CONCEPT OF RIGHT OF PRIVATE DEFENCE IN CRIMINAL JURISPRUDENCE; A CRITIQUE

DHARAM PAL SINGH

DEPARTMENT OF LAWS
PANJAB UNIVERSITY
CHANDIGARH
INTRODUCTION

The right of private defence is based upon the law of nature. It is a natural instinct in man to defend himself and maintain the possession of that, which belongs to him against unlawful aggression of others. Nature has equipped the man with all those means which are essential to achieve this object. Law does not stand in way of the natural right of self defence, which therefore exists in full force.\textsuperscript{1} As observed by Donovan J. that the law of private defence is:

\begin{quote}
Not written but born with us, which we have not learned, or received by tradition, or read, but which we have sucked in and imbibed from nature itself; a law which we were not trained in, but which is ingrained in us, namely, that if our life is in danger by robbers or enemies from violence, every means of securing safety is honourable. For laws are silent when arms are raised and do not expect to be waited, for when he who waits will suffer an undeserved penalty.\textsuperscript{2}
\end{quote}


The law of private defence being the natural and inalienable right of every man, the law of society cannot abrogate it. Though abridged to some extent, it cannot be superseded by the law of society. From ancient times this right has been recognised within certain circumscribed limits. Criminal Law recognized private defence as the first rule and it still continues as a rule, though with the passage of time, this law has been much affected by consideration of necessity, humanity and social order. “The right of defence”, wrote Bentham, is absolutely necessary. The vigilance of magistrates can never make up for the vigilance of each individual on his own behalf. The fear of law can never restrain bad men as the fear of the sum total of individual resistance, Take away this right and you become in so doing the accomplice of all bad men.

It is both the right and duty of a human beings to defend not only one’s own property but also that of others. This duty, man owes to the society which flows from human sympathy. This right of private defence is not abrogated by the mere presence of other persons who are standing merely as silent observers. The law wants its citizens to hold the ground manfully against unlawful aggression. No man is expected to run away, when attacked by criminals or to exhaust all other remedies available before exercising the right of private defence. It is not required from man to behave like a rank coward at any time, however law abiding

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6 Id. at 631.
7 *Kala Singh v. Emperor*, AIR 1933 Lahore 167.
he may be. The right of private defence, as defined by law, must be fostered in the citizens of every free country. There is nothing more degrading to the human spirit than to run away in the face of peril. Man is fully justified, if he holds his ground and gives a counter attack to his assailants. But this right being one of defence only and not of punishment and retaliation. The force used for defending the body or property must not be unduly disproportionate to the injury to be averted or which is reasonably apprehended. The right of private defence must never be exercised vindictive or malicious manner.\(^8\)

The inability of the state to extend its help at all times and in all cases has led to the recognition of this right of private defence. If this right be not given recognition, a man may suffer a wrong at the hands of an aggressor which may never be remedied by law. Thus primary duty is that the state should give due protection to the rights of its citizens and so long as the state is fulfilling its duty, the individual does not have any right of private defence. The individual does not have the right to encroach upon the duty of the state to maintain law and order. But where it fails to defend its citizens, they are allowed to use violence within certain limits to resist unlawful aggression.

Thus the right of private defence is beyond doubt necessary but it is not a necessary evil.\(^9\) For Pollock observes:

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It would be a grave mistake to regard self-defence as a necessary evil suffered by the law because of the hardness of men’s hearts. The right is a just and perfect one. To “repel force by force”, as already stated, is the common instinct of every creature that has means of defence. And when the original force is unlawful, this natural right or power of man is allowed, nay approved by the law. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty.\textsuperscript{10}

CONCLUSION AND SUGGESTIONS

The right of private defence is a natural and an inalienable right of every human being which cannot be abrogated by the law of society. There can be nothing more degrading to the human spirit than to run away in the face of peril and the society is not there to make its members coward. Though, primarily it is the duty of the state to protect the interests of its citizens, yet it is not possible for the state to provide this to all the persons at all times and in all cases. Therefore, when immediate aid is not forthcoming from the state, the individual has a right based upon natural instincts to protect himself and his property against unlawful aggression.

\textsuperscript{10} \textit{Id.}, at pp. 421-422. Pollock, \textit{Law of Torts}, quoted in R.C. Nigam.
The law of private defence embodied in the Indian Penal Code is based upon the English law, but has been adopted with slight changes suited to the requirements of the Indian society. The right of private defence cannot be claimed merely because an unlawful or wrongful act has been done. That act should be an offence but also an offence as specified by Section 97 of the code. The right of private defence can be exercised not only when any of the specified offences is being committed but also when an attempt is made to commit the same or reasonable apprehension of the same is there.

