
THE JURISPRUDENCE OF PRIVATE DEFENCE IN INDIA: CODIFICATION, JUDICIAL PRECEDENTS, AND CONTEMPORARY SHIFTS

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ABSTRACT

This article critically examines the normative and operational framework of the right of private defence in India, tracing its codification from Sections 96–106 of the Indian Penal Code (IPC), 1860, to Sections 34–44 of the Bharatiya Nyaya Sanhita (BNS), 2023. The analysis focuses on necessity, reasonable apprehension, limits on defensive force, and the evidentiary burden applicable to a plea of private defence. It argues that the BNS substantially carries forward the IPC architecture while relocating the doctrine within the post-2023 statutory framework. The article also considers contemporary questions concerning domestic violence, cumulative abuse, and the classification of mutual confrontations as “free fights.”

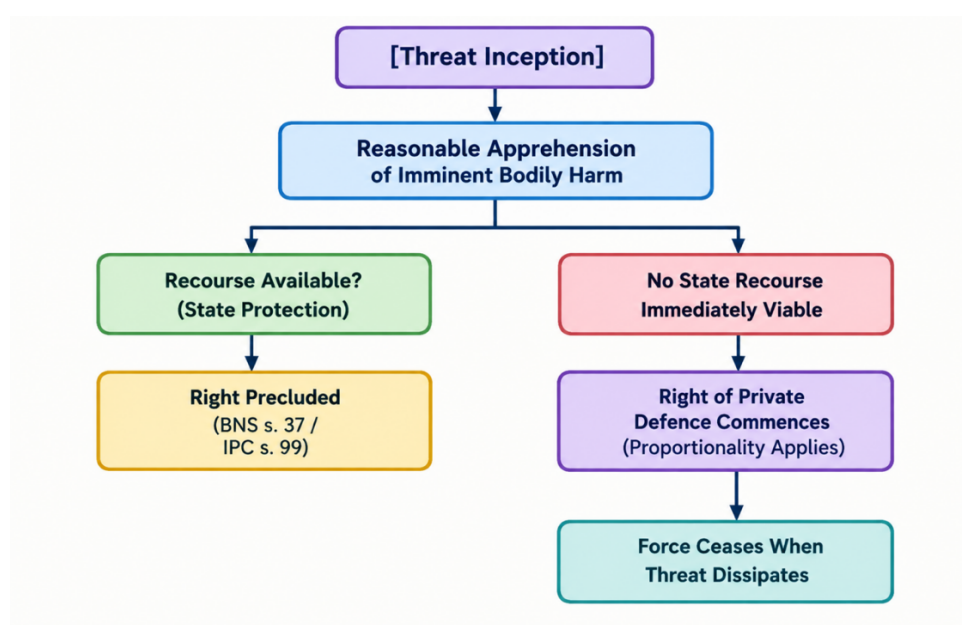
Keywords: Right of Private Defence; Bharatiya Nyaya Sanhita, 2023; Indian Penal Code, 1860; Proportionality; Golden Scale Principle; Preponderance of Probabilities; Bharatiya Sakshya Adhinyam, 2023; Battered Woman Syndrome; Criminal Justification.

Introduction

The doctrine of private defence rests on the long-standing principle that force may, within legal limits, be used to repel unlawful force. Although the modern State ordinarily assumes responsibility for maintaining public order, Indian criminal law recognizes that immediate state protection may not always be available. The right of private defence therefore permits necessary defensive action, but it is not a licence for retaliation or punishment. The doctrine was codified in Sections 96–106 of the Indian Penal Code, 1860 and is now contained, in substantially corresponding form, in Sections 34–44 of the Bharatiya Nyaya Sanhita, 2023.¹

Statutory Architecture: The Continuum from the IPC to the BNS

The statutory provisions do not create an unrestricted licence for private vengeance. They establish a limited defensive justification whose exercise depends on the nature of the threat, the availability of public protection, and the necessity of the harm inflicted.²



Scope and Categorization

The statutory scheme bifurcates the right into two distinct domains: defence of the human body and defence of property.

¹ The Indian Penal Code, No. 45 of 1860, §§ 96–106, India Code (1860); The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 34–44,

² The Indian Penal Code, 1860, § 99; The Bharatiya Nyaya Sanhita, 2023, § 37.

