -Bharatiya Nyaya Sanhita, Private Defence, Rule of Proportionality, Indian Penal Code, and Reasonable Apprehension of Danger.

INTRODUCTION:-

It is the duty of the State to provide security to everyone. The Indian criminal justice system is founded on the principle that the State ensures the safety of all; should a criminal act occur against an individual, it is the obligation of the State to punish the offender and secure justice for the victim. A victim of a crime is expected to place their

trust in the State machinery, await its intervention, and under no circumstances take the law into their own hands. While securing justice is the responsibility of the State and administering it is the duty of the judiciary. However, situations sometimes arise where immediate, independent action becomes necessary for an individual. In such exceptional circumstances, if immediate steps are not taken for self-defence, the individual risks suffering the loss of life or property. The law acknowledges these situations, recognizing that every person must have the right to protect their life and property from unlawful attacks.

“The right of private defence is recognised in every legal system and the extent of this right varies in inverse proportion to the ability of the State to protect the life and property of its subjects”ⁱ. The right to self-defence has existed in India since ancient times. This right has been clearly recognized in ancient Indian culture and literature. “Whoever, whether our own or a stranger, seeks to strike us down, may all the gods crush him back; for within me is the armour of the *brahman*, the protective power of the true word”ⁱⁱ. The right of private defence is recognized as a right that permits the use of reasonable force to protect oneself from an imminent threat, without incurring criminal liability.

The modern criminal justice system introduced in India during the British era incorporated the concept of the right of private defence. This right was codified in Section 96 to 106 of the Indian Penal Code (IPC), a statute drafted by the First Law Commission under the chairmanship of *Lord Macaulay* and in force in India for over 160 years. The primary objective of the British-era laws was to punish Indians rather than to deliver justice. Furthermore, these laws had become outdated and irrelevant; consequently, there had been persistent calls over time to amend the provisions of the IPC, 1860. In 2023, the Indian Parliament repealed the IPC and enacted the BNS, 2023 in its place.

While implementing this new code, the Indian Parliament had the opportunity to exclude obsolete provisions and align existing ones with contemporary realities. As the provisions regarding the right of private defence had also become outdated, there was a need to introduce a revised framework for them within the BNS, 2023.



**PROVISIONS RELATED TO PRIVATE DEFENCE IN THE BHARATIYA
NYAYA SANHITA, 2023-**

‘Chapter III- General Exceptions’ of the BNS 2023 contains provisions regarding the ‘Right of Private Defence’ in Sections 34 to 44. The following table lists the relevant provisions of the BNS and the corresponding provisions of the IPC regarding the right of private defence:-

SECTION (BNS, 2023)	PROVISIONS/SUBJECT MATTER	CORRESPONDING PROVISION OF IPC
34	Things done in Private Defence	96
35	Right of Private Defence of Body and of Property	97
36	Right of Private Defence against Act of a Person of Unsound Mind etc.	98
37	Acts against Which There is no Right of Private Defence	99
38	When Right of Private Defence of Body Extends to Causing Death	100
39	When Such Right Extends to Causing Any Harm Other Than Death	101
40	Commencement and continuance of right of private defence of body	102
41	When right of private defence of property extends to causing death	103
42	When such right extends to causing any harm other than death	104
43	Commencement and continuance of right of private defence of property	105
44	Right of private defence against deadly assault when there is risk of harm to innocent person	106



A brief overview of the provisions regarding the right of private defence introduced in the BNS 2023, along with a comparison with the corresponding provisions of the IPC 1860 to determine whether any changes have been made, is presented below-

1. The Fundamental Principle of Private Defence-Section 34 outlines the fundamental principle of the right of private defence, stating that any act performed in private defence does not constitute an offence. “Nothing is an offence which is done in the exercise of the right of private defence”ⁱⁱⁱ. This provision is similar to the one contained in Section 96 of the IPC.

2. Scope of Right of Private Defence-Section 35 outlines the scope of the right of private defence, subject to the restrictions specified in Section 37, stating that every person has the right to defend their own body or property (whether movable or immovable), as well as that of others, against certain offences. A similar provision has previously existed in Section 97 of the IPC as well.

3. Right of Private Defence against the Acts of a Person Immune from Criminal Liability- Under Section 36^{iv} of the BNS, the right of private defence is available against the acts of persons who are otherwise exempt from criminal liability, such as minors, the mentally unsound, or those in a state of intoxication, in the same manner as it is against an ordinary person. This provision of the BNS is identical to Section 98 of the IPC.

4. Limitation of the Right of Private Defence- Under the BNS 2023, the right of private defence is not granted as an absolute right; rather, certain limitations are imposed-as outlined in Section 37- such as the right not being available where an act is performed by a public servant in the discharge of their official duties, or under their direction, provided there is no reasonable apprehension of death or grievous hurt, or where there is time to seek protection from public authorities; furthermore, this right does not extend to inflicting more harm than is necessary. This provision of the BNS is also similar to the provision contained in Section 99 of the Indian Penal Code, 1860.

According to the Supreme Court^v, the plea of the right of private defence cannot be based merely on conjecture or speculation.

5. Right of Private Defence of the Body- Sections 38 and 39 of the BNS outline the acts that may be committed in the exercise of the right of private defence of the body. Section 38 specifies the circumstances under which the life of an assailant may be taken while defending the body, whereas Section 39 specifies the circumstances under which harm other than death may be caused to the assailant. “The right of private defence of the body extends, under the restrictions specified in Section 37, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

- (a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
- (b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
- (c) an assault with the intention of committing rape;
- (d) an assault with the intention of gratifying unnatural lust;
- (e) an assault with the intention of kidnapping or abducting;
- (f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release;
- (g) an act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act”^{vi}.

