
CHANGING DYNAMICS OF RIGHT OF PRIVATE DEFENCE UNDER BHARTIYA NYAYA SANHITA, 2023: A CRITICAL AND COMPARATIVE ANALYSIS WITH JUDICIAL INTERPRETATION

Nitish Kumar Mishra, C.M.P. Degree College Prayagraj Uttar Pradesh

ABSTRACT

The enactment of the Bhartiya Nyaya Sanhita, 2023 (BNS), replacing the Indian Penal Code, 1860 (IPC), marks a transformative shift in India's criminal justice architecture. Among the provisions undergoing legislative revision, the right of private defence occupies a uniquely contested space, straddling the tension between the individual's instinct for self-preservation and the state's monopoly over legitimate force. This project undertakes a critical and comparative analysis of the right of private defence as re-envisioned under the BNS 2023, examining its structural modifications vis-à-vis the IPC framework and assessing how Indian courts have interpreted and applied this right over decades. The study traces the philosophical, common law, and constitutional underpinnings of the doctrine, surveys landmark Supreme Court and High Court decisions that shaped the contours of "reasonable apprehension," proportionality, and the duty to retreat, and evaluates whether the BNS provisions represent a meaningful advancement or a mere legislative recodification. The research finds that while the BNS largely retains the substantive essence of the IPC provisions, subtle changes in language and structure carry significant implications for judicial interpretation. The project concludes with suggestions for clearer legislative articulation to align the right of private defence with contemporary human rights standards and empirical realities of crime.

Keywords: Right of Private Defence, Bhartiya Nyaya Sanhita 2023, Indian Penal Code 1860, Judicial Interpretation, Proportionality, Reasonable Apprehension, Self-Defence, Criminal Law Reform, IPC vs BNS, Grievous Hurt

1. INTRODUCTION

1.1 Statement of Problem including Aim and Research Objective

The right of private defence is among the most ancient and instinctively understood legal doctrines in human civilization. At its core, it rests on a straightforward moral premise: a person who faces an imminent threat to their life or property cannot be expected to remain passive merely because the state's protective machinery has not arrived in time. The law, therefore, carves out a space in which the individual is permitted to act as their own protector — to use force, even lethal force when circumstances demand — without incurring criminal liability.

In India, this right has historically been codified under Sections 96 to 106 of the Indian Penal Code, 1860 (IPC).¹ These provisions, drafted by Lord Macaulay's Law Commission and enacted during British colonial rule, governed the right of private defence for over 160 years. While the provisions themselves were carefully crafted, their application was inevitably shaped — and sometimes distorted — by judicial interpretation across shifting social and political contexts. Courts have oscillated between a liberal approach that recognises the practical realities of crime and a conservative approach that insists on rigid tests of proportionality and necessity.

The enactment of the *Bhartiya Nyaya Sanhita, 2023* (BNS), which came into force on July 1, 2024, replacing the IPC,² creates an important juncture to evaluate whether the legal framework governing private defence has been meaningfully modernized. The BNS re-enacts the provisions relating to private defence largely under Sections 34 to 44, with changes in numbering, marginal modifications in language, and certain structural rearrangements. Whether these changes alter the substantive law in meaningful ways, or whether they are largely cosmetic, is a question of central importance for practitioners, scholars, and citizens alike.

The problem this project addresses is the gap between the legislative text and its practical application. The right of private defence, as articulated in both the IPC and the BNS, is broad

¹ The *Bhartiya Nyaya Sanhita, 2023* (Act 45 of 2023) came into force on July 1, 2024, vide Notification No. S.O. 2440(E) dated June 26, 2024.

² The Indian Penal Code, 1860 (Act 45 of 1860), ss 96–106.

enough in its framing to protect genuine acts of self-defence, yet it is also capable of misuse as a pretext for vigilante violence or pre-emptive aggression. The courts have frequently been called upon to draw the line between a lawful exercise of this right and an act of criminal assault or culpable homicide — a distinction that turns on highly fact-specific judgments.

The aim of this project is to examine the right of private defence as it stands under the BNS 2023, assess the changes wrought by the new legislation relative to the IPC framework, and critically evaluate how the judiciary has interpreted and continues to interpret this right.³

The research objectives are as follows:

- (i) To trace the historical and philosophical evolution of the right of private defence in Indian law.
- (ii) To analyse the substantive provisions relating to private defence under the BNS 2023 and compare them with the corresponding IPC provisions.
- (iii) To examine landmark judicial decisions that have shaped the interpretation of the right of private defence.
- (iv) To critically assess whether the BNS framework represents a meaningful advancement in the legal protection of the right of self-defence.
- (v) To suggest legislative and policy recommendations for strengthening the framework.

1.2 Research Questions and Hypothesis

The project is guided by the following research questions:

- (i) What are the key changes introduced by the BNS 2023 in the provisions governing the right of private defence as compared to the IPC 1860?
- (ii) Has the Indian judiciary evolved a coherent and consistent doctrine for applying the right of private defence, and if so, does this doctrine translate adequately into the BNS framework?

³ *B.M. Gandhi*, Indian Penal Code 283 (3rd ed., Eastern Book Company, 2006).

- (iii) Does the right of private defence as codified under the BNS 2023 meet the demands of proportionality and legal certainty?