Legal Dimension	Indian Penal Code, 1860	Bharatiya Nyaya Sanhita, 2023	Core Legal Scope
General Principle	Section 96	Section 34	Acts done in exercise of private defence do not constitute an offence.
Subject Matter	Section 97	Section 35	Right extends to defending one's own body/property or the body/property of any other person.
Incompetent Aggressor	Section 98	Section 36	Defence exists against individuals lacking legal capacity (minors, persons of unsound mind, intoxicated individuals).
Express Limitations	Section 99	Section 37	No right in specified circumstances involving public servants acting in good faith, and no right where there is time to seek public protection; in all cases, no more harm may be inflicted than necessary for defence.
Lethal Force (Body)	Section 100	Section 38	Extends to causing death where assault falls within specified categories, including apprehension of death or grievous hurt, rape, “unnatural lust,” kidnapping/abduction, certain wrongful confinement, and acid attack.
Lethal Force (Property)	Section 103	Section 41	Extends to causing death in specified property offences, including robbery, nighttime house-breaking, arson/explosives against specified buildings or vessels, and certain theft or mischief accompanied by apprehension of death or grievous hurt.
Temporal Boundaries	Sections 102, 105	Sections 40, 43	Body: begins when reasonable apprehension of danger arises and continues while that apprehension continues. Property: Section 43 specifies offence-specific commencement and continuance rules.
Innocent Bystanders	Section 106	Section 44	Permits running the risk of harming an innocent person when defending against deadly assault (e.g., firing into an attacking mob).

*(Table consolidated under the governing statutory schemes.)*³

³ The Indian Penal Code, 1860, §§ 96–106; The Bharatiya Nyaya Sanhita, 2023, §§ 34–44.

Judicial Doctrines and the Golden Scale Principle

The statutory provisions leave several questions of application to judicial determination. Supreme Court precedent has consequently developed practical tests concerning reasonable apprehension, the degree of force that may be used, the duration of the right, and the distinction between defence and retaliation.

Reasonable Apprehension Over Actual Impact

A person need not wait until an unlawful assault has actually produced physical injury before exercising private defence. Under the corresponding IPC rule, the Supreme Court held that the right arises when a reasonable and sufficiently imminent apprehension of danger arises; the BNS now states the same principle expressly in Section 40.⁴ The inquiry is contextual: the court assesses the circumstances confronting the accused rather than requiring proof that the feared harm had already occurred.

The Doctrine of Necessity and the “Golden Scales” Principle

Section 37(2) of the BNS provides that the right does not extend to inflicting more harm than is necessary for the purpose of defence. This does not require mathematical calculation during an emergency; in *Darshan Singh v. State of Punjab*, the Supreme Court emphasized that a person facing an imminent attack cannot realistically be expected to calibrate defensive force with “golden scales,” rendering the standard one of reasonable necessity rather than exact numerical proportionality.⁵

In *Darshan Singh v. State of Punjab* (2010), the Supreme Court summarized the governing principles: private defence is preventive rather than retaliatory; a reasonable apprehension can trigger the right; and the force used must not be wholly disproportionate or substantially beyond what is necessary to avert the threatened harm.⁶ The Court also recognized that the defender’s response cannot be judged as though it were planned under calm, detached conditions.

⁴ Deo Narain v. State of U.P., (1973) 1 SCC 347 (India); State of U.P. v. Ram Swarup, (1974) 4 SCC 764 (India); The Bharatiya Nyaya Sanhita, 2023, § 40.

⁵ The Bharatiya Nyaya Sanhita, 2023, § 37(2); *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333 (India).

⁶ *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333, paras. 58–60 (India).

The Retreat Rule and Recourse to Public Authorities

Indian law does not impose a general common-law-style duty to retreat before exercising private defence. The Supreme Court has affirmed that a person confronted with grave and imminent unlawful aggression is not ordinarily required to flee, though this does not authorize retaliation once the threat subsides.⁷

Section 37(1)(c) of the BNS limits private defence where there is time to have recourse to the protection of public authorities.⁸ This is a statutory limitation, not a general retreat rule. Whether recourse was realistically available must be assessed in light of the immediacy and seriousness of the threat.

Evidentiary Burden and the Standard of Proof

The evidentiary position contains two related but distinct burdens. Under Section 108 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA), corresponding to Section 105 of the Indian Evidence Act, 1872, the burden of proving the circumstances bringing the case within a General Exception lies on the accused, and the court presumes their absence unless the burden is displaced, while the prosecution's fundamental burden of proving the charged offence beyond reasonable doubt remains un-transferred.⁹

As held in *Vijayee Singh v. State of U.P.* (1990) and *Munshi Ram v. Delhi Administration* (1968), the accused is not required to establish private defence beyond reasonable doubt; the defence may be established on a preponderance of probabilities, including through circumstances emerging from prosecution evidence.¹⁰ The precise operation of this burden must nevertheless be distinguished from the prosecution's continuing burden to prove the offence beyond reasonable doubt.

The accused also need not necessarily plead private defence in express terms. If the material on record—including prosecution evidence—raises a reasonable and probable case that the accused acted in lawful private defence, the court may consider the defence, examined under

⁷ *State of U.P. v. Ram Swarup*, (1974) 4 SCC 764 (India); *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333 (India).