In other cases, any harm other than death may be caused to the assailant in the exercise of the right of private defence of the body^{vii}. The aforementioned provisions in the BNS correspond to the provisions contained in Sections 100 and 101 of the IPC.

6. Commencement and Continuance of Right of Private Defence of Body- Section 40 of the BNS contains the following provision regarding the commencement and continuance of the right of private defence of the body- even though the crime may not have been committed, the right to private defence of the body begins as soon as a



reasonable fear of bodily harm results from an effort or threat to do it. It lasts as long as this fear persists. This provision is equivalent to Section 102 of the IPC.

The Supreme Court^{viii} has held that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises, and this right continues as long as such apprehension of danger persists.

7. Right of Private Defence of the Property- Sections 41 and 42 of the BNS specify the circumstances under which the life of an offender may be taken, or any other harm caused to them, while exercising the right of private defence of property.

According to Section 41, the death of an offender may be caused while defending property against the following offences- Robbery^{ix}; House-breaking after sunset and before sunrise^x; Mischief by fire or any explosive substance 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^{xi}; and 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. The provisions of Section 41 correspond to Section 103 of IPC.

According to Section 42, which contains provisions similar to Section 104 of the IPC, in situation other than those specified in Section 41, any harm other than death may be caused to the offender while exercising the right of private defence of property^{xii}.

8. Commencement and Continuance of Right of Private Defence of Property-Section 43 of the BNS contains provisions regarding the commencement and duration of the right of private defence of property. This right arises on different occasions and continues under varying circumstances, depending on the specific offences committed against the property. The provisions of Section 43 correspond to Section 105 of the IPC. According to Section 43:

“The right of private defence of property- (a) commences when a reasonable apprehension of danger to the property commences; (b) against theft 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; (c) against robbery 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; (d) against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief; and (e) against house-breaking after sunset and before sunrise continues as long as the house-trespass which has been begun by such house-breaking continues”.

9. Extension of the Right of Private Defence to Endangering the life of an Innocent Person-Section 44 of the BNS address the difficult and exceptional situation where a person can exercise the right of private defence only by putting the life of an innocent person at risk otherwise he would be unable to exercise his right of private defence. This Section^{xiii} clearly states that, in such a scenario, the person is entitled to take that risk. This provision of the BNS is equivalent to Section 106 of the IPC.

CRITICAL ANALYSIS OF THE PROVISIONS OF THE BNS, 2023- A comparison of the provisions regarding the right of private defence in Sections 34 to 44 of the BNS 2023 with the corresponding provisions of the IPC reveals that the legislature has opted for continuity rather than reform. The old provisions have essentially been “copy-pasted” under new Section numbers, nothing more. The ambiguities and uncertainties that plagued the old provisions persist. It is beyond comprehension why this important provision was left unchanged when the legislature was working towards reform by introducing a new law to replace the British-era criminal law. In contemporary times, numerous situations such as domestic violence and cybercrimes are arising that give rise to the right to private defence of body and property. Such offences could not have even been envisioned in 1860. Therefore, it was essential to comprehensively interpret the right of private defence and bring these new categories of offences within its ambit. Both the old legal provisions and the new law remain silent regarding the limits of the force that may be employed against a threatened use of force. Similarly, the new laws contain no specific provisions concerning ‘reasonable apprehension’ leaving the judiciary to interpret this concept on a case-by-case basis.



CONCLUSION-It is true that the law can never- nor should it- be rigid or immutable; it has consistently evolved to align with the changing needs of society and public expectations. The Indian criminal justice system still bears the deep imprint of British rule. When it becomes evident that the criminal laws enacted during the British era were no longer relevant to India, new laws were introduced, incorporating sweeping changes. This presented an opportunity for the legislature to not only shed the legacy of British-era influence but also to repeal or amend provisions that were ambiguous. However, by retaining the provisions regarding the right of private defence exactly as they were, the underlying issues have been left unaddressed. The right of private defence, hen based on mere suspicion, often borders on the act of aggression itself; therefore, rather than leaving the matter entirely to the judiciary, there is a need for greater clarity.

REFERENCE

- ⁱ Huda, S. *The principles of the law of crimes*. 382.
- ⁱⁱ *yo naḥ svo araṇo yaś ca niṣṭyo jighāmsati | devās taṃ sarve dhūrvantu brahma varma mamāntaram || Rigveda, Maṇḍala 6, Sūkta 75.*
- ⁱⁱⁱ Section 34, The Bharatiya Nyaya Sanhita, 2023- Things done in Private Defence
- ^{iv} Section 36:- Right of Private Defence against 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.
- ^v Madan v. State of M.P., (2008) 4 Cr.L.J. 3950 (SC).
- ^{vi} Section 38, The Bharatiya Nyaya Sanhita, 2023- When Right of Private Defence of Body Extends to Causing Death.
- ^{vii} Section 39, The Bharatiya Nyaya Sanhita, 2023- When Such Right Extends to Causing Any Harm Other Than Death.
- ^{viii} Arun v. State of Maharashtra, (2009) 2 Cr.L.J. 2065 (SC).
- ^{ix} Section 309, The Bharatiya Nyaya Sanhita, 2023.
- ^x Section 331, The Bharatiya Nyaya Sanhita, 2023.
- ^{xi} Section 326(b), The Bharatiya Nyaya Sanhita, 2023.



- ^{xii} “If the offence, the committing of which, or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions specified in section 41, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions specified in section 37, to the voluntary causing to the wrong-doer of any harm other than death”.
- ^{xiii} Section 44, The Bharatiya Nyaya Sanhita, 2023- Right of private defence against deadly assault when there is risk of harm to innocent person- If in the exercise of the right of private defence 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 of private defence extends to the running of that risk.