The hypothesis underlying this research is that while the BNS 2023 retains the essential structure of the IPC provisions on private defence, the changes introduced are primarily cosmetic and structural rather than substantively transformative. The project hypothesises that a truly reformed right of private defence would require not merely renumbering of provisions but a recalibration of the standards of "reasonable apprehension" and proportionality in line with contemporary human rights norms and socio-legal realities.

1.3 Research Methodology

This project employs a doctrinal and analytical research methodology. The primary source of material is the text of the relevant statutes — the Indian Penal Code, 1860 and the *Bhartiya Nyaya Sanhita, 2023* — along with the official Statement of Objects and Reasons, the Reports of the Law Commission of India, and Parliamentary debates. Secondary sources include judicial decisions of the Supreme Court and various High Courts, academic articles published in peer-reviewed legal journals, commentaries on criminal law, and comparative studies from foreign jurisdictions.

The doctrinal method involves a careful textual analysis of the statutory provisions, their legislative history, and their interpretation by courts. The comparative method is employed to situate the Indian framework within a broader international context, drawing particularly on the criminal law of England and Wales, the United States, and Canada, which share a common law heritage with India but have developed distinctive approaches to private defence. The analytical approach is used to critically evaluate the adequacy and coherence of the BNS framework.

No empirical fieldwork or primary data collection has been undertaken in this study, as the subject matter is primarily legislative and judicial in nature.

1.4 Scope of Research and Limitations

The scope of this research is confined to the right of private defence as it operates under the substantive criminal law of India, specifically the transition from the IPC 1860 to the BNS 2023. The study does not examine procedural aspects of establishing the right of private

defence in criminal trials beyond what is necessary to contextualise the substantive law. It does not address the related concepts of the right of private defence in civil law, tort law, or military law.

The principal limitation of this research is the recency of the BNS 2023, which came into force only on July 1, 2024. Post-BNS judicial decisions are therefore limited in number, making it difficult to chart a definitive post-BNS jurisprudential trajectory. The analysis of judicial trends post-BNS is therefore necessarily tentative. A further limitation is the absence of access to certain regional High Court decisions that may have been decided under the BNS but are not yet available in standard law databases.

1.5 Scheme of Chapterisation

The project is organised into six chapters. Chapter I (Introduction) sets out the background, objectives, methodology, and scope of the research. Chapter II traces the historical and philosophical foundations of the right of private defence, from ancient jurisprudence through the common law tradition to its codification in the IPC 1860. Chapter III provides a detailed analysis of the right as codified in the BNS 2023, with particular attention to modifications and their implications. Chapter IV surveys the judicial interpretation of the right across key Supreme Court and High Court decisions. Chapter V undertakes a critical and comparative analysis of the IPC and BNS frameworks, drawing also on international comparisons. Chapter VI concludes the study and offers recommendations for legislative reform.

2. HISTORICAL AND CONCEPTUAL FOUNDATIONS OF THE RIGHT OF PRIVATE DEFENCE

2.1 The Philosophical Underpinnings of Self-Defence

The philosophical justification for the right of private defence has been articulated across diverse intellectual traditions spanning millennia. In ancient Roman law, the maxim *vim vi repellere licet* — "it is lawful to repel force by force" — captured the intuitive recognition that the law cannot, without becoming morally incoherent, demand passivity in the face of unlawful aggression. This principle finds its echo in the philosophical writings of Cicero, who argued that the right of self-preservation is prior to and independent of positive law, grounded

in natural reason itself.⁴

In the natural law tradition, thinkers such as Grotius, Pufendorf, and Locke located the right of private defence within a broader framework of natural rights that the state is obligated to recognise and protect.⁵ For Locke, the social contract through which individuals transferred their natural right to enforce the law of nature to the state was conditioned on the state's ability to provide protection. Where the state's protection was unavailable — as in cases of immediate attack — the original natural right to self-defence revived. This Lockean idea influenced the development of the common law of private defence and found resonance in the jurisprudence of the Indian Supreme Court.

Utilitarian philosophers such as Jeremy Bentham approached private defence from a consequentialist angle. From this perspective, the law's permission to exercise private defence is justified because it deters potential aggressors, reduces net social harm, and supplements the deterrent capacity of the criminal justice system. Bentham was careful, however, to insist that this permission must be governed by strict conditions of necessity and proportionality; otherwise, it would license gratuitous violence rather than mere self-preservation.⁶

German legal philosophy, particularly through Kant and Hegel, offered a deontological justification. For Kant, the right to resist unlawful force was grounded in the categorical imperative and the concept of Right (Recht) itself: to submit to wrongful coercion was not merely imprudent but a violation of one's rational autonomy as a person. Hegel similarly grounded private defence in the negation of the negation of right — the aggressor's attack represents a negation of the victim's right, and the defensive act restores the normative order.

Indian classical jurisprudence, as reflected in the *Arthashastra* of Kautilya and the *Manusmriti*, also recognised the right of self-defence as a fundamental aspect of dharmic order. The *Arthashastra* explicitly permitted the killing of a person who threatened one's life or the life of a close relative, subject to the condition that the defensive act was proportionate to the threat. This ancient recognition underscores the universality of the principle across legal

⁴ Cicero, *De Officiis*, Book I, Ch. 11; see also George P. Fletcher, 'Proportionality and the Psychotic Aggressor' (1973) 8 *Israel Law Review* 367.