⁸ The Bharatiya Nyaya Sanhita, 2023, § 37(1)(c); The Indian Penal Code, 1860, § 99.

⁹ The Bharatiya Sakshya Adhiniyam, No. 47 of 2023, § 108, Acts of Parliament, 2023 (India); The Indian Evidence Act, No. 1 of 1872, § 105, India Code (1872).

¹⁰ *Vijayee Singh v. State of U.P.*, (1990) 3 SCC 190 (India); *Munshi Ram v. Delhi Administration*, AIR 1968 SC 702 (India).

the current procedural framework where Section 351 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 corresponds to the former Section 313 of the Code of Criminal Procedure (CrPC).¹¹

Contemporary Legal Gaps and Doctrinal Tensions

Although the BNS largely preserves the IPC structure of private defence, contemporary scholarship raises questions about how a doctrine designed around an immediate threat should respond to prolonged domestic abuse and other situations in which danger may be experienced cumulatively rather than through a single attack.¹²

Gendered Self-Defence and Battered Woman Syndrome

The conventional statutory model is most readily applied to an identifiable and continuing threat. Difficult questions arise in cases of prolonged domestic abuse where the accused acts when the abuser is asleep, temporarily incapacitated, or not at that precise moment delivering an assault. Indian law does not contain an express statutory defence of “slow-burn” self-defence or Battered Woman Syndrome (BWS), requiring such cases to be evaluated under existing rules on reasonable apprehension, private defence, provocation, and the surrounding history of abuse.¹³

R v. Ahluwalia is relevant primarily to the English law of provocation and diminished responsibility, rather than creating a general self-defence exception for battered women, while Indian courts have addressed sustained abuse as a mitigating factor rather than an autonomous justification in decisions such as *Manju Lakra v. State of Assam*.¹⁴ *Manju Lakra* treated sustained provocation as a judicially discussed mitigating concept and cautioned against treating courts as legislators, underscoring the critical distinction between complete justification under private defence and partial mitigation of culpability.

Pre-emptive Strike vs. Unlawful Retaliation

The distinction between a justified defensive act and unlawful retaliation can become difficult

¹¹ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 351, Acts of Parliament, 2023 (India); The Code of Criminal Procedure, No. 2 of 1974, § 313, India Code (1974).

¹² The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 34–44; The Indian Penal Code, No. 45 of 1860, §§ 96–106.

¹³ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207 (India); The Bharatiya Nyaya Sanhita, 2023, § 37.

¹⁴ *R v. Ahluwalia*, [1992] 4 All ER 889 (England and Wales); *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207 (India).

when both sides use force. The Supreme Court's "free fight" jurisprudence establishes that where both sides deliberately intend to fight a pitched battle, the plea of private defence is unavailable; however, as held in *Gajanand v. State of U.P.*, mutual confrontation does not automatically defeat private defence if the evidence demonstrates that one party acted as the unlawful aggressor.¹⁵

The right of private defence in Indian law remains strictly a defensive justification rather than a mechanism for retribution. Sections 34–44 of the BNS preserve the IPC architecture by anchoring the doctrine to reasonable apprehension, necessity, temporal continuity, and the prohibition of excessive harm, while excusing defensive action from mathematical precision without countenancing force once danger has ceased.¹⁶

¹⁵ *Gajanand v. State of U.P.*, AIR 1954 SC 695 (India); The Indian Penal Code, 1860, §§ 300, 304; The Bharatiya Nyaya Sanhita, 2023, §§ 37, 100.

¹⁶ The Bharatiya Nyaya Sanhita, 2023, §§ 34–44; *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333 (India)

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8. The Bharatiya Nyaya Sanhita, 2023, § 37(1)(c); The Indian Penal Code, 1860
9. The Bharatiya Sakshya Adhiniyam, No. 47 of 2023, § 108, Acts of Parliament, 2023 (India); The Indian Evidence Act, No. 1 of 1872, § 105, India Code (1872).
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12. The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 34–44; The Indian Penal Code, No. 45 of 1860, §§ 96–106.
13. Manju Lakra v. State of Assam, 2013 SCC OnLine Gau 207 (India); The Bharatiya Nyaya Sanhita, 2023, § 37.

14. R v. Ahluwalia, [1992] 4 All ER 889 (England and Wales); Manju Lakra v. State of Assam, 2013 SCC OnLine Gau 207 (India).
15. Gajanand v. State of U.P., AIR 1954 SC 695 (India); The Indian Penal Code, 1860, §§ 300, 304; The Bharatiya Nyaya Sanhita, 2023, §§ 37, 100.
16. The Bharatiya Nyaya Sanhita, 2023, §§ 34–44; Darshan Singh v. State of Punjab, (2010) 2 SCC 333 (India).