



THE RELATIONSHIP BETWEEN THE PROSECUTION AND THE ACCUSED HOLDING PRIVATE DEFENCE IN INDIAN LAW

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ABSTRACT

The Indian criminal justice system is fundamentally adversarial. The Prosecution represents the State and seeks to prove guilt, while the Accused seeks to establish innocence. The plea of Private Defence under Sections 37 to 44 of the Bharatiya Nyaya Sanhita, 2023 [BNS] introduces a doctrinal shift in this relationship. The accused admits the commission of the act but pleads justification. This paper examines how this plea reconfigures the evidentiary burden, prosecutorial strategy, and judicial scrutiny. Through statutory interpretation, case law analysis, and comparative study, it argues that private defence creates a “qualified adversarial” relationship. The Prosecution must not only prove the act but also disprove justification beyond reasonable doubt, while the accused bears only an evidential burden. This balance reflects the law’s commitment to both societal protection and individual liberty.

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1. Introduction

There are two purpose of our Criminal legal system one is to punish those whose acts that harm society and to protect individuals from unlawful harm. These two objectives create a natural pressure. On one hand to the State through the Police and the Prosecution to maintain order. On the other, the individual retains a natural right of self-preservation.

In a standard criminal court trial, the relationship is twofold: Prosecution alleges → Accused denies. The entire burden lies on the Prosecution under Section 101 of the Bharatiya Sakshya Adhiniyam, 2023 [BSA]. The plea of Private Defence disrupts this simplicity. Under the BNS, 2023, private defence is a "General Exception". The accused does not deny the actus reus. Instead he says: "Yes, I caused the harm, but I was legally entitled to do so."

Thus, the central question of this paper is: How does the plea of private defence alter the legal, evidentiary, and strategic relationship between the Prosecution and the Accused in Indian Law? This paper contends that the plea transforms the relationship from a contest of facts to a contest of justification, imposing a dual burden on the Prosecution and redefining the role of the court as an arbiter of reasonableness.

2. Literature Review

2.1. Doctrinal and textbook literature

The foundational understanding of private defence in India comes from leading commentaries on criminal law Ratanlal & Dhirajlal, The Bharatiya Nyaya Sanhita traces the origin of private defence to natural law and calls it "the first law of nature". The authors emphasize that Sections 37-44 BNS are not mere exceptions but affirmative rights. They highlight that the shift from IPC 1860 to BNS 2023 retained the structure but updated language to reflect constitutional values.

K.D. Gaur, Textbook on the Indian Penal Code provides the most detailed doctrinal analysis of burden of proof. Gaur argues that Sec 105, Bharatiya Sakshya Adhiniyam creates a "dual burden" system: evidential burden on accused, legal burden on prosecution. He criticizes that this often confuses trial courts who wrongly place entire burden on accused.

R.V. Kelkar, Criminal Procedure connects private defence to investigation. Kelkar notes that failure of police to record injuries on accused u/s 176(1A) BSA is the single biggest reason why genuine private defence pleas succeed. This shows the evidentiary consequences of the plea. Most textbooks treat private defence as a static doctrine. They do not analyze how it actively "reconfigures" the adversarial relationship during trial.

2.2. Judicial literature and case law analysis

Indian Supreme Court jurisprudence forms the core secondary literature. The "Reasonableness" Jurisprudence: The landmark *Deo Narain v. State of U.P.* established the subjective-objective test. The Court held courts must not use "golden scales" to measure force. This was reiterated in *Vijay Singh v. State of M.P.* where SC warned against "narrow and pedantic" approach. Legal scholars like Dr. S.N. Mishra argue this gives judges wide discretion, leading to inconsistency.

The "Burden of Proof" Jurisprudence: *Darshan Singh v. State of Punjab* is the leading authority on burden shifting. It clarified that once accused probabilizes the plea, prosecution must disprove Beyond Reasonable Doubt. *State of U.P. v. Ram Swarup* set the "preponderance of probability" standard for accused.

3. Conceptual And Statutory Framework Of Private Defence In India

The right of private defence is a fundamental legal validation that protects individuals from criminal liability when they use necessary and proportionate force to protect themselves, others, or property from unlawful aggression. Under Indian law, this right is governed concurrently by historical provisions of the Indian Penal Code, 1860 (IPC) and the modernized provisions of the Bharatiya Nyaya Sanhita, 2023 (BNS).

3.1 Philosophical Foundation

The jurisprudence of private defence is deeply rooted in the philosophy of individual independence and the social contract theory, most notably aligned with the ideas of thinkers like Thomas Hobbes and John Locke. The right of private defence is rooted in natural law- *vim vi repellere licet*, meaning

force may be repelled by force. English Philosopher John Locke argued that in the absence of a common authority, every man has the right to protect his life and property.