⁵ John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge University Press, 1988) §§ 87, 168.

⁶ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns & H.L.A. Hart eds., Athlone Press, 1970) ch 13.

traditions.⁷

2.2 Historical Evolution under Indian Law

The formal codification of the right of private defence in India was the work of the First Law Commission of India, established in 1833 under the Charter Act of that year. Lord Macaulay, the Commission's leading member, drafted a Penal Code that was submitted to the Governor-General in Council in 1837. The draft was eventually enacted, with modifications, as the Indian Penal Code in 1860.⁸

Macaulay's drafting notes reveal a careful and sophisticated engagement with the theoretical underpinnings of private defence. He was explicit that the right should be generous enough to reflect the realities of life — that a person confronted with sudden aggression cannot be expected to compute their response with the same precision as a judge deliberating in the calm of a courtroom. His famous observation that the law ought to remember that "a man who is attacked under circumstances which leave no time for deliberation cannot be expected to weigh with accuracy the exact amount of force which is necessary" became foundational to the liberal approach in Indian courts.

Before the enactment of the IPC, the regulation of private force in India was a patchwork of Moghul criminal law (administered in the Sadr Diwani Adalat courts), English common law (applied in the Presidency towns), and diverse customary practices in the princely states. The IPC brought a measure of uniformity that was unprecedented in the subcontinent's legal history, and its provisions on private defence were deliberately drafted to be broad and flexible enough to accommodate the enormous diversity of social and geographical conditions.

The subsequent history of private defence law in India is largely a judicial history. The courts repeatedly encountered situations that tested the outer boundaries of the statutory provisions — cases involving communal riots, dacoity, mob violence, domestic disputes, and land conflicts — and in each context, they were called upon to determine whether the accused's resort to force was a legitimate exercise of private defence or an act of excess.

⁷ R. Lingat, *The Classical Law of India* (J.D.M. Derrett trans., University of California Press, 1973) 210–215.

⁸ Sir William Stokes, *The Anglo-Indian Codes*, Vol. I (Clarendon Press, 1887) 71.

2.3 The Right under the Indian Penal Code, 1860

Under the IPC, the right of private defence was governed by Sections 96 to 106.⁹ Section 96 established the general principle that nothing done in the exercise of the right of private defence is an offence. Section 97 specified the scope of the right — extending it to the defence of the body of any person and to the defence of the property of any person. The inclusion of the phrase "any person" was significant, as it expanded the right beyond mere self-defence to the defence of third parties.

Section 99 imposed the critical limitations on the right. It specified that the right does not extend to acts that do not reasonably cause the apprehension of death or grievous hurt, where the accused had time to have recourse to the protection of public authorities, and it defined the extent of harm that may be caused in exercise of the right. The jurisprudential heart of the IPC scheme was the concept of "reasonable apprehension" — a phrase that proved rich with interpretive possibility and generated an extensive body of case law.¹⁰

Sections 100 and 101 dealt specifically with the right of private defence of the body — Section 100 listed the situations in which the right extended to causing death (such as an assault reasonably causing apprehension of death or grievous hurt, or rape, kidnapping, or abduction), while Section 101 provided that in all other cases only so much harm as was necessary could be caused. Sections 102 and 105 addressed the commencement and continuance of the right.

Sections 103 and 104 governed private defence of property, with Section 103 specifying when the right extended to causing death — namely, robbery, house-breaking by night, mischief by fire on buildings, and theft, mischief, or trespass accompanied by circumstances causing reasonable apprehension of death or grievous hurt. Section 106 addressed the unique scenario where an act of private defence against a large group of attackers risked harm to innocent bystanders, permitting such harm if it was the only possible way to exercise the right effectively.

The IPC framework was thus a relatively comprehensive articulation of the right, but it was inevitably abstract. The concrete application of these provisions required courts to make difficult factual determinations — about the credibility of witnesses, the sequence of events,

⁹ B.M. Gandhi, *supra* note 3, at 289.

¹⁰ Statement of Objects and Reasons, Bhartiya Nyaya Sanhita Bill, 2023 (Lok Sabha Bill No. 121 of 2023).

the state of mind of the accused at the critical moment, and the reasonableness of their apprehension. Over more than 160 years, a rich and sometimes contradictory body of case law accumulated around these provisions.

3. RIGHT OF PRIVATE DEFENCE UNDER THE BHARTIYA NYAYA SANHITA, 2023

3.1 Overview and Legislative Context of BNS 2023

The Bhartiya Nyaya Sanhita, 2023 was enacted as part of a comprehensive overhaul of India's colonial-era criminal laws.¹¹ The Government of India introduced three bills in the Lok Sabha in August 2023: the Bhartiya Nyaya Sanhita Bill (replacing the IPC), the Bhartiya Nagarik Suraksha Sanhita Bill (replacing the Code of Criminal Procedure, 1973), and the Bhartiya Sakshya Bill (replacing the Indian Evidence Act, 1872). All three were passed by both Houses of Parliament and received Presidential assent in December 2023, coming into force on July 1, 2024.

The stated rationale for this comprehensive overhaul was to decolonize the criminal justice system, replace laws that reflected imperial priorities with legislation rooted in Indian constitutional values, and incorporate developments in criminal jurisprudence that had accumulated over decades. The Union Home Minister, while introducing the bills, emphasised that the new laws were designed to provide justice rather than merely administer punishment — a distinction that has important implications for the interpretation of defences including private defence.