No society can afford to provide an unqualified right of private defence. The right of private defence has come to stay through legislative and judicial process. The denial of unqualified right of private defence does not however, necessarily mean denial of the right where there is reasonable apprehension of danger to the person or property and an access to state help may not be easily available. This right is also available not only to the parties concerned but even to third person. The right of private defence to property is not only available to the true owner of property but it is also available to the trespasser who is in settled possession of the property\textsuperscript{11}.

In \textit{Puran Singh v State of Punjab\textsuperscript{12}} the Supreme Court propounded the theory of settled possession. This theory is not satisfactory because it provides better status to the trespasser than that of the real owner. If the true owner of

\textsuperscript{11} \textit{Puran Singh v. State of Punjab, AIR 1975 SC 1674.}

\textsuperscript{12} AIR 1975 SC 1674.
the property uses force to dispossess the trespasser, he would be treated as a offender. This theory directly or indirectly supports the anti-social elements. It is very difficult to agree with the theory of settled possession.

According to our view there should be duty to retreat. The retreat rule provides that a person is attacked must, if possible, should avoid the deadly force against his assailant. Duty to retreat is the part of human rights approach.

In *G.V.S. Subraiaanyam v State of A.P.* the Supreme Court stated that the accused can take the plea of right of private defence, though he pleaded *alibi*. It is very difficult to support decision of the Supreme Court that the plea of private defence can be provided even if the accused has taken an inconsistent plea like *alibi*. It is quite astonishing to know that if the plea of *alibi* has failed, the benefit of plea of private defence can be availed of. The burden of proof to be discharged by the accused is not of the same standard as required from the prosecution for establishing a case and the burden can be discharged by showing a preponderance of probabilities in favour of that plea on the basis of the material on record. The evidence adduced by the offender should be of such nature as a reasonable man starts thinking that he would act in the same manner, if placed in the similar circumstances.

For claiming the right of private defence, the accused is not only to prove that the right had commenced but also the right had not ended. The accused is also required to

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prove that he has not exceeded the right had commended but also the right had not ended. The accused is also required to prove that he has not exceeded the right.

Merely the number of injuries or the scrutiny of the medical certificate is not sufficient to decide whether the said right of private defence is exceeded or not. The accused is also required to prove that before exercising such right, there was not ample opportunity to have recourse to the protection of public authorities. It is also necessary for the accused to establish ownership or possession of the property.

There is a great controversy whether the restriction, namely, there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, on the exercise of the right of private defence should be retained or removed or modified.\textsuperscript{14} A sufficient number of citizens of India consider the restriction enumerated in paragraph 3 of Section 99 of the Penal Code to be necessary as there is already much disrespect for law and order and the deletion of this restriction will encourage the people to commit more crimes and consequently result in more lawlessness.\textsuperscript{15} An equal number of citizens hold the view on the other side. They are not in favour of any such restriction on the exercise of the right of private defence as has been mentioned in para 3 of Section 99 of the Penal Code because of the present experience of uncertainty of getting timely and effective

\textsuperscript{14} Law Commission of India, The Indian Penal Code, 42\textsuperscript{nd} Report (1971), p. 103.

\textsuperscript{15} Ibid.
protection of the public authorities when called upon. The restriction, therefore, tends to deprive of the right of private defence itself and defeat the very purpose of Section 99 of the Penal Code.\textsuperscript{16} Quite a few of the citizens are in favour of some modification in the said paragraph, without indicating clearly the change to be brought about. One suggestion being that the second para of Section 105 and para 3 of Section 99 of the Penal Code should be combined together. The other suggestion is that the condition of having recourse to the protection of public authorities should only apply when information regarding the impending assault is received sufficient time earlier than the actual attack.\textsuperscript{17} Law commission recommended that paragraph 3\textsuperscript{rd} of Section 99 of the IPC should be deleted.\textsuperscript{18}

However, 14\textsuperscript{th} Law Commission,\textsuperscript{19} expressed its reservation about deletion of the para 3 of Section 99 of the Penal Code suggested by the 5\textsuperscript{th} Law Commission. It strongly recommended for retention of the restriction.

If this paragraph 3 of Section 99 of the Penal Code is deleted, people will start settling their disputes out of courts and cause harm to the others in the exercise of the right of private defence even if the public authorities are present on the scene and are offering effective help.