The State codifies this right because it cannot guarantee protection at every instance. The state holds the monopoly on the use of force, but because the state cannot be physically present everywhere at all times, the law temporarily delegates its authority to the individual when faced with imminent danger. Indian courts have called it “the first law of nature.”¹

3.2 Statutory Provisions: Bharatiya Nyaya Sanhita, 2023

The BNS retains the scheme of the IPC with updated language. The relevant provisions are:

1. Section 37: General right of private defence of body and property.
2. Section 38: Extent to which the right extends to causing death. Death can be caused only in 6 situations, including apprehension of death, grievous hurt, rape, kidnapping.
3. Section 39-43: Right of private defence of property.
4. Section 44: Restrictions. No right against acts of public servants, or when there is time to seek help of public authorities. The use of the word “right” is significant. It is not a mercy but an entitlement.

3.3 Essential Ingredients

For the plea to succeed, the accused must establish:

1. Imminent Threat: There must be a reasonable apprehension of harm.
2. Necessity: There was no time to approach State authorities.
3. Proportionality: The force used was not disproportionate to the threat.

4. Methodology Of The Prosecution-Accused Relationship

The plea of private defence changes three core aspects of the trial relationship. Under Indian Law - Bharatiya Nyaya Sanhita, 2023 & Bharatiya Sakshya Adhiniyam, 2023. In a normal criminal trial the Prosecution vs Accused relationship is straightforward: Adversarial. But when the accused pleads Private Defence u/s 37-44 BNS, 2023, that relationship is fundamentally "reconfigured". It becomes a "Qualified Adversarial" relationship.

4.1 From “Factual Denial” to “Legal Justification”

Aspect	Normal Trial	Trial with plea of Private Defence
What is admitted	Accused denies the act	Accused admits the wrong doing’ actus reus
Core Issue	‘Did the accused do it’?	‘Was the accused justified in doing it’?
Role of Accused	Passive. ‘Benefits from benefit of doubt’	Active. Becomes a claimant of a legal right.
Accused Strategy	Deny everything	Admit + Justify + Take risk
Prosecution Strategy	Prove Guilt	Prove Guilt + Prove absence of Justification
Key Evidence	Witnesses, weapon, motive	Injuries on accused, prior enmity, context

In a normal trial

Prosecution: “A killed B”

Accused: “I did not.”

With Private Defence

Prosecution: “A killed B”

Accused: "I killed B, but in self-defence."

This admission has consequences. The accused forfeits the benefit of factual doubt and stakes the case on law. The trial thus shifts from "who" to "why". The Prosecution can no longer just prove "A killed B". It must also prove "A killed B without justification". The trial shifts from a contest of facts to a contest of context and reasonableness. In the case *Darshan Singh v. State of Punjab* Supreme Court said once private defence is set up, the court must examine the entire background.

4.2 The Burden of Proof: A Shifting Onus

The general rule is Section 101, BSA: "Burden of proof lies on the person who asserts a fact." Section 105, BSA specifically deals with General Exceptions: "The burden of proving the existence of circumstances bringing the case within any of the General Exceptions... is upon him." However, the Supreme Court has drawn a critical distinction. The burden on the accused is only "evidential" to raise the plea on a preponderance of probability.² Once raised, the legal burden shifts back to the Prosecution to disprove the plea beyond reasonable doubt.³

This creates a two-stage process:

Stage 1: Accused adduces sufficient evidence to make the plea probable.

Stage 2: Prosecution must demolish that probability. Thus, the relationship is no longer one-sided.

The Prosecution must fight on two fronts.

4.3 Evidentiary and Strategic Consequences

For the Accused, the plea is high-risk, high-reward. If successful, complete acquittal follows. If it fails, the admission of the act becomes the strongest evidence for conviction. The accused must therefore take the stand, produce medical records, and call witnesses.

Evidence the Accused must bring:

1. Injuries on Accused: Medical reports, MLC. Shows he was also attacked. Failure of police to record this hurts prosecution.
2. Prior Threats/Hostility: FIRs, complaints, witness testimony to show he had reason to fear.
3. Nature of Weapons: If he was attacked with lathis and he used a knife, proportionality is debated.
4. Immediate Circumstances: Time, place, darkness, number of attackers. To show "no time to call police" u/s 44 BNS.

For the Prosecution, the investigation and trial strategy must change:

1. It must prove corpus delicti that the accused caused the injury.
2. It must prove absence of justification that there was no threat, or force was excessive, or there was time to call police. This requires evidence of who was the aggressor, prior enmity, injuries on the accused, weapons used, and time of incident.