The Parliamentary Standing Committee on Home Affairs examined the bills and submitted detailed reports.¹² While the Committee endorsed the overall objective of the legislation, it noted certain concerns about the pace of the reform and the absence of broad-based stakeholder consultation. Several legal scholars and bar associations expressed apprehensions that the new laws made insufficient changes to outdated provisions and that certain modifications raised new uncertainties.

¹¹ Standing Committee on Home Affairs, One Hundred and Forty-eighth Report on the Bhartiya Nyaya Sanhita Bill, 2023 (November 2023).

¹² *Laxmi v. Union of India*, (2014) 4 SCC 427 (recognising acid attack as a distinct offence warranting special protection).

The BNS retains the general architecture of the IPC but introduces changes in the structure, numbering, and language of many provisions. In the context of private defence, the substantive provisions have been relocated and renumbered from Sections 96–106 of the IPC to Sections 34–44 of the BNS, with the most significant substantive modifications being found in the articulation of when the right extends to causing death and in the treatment of the right to defend property.

3.2 Relevant Provisions under BNS 2023

Section 34 of the BNS corresponds to Section 96 of the IPC and states that nothing is an offence which is done in the exercise of the right of private defence. The language is essentially identical, and the provision serves the same foundational function of establishing private defence as a complete justification (not merely an excuse) for acts that would otherwise constitute offences.

Section 35 of the BNS corresponds to Section 97 of the IPC and defines the scope of the right. It extends to the defence of the body of any person and to the defence of property of any person — whether moveable or immovable — against theft, robbery, mischief, or criminal trespass, or an attempt to commit any of these offences. The word "any person" is retained, affirming the altruistic dimension of the right.

Section 36 of the BNS corresponds to Section 98 of the IPC, which deals with the right of private defence against acts of persons who are not culpably responsible — such as a person of unsound mind, an intoxicated person, or a child below the age of criminal responsibility. This provision ensures that the victim of aggression is not denied the right of self-defence merely because the aggressor lacks mens rea.

Section 37 of the BNS corresponds to Section 99 of the IPC and defines the limitations on the right. The provision specifies that the right of private defence does not extend to cases where there is time to have recourse to the protection of public authorities, and that the right does not justify the infliction of more harm than is necessary for the purposes of defence. Importantly, Clause (4) of Section 37 specifically states that there is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done in good faith by a public servant or upon the direction of a public servant.

Section 38 of the BNS is one of the most significant provisions, corresponding to Section 100 of the IPC. It specifies the circumstances in which the right of private defence of the body extends to voluntarily causing the death of the assailant. These circumstances are:

- (i) An assault as may reasonably cause the apprehension that death will otherwise be the consequence.
- (ii) An assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence.
- (iii) An assault with the intention of committing rape.
- (iv) An assault with the intention of gratifying unnatural lust.
- (v) An assault with the intention of kidnapping or abducting.
- (vi) An assault with the intention of wrongfully confining a person, where there may be reasonable apprehension that the person will be unable to have recourse to public authorities.
- (vii) 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.

This seventh circumstance — relating to acid attacks — is a notable addition in the BNS that was absent from the original IPC framework.¹³ Its inclusion reflects the legislative recognition of the growing menace of acid violence and the need to ensure that victims of such attacks are accorded the full protection of the right of private defence. This represents one of the more substantive innovations in the BNS relative to the IPC.

Section 39 of the BNS corresponds to Section 101 of the IPC and addresses the right of private defence of the body in cases not covered by Section 38. It permits the infliction of any harm other than death, provided that harm is necessary for the purpose of defence.

Section 40 of the BNS deals with the commencement and continuance of the right of private

¹³ K.I. Vibhute, P.S.A. Pillai's Criminal Law 329 (13th ed., LexisNexis, 2019).

defence of the body — a provision of considerable practical importance, since many cases turn on whether the accused's resort to force was exercised during the continuance of the right or after the threat had passed. The provision states that the right commences as soon as a reasonable apprehension of danger to the body arises and continues as long as that apprehension exists.

Sections 41 and 42 of the BNS address the right of private defence of property, specifying the offences against which the right extends and the conditions under which it may extend to causing death.

Section 44 of the BNS corresponds to Section 106 of the IPC and deals with the right of private defence against a group where causing harm to innocent persons may be unavoidable. This provision is particularly relevant in mob attack situations and continues to be one of the more delicate areas of application.

3.3 Changes and Modifications from IPC to BNS

A careful comparative reading of the IPC and BNS provisions reveals that the modifications are more significant in their details than a superficial reading might suggest. The most notable substantive change is the inclusion of acid attacks as a ground for extending the right of private defence to causing death under Section 38(vii) of the BNS.¹⁴ This addition is both timely and legally sound: acid attacks, which have been recognised by the Supreme Court and Parliament as a distinct and particularly heinous form of assault, can unquestionably cause apprehension of grievous hurt, and it was anomalous that the IPC did not expressly include them within the protective ambit of Section 100.

Beyond this addition, the modifications in the BNS are largely textual and structural. The organisation of the provisions has been slightly rationalised, and the language has been updated to eliminate certain archaic formulations. The phrase "criminal trespass" in the property defence provisions has been retained, though its interpretation has evolved through case law. The basic conceptual architecture — the requirement of reasonable apprehension, the prohibition of excess, the limitation related to the availability of public authority protection, and the extension of the right to property defence — remains unchanged.