The necessary corollary to the doctrine of the right of private defence is that the force used in defence of person or

\textsuperscript{16} Ibid.  
\textsuperscript{17} Ibid.  
\textsuperscript{18} Law commission of India, The Indian Penal Code, 42\textsuperscript{nd} Report, (1971), p. 104.  
\textsuperscript{19} Law commission of India, The Indian Penal Code, 146\textsuperscript{th} Report, (1997), Para 12, 24.
property should be necessarily proportionate to the danger to be averted or the danger reasonably apprehended and must not go beyond the legal purpose for which the force is being used. It seems to be impossible to put down any hard and fast rule regarding the quantum of force to be used in every case. It has to be determined according to circumstances of each case. But a person attacked is not required to modulate his defence step by step, according to the assault.

The words “though that act may not be strictly justifiable” have been interpreted uniformly by the High Courts as covering only irregular and not wholly illegal acts of public servants. This unanimous judicial view has produced certain awkward situations and has also placed the public servants in a dangerous position while executing the orders of the courts. The judicial interpretation has given the right of private defence against the acts of public servants though done in good faith while executing the orders or judgements of a court of justice where the court of justice was having no jurisdiction to issue such orders or judgments. Such acts under Section 78 of the Indian Penal Code are not offences and public servants are immune from prosecution for such acts. Though complete immunity from prosecution has been guaranteed under Section 78 of the Indian Penal Code, yet public servants can be forcibly ejected or injured under the shield of right of private defence under Section 99 of the Penal Code by the person against whom the public servant attempts to execute the judgement or order of the court. About the susceptibility of
the public servant on this ground, the law commission has observed:

“A study of the case law under the first paragraph of Section 99 shows how, in a large number of instances, public servants acting in execution of the court’s order have been badly injured, and the courts have acquitted their assailants on the sole ground that the court’s order was without jurisdiction. Whether an order of a court is within its jurisdiction or outside its jurisdiction, is extremely difficult to decide, and, in many instances, there can be no final view in this matter until the dispute is taken up to the highest court. But a subordinate public servant executing that order should not be put in jeopardy of bodily injury so long as his action is in good faith. Public policy also requires that such protection should be given to facilitate the prompt execution of the court’s order. The orders of a court ought to be implicitly obeyed. We, therefore, recommend the insertion of a new provision in Section 99 so as to make the immunity from prosecution conferred by Section 78 co-extensive with the deprivation of the right of private defence against such action in the first paragraph of Section 99”.20

They have proposed a change in the language of Section 99 of the Penal Code supported by convincing arguments. If the public servant does not obey the orders of the court, he will be liable for disobedience on contempt even if the orders are without jurisdiction, and if he acts according to the orders of the court, he may be badly

injured in the exercise of the right of private defence. Similar views have been expressed by the commission regarding the acts of persons acting under the direction of public servants where the private persons do acts under the orders or judgment of the court of justice, though that court may not be having the jurisdiction to issue such orders or judgement.

The first paragraph of Section 105 of the Penal Code is silent about an attempt of threat to commit the offence which words are enumerated in Section 102 of the Penal Code which deals with the commencement and continuance of the right of private defence of body. The law commission considered the suggestion to add the words “the apprehension of danger may arise from an attempt or threat to commit the offence” in Section 105 of the Penal Code but rejected the suggestion as the absence of these words are not creating and difficulty.\footnote{Law commission of India, The Indian Penal Code, 42\textsuperscript{nd} report, 1971, p.107.}

The lawful exercise of the right of private defence of property against theft continues (a) till the offender has effected his retreat with the property; or (b) the assistance of public authorities is obtained; or (c) the property has been recovered. The expression “till the offender has effected his retreat with the property” is very indefinite and vague. Even the authors of the original draft of the Penal Code were not sure of the meaning of this phrase. They suggested that the privilege of the clause should operate till the offender is taken and be delivered to an office of justice. The courts have occasionally found it necessary to point out that they
are not easy of application. The Law Commission in their report have considered this phrase and wanted to make slight verbal change. This could not be done because of the fact that the commission could not find a better form of words to express the idea.

It is submitted that it is necessary to review the whole legislation and judicial decisions with respect to right of private defence.

The new provisions regarding the law of private defence of person or property are long awaited to suit the social conditions and values which have undergone drastic changes. The only change which in my opinion is not consistent with the needs of the present society is the omission of paragraph 3 of section 99 of the Penal Code which requires recourse to public authorities before the exercise of the right. This paragraph could be replaced by a new paragraph as follows: -

There is no right of private defence in cases in which the assistance of public authorities has been provided.