¹⁴ *Amjad Khan v. State of Rajasthan*, AIR 1952 SC 165, para 7.

One area where the BNS has been criticised for missing an opportunity for reform is the absence of any explicit provision codifying the "no duty to retreat" principle. Indian courts have largely held, in line with common law, that there is no duty to retreat before exercising the right of private defence, but this judicial position has never been given statutory expression. The BNS could have rectified this lacuna but did not do so.

Similarly, the BNS does not address the increasingly relevant question of the right of private defence in the digital or cyber context. While this may not have been within the immediate scope of the criminal law reform, the rapidly evolving nature of online threats and cybercrimes calls for legislative attention to whether and how the concept of private defence extends to acts done in the digital realm.

4. JUDICIAL INTERPRETATION OF THE RIGHT OF PRIVATE DEFENCE

4.1 Landmark Supreme Court Judgments under IPC

The Supreme Court of India has over several decades developed a body of doctrine interpreting the right of private defence under the IPC. This jurisprudence is characterised by a broadly liberal approach to the right itself, combined with close scrutiny of whether the specific facts of each case establish the conditions for its exercise.

One of the earliest and most frequently cited decisions is *Amjad Khan v. State of Rajasthan*, where the Supreme Court held that the right of private defence is a very valuable right and that the courts should not whittle it down by too narrow a construction. The Court emphasised that the right should be construed broadly in favour of the accused and that minor excesses committed in the heat of the moment should not be penalised too harshly.¹⁵

In *Deo Narain v. State of U.P.*, the Supreme Court articulated the important principle that the right of private defence does not require the accused to have waited until they had actually been struck. The apprehension of danger, if reasonable in the circumstances, is sufficient to trigger the right. This forward-looking approach — measuring the right against the anticipated harm rather than the harm already inflicted — reflects a realistic understanding of how violent confrontations unfold.¹⁶

¹⁵ *Deo Narain v. State of U.P.*, AIR 1973 SC 473, para 9.

¹⁶ *Munshi Ram v. Delhi Administration*, AIR 1968 SC 702, para 12.

The case of *Munshi Ram v. Delhi Administration* established that where the accused and the deceased were members of rival groups engaged in a violent altercation, the right of private defence could extend to more forceful acts of defence provided the initial aggression came from the deceased's group. The Court was careful, however, to distinguish between acts of genuine defence and acts of retaliation motivated by anger rather than necessity.¹⁷

James Martin v. State of Kerala is one of the most comprehensive modern articulations of the doctrine by the Supreme Court. A two-judge bench, speaking through Justice Arijit Pasayat, outlined a series of propositions governing the right of private defence: that the right is defensive and not offensive; that it cannot be exercised against an innocent person; that it must be exercised only against a person actually committing an offence; that there must be a reasonable apprehension of danger; that the right does not extend to inflicting more harm than is necessary; and that the right terminates when the threat ceases. These propositions, drawn from earlier decisions, remain the authoritative statement of the right in Indian law.¹⁸

Darshan Singh v. State of Punjab is significant for its synthesis of the conditions necessary for the exercise of the right. The Court held that in order to claim the right of private defence successfully, the accused must establish: (i) that they were not the aggressor; (ii) that the threat was real and imminent; (iii) that the force used was proportionate to the threat; and (iv) that there was no opportunity or time to seek the protection of public authorities. This four-part test has been widely applied in subsequent decisions.¹⁹

The Court in *Rizan v. State of Chhattisgarh* engaged with the question of excess in the exercise of private defence and laid down the principle that an act done in excess of the right amounts to culpable homicide not amounting to murder under Section 304 of the IPC, rather than to murder under Section 302. This important mitigation principle, enshrined in Section 300 Exception 2 of the IPC and its BNS equivalent, significantly reduces the severity of punishment for those who act in genuine but excessive self-defence.²⁰

The Supreme Court in *Yogendra Morarji v. State of Gujarat* dealt with the right of private defence of property and clarified that the right extends to defending the property of others (not merely one's own property) and that the conditions for its exercise mirror those applicable to

¹⁷ *James Martin v. State of Kerala*, (2004) 2 SCC 203, paras 8–12.

¹⁸ *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333, para 21.

¹⁹ *Rizan v. State of Chhattisgarh*, (2003) 2 SCC 661, para 18.

²⁰ *Yogendra Morarji v. State of Gujarat*, AIR 1980 SC 660, para 7.

the right to defend the body.²¹

4.2 High Court Decisions and Evolving Standards

The High Courts have generated a voluminous body of jurisprudence on the right of private defence, often dealing with the specific factual patterns that the Supreme Court's general principles must be applied to. Some recurring themes in this jurisprudence are worth examining.

First, the question of the burden of proof: while it is settled law that the prosecution must prove its case beyond reasonable doubt and that the accused need only establish the defence on the balance of probabilities, the courts have been inconsistent in how they apply this standard. In several decisions, High Courts have seemed to require the accused to affirmatively prove every element of the right of private defence, while the better view, as articulated by the Supreme Court, is that it is sufficient if the right of private defence is reasonably established by the material on record, including the prosecution's own evidence.

Second, the treatment of injuries received by the accused: the Allahabad High Court, in a line of decisions, has held that unexplained injuries on the person of the accused, if consistent with the defence version, create a reasonable doubt in the prosecution's case and may in themselves establish the basis for the right of private defence. The Punjab and Haryana High Court has similarly recognised that the courts are obligated to consider the significance of injuries on the accused before arriving at a conclusion.

Third, the application of the right in cases of sudden fights: the courts have consistently distinguished between cases where the accused and the deceased were engaged in a sudden quarrel that escalated to violence and cases involving premeditated aggression. In the former, while the right of private defence may not always be available, the accused may benefit from Exception 4 to Section 300 of the IPC (sudden fight in the heat of passion).

Fourth, the private defence of property: the High Courts have grappled with the right to protect agricultural land from encroachment and trespass — a common source of violent conflict in rural India. The courts have generally held that the right extends to driving away trespassers and to using reasonable force for this purpose, but that the right to cause death is available

²¹ Criminal Justice and Immigration Act, 2008 (UK), s 76; Crime and Courts Act, 2013 (UK), s 43.

only in the limited circumstances specified by the statute.

4.3 Post-BNS Judicial Trends

Since the BNS came into force on July 1, 2024, judicial decisions applying its provisions are beginning to accumulate. It is noteworthy that the transition from the IPC to the BNS has not prompted courts to depart from the interpretive framework developed under the IPC. The judicial decisions available at the time of writing this project confirm that courts have treated the BNS provisions on private defence as a legislative continuation of the IPC regime, and have continued to rely on pre-BNS precedent in adjudicating cases.

This approach is both practically sensible and legally defensible. The right of private defence as codified in the BNS is, as shown in Chapter III, substantially identical to the IPC framework in its conceptual underpinnings, and the judicial constructions developed under the IPC remain fully applicable. The one significant addition — the inclusion of acid attacks — will doubtless be tested in courts as cases arising from such incidents come before them under the new Act.

It remains to be seen whether the change of legislative context from a colonial penal code to an avowedly indigenous *Bhartiya Nyaya Sanhita* will produce any interpretive shift. Some scholars have argued that the new nomenclature creates a symbolic opportunity for courts to revisit interpretations that were unduly influenced by colonial attitudes toward crime and self-help, and to embrace a more robust conception of the citizen's right to defend themselves. Whether this aspirational reading will be adopted by the courts is a question for the future.

5. CRITICAL AND COMPARATIVE ANALYSIS

5.1 Comparative Analysis: IPC vs. BNS

A side-by-side analysis of the IPC and BNS provisions on private defence reveals a picture of substantial continuity with marginal modifications. The following discussion identifies the key areas of similarity and difference.

(a) Structure and Numbering

The most immediately obvious change is the renumbering of provisions. What was Sections

96–106 in the IPC is now Sections 34–44 in the BNS. This renumbering reflects a broader reorganisation of the criminal code: the BNS places the general exceptions (including private defence) earlier in the legislative structure, which arguably signals a greater emphasis on defences and justifications. However, renumbering alone carries no substantive legal effect.

(b) The Acid Attack Addition

As discussed in Chapter III, the most meaningful substantive innovation in the BNS is the explicit inclusion of acid attacks as a ground for the right of private defence extending to causing death. This addition fills a genuine gap in the IPC and is to be warmly welcomed. The Supreme Court in *Laxmi v. Union of India* had already recognised the severity of acid violence and directed legislative action; the BNS has, to this limited extent, responded to that direction.²²

(c) Language and Drafting Quality

Critics of the BNS have observed that certain archaisms in the IPC have been retained rather than modernised. The concept of "grievous hurt," for instance, continues to be defined by a list of specific injuries that may not fully capture all serious harms in the modern medical context. The concept of "reasonable apprehension" has not been given any further legislative definition, leaving courts to continue developing the standard through case-by-case adjudication. This may not be a defect — judicial development of the standard allows for necessary flexibility — but it does mean that the BNS has not resolved any of the interpretive uncertainties that characterised the IPC regime.

(d) Right of Private Defence against Lawful Acts

Section 37 of the BNS, like its IPC predecessor, provides that there is no right of private defence against acts done in good faith by or on the direction of a public servant. This provision has been a source of controversy in cases involving police encounters. The Supreme Court has held that a person who has reasonable apprehension of harm from a public servant acting in bad faith retains the right of private defence; the good faith requirement in the provision is a genuine limitation, not a blanket exclusion of the right against all official acts.

²² American Law Institute, *Model Penal Code* § 3.04 (1962).

The BNS does not modify this standard, leaving the existing case law to govern.

5.2 International Comparative Perspective

(a) England and Wales

The law of private defence in England and Wales has, since the Criminal Justice and Immigration Act 2008 and the Crime and Courts Act 2013, been significantly liberalised.²³ The statutory framework, now codified in the Criminal Law Act 1967 (as amended), permits the use of "reasonable force" in self-defence, with courts directed to consider whether the defendant genuinely believed the use of force was necessary, even if that belief was mistaken. Crucially, the 2013 Act introduced the "householder defence," which permits householders to use greater-than-proportionate force against intruders in their homes (short of force that is grossly disproportionate), a standard significantly more generous than the traditional common law test.

The English approach is notable for its explicit recognition that persons acting in defence may not be able to weigh their response with precision and should receive the benefit of the doubt if their belief was genuine and reasonable. The Model Penal Code in the United States takes a similar approach, allowing defensive force based on honest belief rather than objectively reasonable belief, though subjecting certain honest-but-unreasonable beliefs to a reduced charge of recklessness rather than a complete defence.²⁴

(b) United States

The United States presents a heterogeneous legal landscape, with private defence law varying significantly by state. At one end of the spectrum, "stand your ground" laws in states such as Florida eliminate the duty to retreat entirely, even in public places, where the defendant is in a place they have a lawful right to be. At the other end, some states retain the traditional "castle doctrine" limited to the home, combined with a general duty to retreat in public. The federal Model Penal Code approach requires a reasonable belief in the necessity of force and applies

²³ Chandler McClellan & Erdal Tekin, 'Stand Your Ground Laws, Homicides, and Injuries' (2017) 59 *Journal of Human Resources* 628.

²⁴ Citizen's Arrest and Self-defence Act, 2012 (Canada), amending *Criminal Code*, RSC 1985, c C-46, s 34.

a proportionality standard.

The American experience provides a cautionary tale about the dangers of an excessively permissive approach to private defence. Research has shown that stand your ground laws are associated with significant increases in homicide rates, raise serious concerns about racial disparities in their application, and can create perverse incentives by permitting the escalation of confrontations that might otherwise have been avoided.²⁵

(c) Canada

Canadian law underwent a significant reform of self-defence provisions through the Citizen's Arrest and Self-defence Act, 2012, which replaced the previous complex and overlapping provisions with a single, consolidated test.²⁶ Under Section 34 of the Canadian Criminal Code (as amended), a person is justified in using force if they believe on reasonable grounds that force is being used against them or another person, the act is committed for the purpose of defence, and the act is reasonable in the circumstances. The reasonableness determination considers a non-exhaustive list of factors including the nature of the threat, the role of the defender in the incident, and whether non-violent means were available.

The Canadian approach is widely regarded as a model of clarity and flexibility, and it offers a useful template for India to consider in any future reform of the BNS provisions.²⁷ The articulation of a multi-factor reasonableness test in the statute itself would reduce judicial uncertainty without sacrificing the flexibility needed to do justice in diverse factual situations.

5.3 Critical Assessment of the BNS Framework

The critical assessment of the BNS framework from both a comparative and an internal perspective reveals several strengths and weaknesses.

The principal strength of the BNS framework is its basic intellectual integrity. The provisions correctly identify the core conceptual elements of a justifiable system of private defence: the requirement of reasonable apprehension, the prohibition of excess, and the limitation related

²⁵ Gary Trotter, 'Self-Defence Reform and Codification in Canada' (2014) 18 *Canadian Criminal Law Review* 97.

²⁶ Usha Tandon, 'Reforming the Right of Private Defence in India: A Legislative Agenda' (2021) 63 *Journal of the Indian Law Institute* 47.

²⁷ Supreme Court Legal Services Committee, 'Access to Justice in Criminal Cases: A Study' (2022).

to the availability of alternative protection. The inclusion of the acid attack ground demonstrates a capacity for legislative responsiveness to new social realities.

However, the BNS framework also has several significant weaknesses. First, the absence of any codified statement of the no-duty-to-retreat principle creates unnecessary uncertainty. While Indian courts have generally held that there is no duty to retreat, this position rests on inference from case law rather than on express statutory authority. A clear statutory statement would be both legally beneficial and symbolically important in affirming the citizen's right to stand their ground in the face of unlawful aggression.

Second, the limitation in Section 37 (corresponding to IPC Section 99) — that the right does not extend to cases where there was time to have recourse to public authority protection — is increasingly anomalous in the Indian context. The assumption that public authority protection is reliably available is not borne out by the realities of policing in vast swathes of rural and semi-urban India. A more realistic legislative approach might condition this limitation on the actual accessibility of public protection in the specific circumstances, rather than treating it as an abstract absolute.

Third, the standard of "reasonable apprehension" has not been given any statutory elaboration in the BNS. Courts have developed rich doctrine around this phrase, but the absence of any legislative guidance means that there is scope for divergence between courts in different states and at different levels of the judicial hierarchy. A non-exhaustive list of factors (analogous to the Canadian model) that courts should consider in assessing reasonable apprehension would improve legal certainty without sacrificing necessary flexibility.

Fourth, the treatment of proportionality in the BNS is incomplete. The prohibition of "more harm than is necessary" is a proportionality requirement, but it is framed in the most general terms. Contemporary proportionality doctrine, as developed by courts in other jurisdictions and by international human rights bodies, requires a more nuanced analysis that considers the nature of the threat, the severity of the defensive act, the availability of less harmful alternatives, and the temporal relationship between the threat and the response.

Incorporating these considerations into the statutory framework would strengthen the protections against both the under-enforcement and the over-extension of the right.

6. CONCLUSION AND SUGGESTIONS

6.1 Conclusion

This project has traced the historical, philosophical, and statutory evolution of the right of private defence in Indian law, from its ancient roots in Roman and classical Indian jurisprudence through its codification in the IPC 1860 and its re-enactment in the BNS 2023. The study has surveyed the rich body of judicial interpretation that has developed around these provisions and has critically assessed the BNS framework in comparative perspective.

Several conclusions emerge from this analysis. First, the right of private defence occupies a foundational position in the moral and legal architecture of the criminal law. It reflects the philosophical recognition that the state's monopoly over legitimate force has practical limits, and that citizens must be permitted to act as their own protectors when the state's protective machinery is unavailable. This recognition is not a licence for violence; it is a carefully calibrated acknowledgement of the irreducible reality of human vulnerability.

Second, the IPC framework, despite being drafted in the colonial era, articulated a set of principles that have proven durable and adaptable. The core concepts of reasonable apprehension, proportionality, and the limitation related to the availability of public authority protection have provided courts with sufficient tools to do justice across an enormous range of factual situations. The judicial elaboration of these concepts, particularly by the Supreme Court in cases such as *James Martin*, *Darshan Singh*, and *Deo Narain*, has produced a coherent and broadly workable doctrine.

Third, the BNS 2023, while representing a welcome step in the decolonization of India's criminal law, has not fundamentally transformed the framework of private defence. The substantive provisions are largely identical to their IPC counterparts, with the notable exception of the inclusion of acid attacks as a ground for the right extending to causing death. This addition is substantively significant and legally sound, but it is a targeted modification rather than a comprehensive reform.

Fourth, the comparative analysis reveals that India's framework, while broadly adequate, lags behind certain other common law jurisdictions in important respects. The absence of a codified no-duty-to-retreat principle, the abstract formulation of reasonable apprehension, and

the incomplete treatment of proportionality create unnecessary uncertainty and potential injustice. The Canadian model, in particular, offers a template for a more clearly articulated and comprehensive statutory framework.

Fifth, the post-BNS judicial response confirms that courts have largely treated the new provisions as a continuation of the IPC regime. While this ensures continuity and predictability, it also means that the potential for the BNS to prompt a fresh interpretive approach to private defence has not yet been realised.

6.2 Suggestions

Based on the foregoing analysis, the following suggestions are offered for legislative and judicial reform of the right of private defence in India.

(i) Codification of the No-Duty-to-Retreat Principle

The BNS should be amended to include an express provision stating that a person is not required to retreat before exercising the right of private defence. This codification would eliminate the remaining uncertainty on the point and affirm a principle that the courts have largely endorsed but that lacks statutory authority. The provision should be carefully drafted to apply within the scope of the existing limitations, particularly the requirement that force used must not be in excess of what is necessary.

(ii) A Multi-Factor Test for Reasonable Apprehension

Section 37 of the BNS should be amended to include a non-exhaustive list of factors that courts must consider in determining whether the accused's apprehension of harm was reasonable. Drawing on the Canadian model and the extensive Indian case law, these factors might include: the nature and imminence of the threat, the physical attributes and capabilities of the parties, the prior relationship between the parties (including any history of violence), the environment in which the incident occurred, and the availability or inaccessibility of alternative means of protection. This would not change the basic standard but would give it statutory structure and reduce the risk of inconsistent application.

(iii) Revisiting the Public Authority Limitation

The limitation in Section 37(2) of the BNS — that the right does not extend to cases where

there was time to seek protection from public authorities — should be reformulated to reflect the empirical reality of policing in India. The provision should be redrafted to specify that the limitation applies only where public authority protection was reasonably accessible in the specific circumstances of the case, having regard to factors such as proximity to police infrastructure, time of day, and nature of the area. This would make the limitation more just and more realistic.

(iv) Gender-Sensitive Provisions

The BNS should incorporate gender-sensitive provisions that explicitly address the particular vulnerabilities faced by women in exercising the right of private defence. Women who kill or seriously injure violent intimate partners are often in a peculiarly disadvantageous position when claiming private defence, since their defensive act may follow a period of abuse rather than a single incident of aggression. Some jurisdictions have developed "battered woman syndrome" jurisprudence to address this; the BNS could incorporate a provision explicitly recognising cumulative provocation and past abuse as relevant factors in assessing reasonable apprehension.

(v) Judicial Training and Legal Aid

Legislative reform alone is insufficient. The right of private defence is only as effective as its implementation by the courts and its accessibility to accused persons. There is a compelling case for enhanced judicial training in the doctrine of private defence, particularly in the lower courts where the majority of cases are decided.²⁸ There is an equally compelling case for strengthened legal aid services to ensure that accused persons who may have a genuine defence are not convicted merely because they cannot afford effective legal representation.²⁹

(vi) Recognition of Cyber and Digital Self-Defence

As digital threats to persons and property become increasingly common, the legislature should consider whether and how the concept of private defence applies in the digital context. A person who takes protective action against a cyber aggressor — for instance, by disrupting an ongoing cyber attack — may not fall within the current formulation of private defence, which speaks of physical force and physical property. Future legislative amendments should address

²⁸ R.V. Kelkar, *Lectures on Criminal Procedure* 215 (6th ed., Eastern Book Company, 2017).

this gap and clarify the legal status of digital self-help.

To conclude, the right of private defence is not a static legal concept but a living doctrine that must evolve with the social, technological, and constitutional realities of the age. The BNS 2023 represents a beginning, not an end, of the legislative journey toward a truly just and rational framework of private defence. The suggestions offered in this project are intended to contribute to that ongoing journey — with the conviction that a society that takes the right of self-preservation seriously is a society that takes the dignity and autonomy of its citizens seriously.