Evidence the Prosecution must bring to disprove

1. Who was the Aggressor: To show accused started the fight and thus lost right u/s 44(2) BNS.
2. Excess of Force: To show response was grossly disproportionate.
3. Possibility of Retreat: To show there was time to approach public authorities.
4. Contradictions in Accused's Story: To show the "apprehension" was not reasonable.

Strategic Consequences

For the PROSECUTION

The Prosecution's strategy changes from "Fact Proving" to "Justification Negating".

At Investigation Stage:

1. Dual Investigation: Police must investigate both the victim and the accused. Must photograph injuries on accused, seize weapons from both sides. The police must record injuries on the accused under Section 176(1A) BSA. Failure to do so is often fatal to the prosecution case because it suggests the accused was also a victim.
2. Scene Reconstruction: Must establish who entered whose house/property. Important for Sec 38 & 41 BNS.
3. Motive of Aggression: Must collect evidence of who started it.

At Trial Stage:

1. Cross-Examination Shift: Questions change from "Did you stab him?" to "Why didn't you run? Why 5 stab wounds? Why use gun against sticks?" Instead of "Did you stab him?", Why did you use

a knife against fists?”

2. Destroying Reasonableness: Prosecution will argue the apprehension was not reasonable, or the accused had time to call 112.
3. Risk: If prosecution fails to disprove private defence, acquittal is mandatory even with admission. If the Prosecution cannot prove the accused was the aggressor, it will lose. This makes the plea a powerful defence in sudden fights and domestic violence cases.

For the ACCUSED/DEFENCE

The plea is "high risk, high reward".

Strategic Advantages:

1. Shifts Focus: Moves attention away from the act to the victim's conduct.
2. Benefit of Doubt: Even if court is 51% convinced it was self-defence, accused gets acquitted.
3. Narrative Control: Accused gets to tell his story and become a "victim-turned-actor".

Strategic Risks:

1. Taking the Stand: Accused often has to enter the witness box u/s 313 BSA to explain circumstances. He becomes open to cross-examination.
2. All-or-Nothing: If court finds force was excessive, Sec 106 BNS may reduce murder to culpable homicide, but conviction still happens.
3. Credibility Test: If the court finds the plea is false/fabricated, it damages overall credibility.

For the COURT

The judge's role expands. The court must now conduct a 3-part test:

1. Subjective: What did the accused perceive at that moment?
2. Objective: Would a reasonable person have perceived the same threat?
3. Proportionality: Was the force used in response to that threat?

The court becomes an arbiter of "reasonableness" not just a "fact finder".

5. Judicial Interpretation: Mediating The Relationship

Indian courts have developed clear principles to govern this unique relationship.

5.1 The “Reasonable Apprehension” Test

The court must place itself in the position of the accused at the time of the incident. In *Deo Narain v. State of U.P.*⁴, the Supreme Court held: “A person faced with an imminent threat is not expected to modulate his defence with the precision of a surgeon.” The test is subjective, judged objectively.

5.2 Principle of Proportionate Force

In *Munshi Ram v. Delhi Administration*⁵, the Court said the right is not unlimited. If a person is attacked with a lathi and responds with a gun, the force is disproportionate and the plea will fail. The Prosecution often succeeds by proving excess.

5.3 Duty of the Prosecution to Disprove

*Darshan Singh v. State of Punjab*⁶ is the leading authority. The Court held: “Once the accused probabilizes his plea, the burden lies on the prosecution to prove that the accused did not act in self-defence.” Failure means acquittal. In *Vijay Singh v. State of M.P.*⁷, the SC reiterated that courts must not take a “narrow and pedantic” view. Private defence is a “valuable right of self-preservation”.

5.4 “Excess of Private Defence”

Section 106 BNS provides that if the accused exceeds the right in good faith, he may be liable for a lesser offence of culpable homicide instead of murder. This shows the law’s attempt to balance both interests.

6. Challenges And Criticisms

1. Potential for Misuse: The plea can be misused to cover up planned assaults especially by the habitual offenders. Courts counter this by scrutinizing who was the aggressor.⁸
2. Difficulty for Prosecution: Proving a negative is a difficult task that there was no threat, it is inherently difficult to disprove the accused’s state of mind at that time, especially when witnesses

turn hostile.

3. Subjectivity vs Objectivity: The “reasonable apprehension” test gives judges wide discretion, leading to inconsistent outcomes. What was reasonable for the accused at the spot or in the dark or during hostile situation is judged by a judge three years later in a different cool environment. This leads to inconsistent judgments. Two judges or two courts may have opposite conclusions on similar facts.

4. Victim’s Rights: Critics argue an over broad interpretation can deny justice to the actual victim. The law addresses this through the proportionality test. In domestic violence cases abusive husbands death by a perpetual victim women often face hurdles to prove the imminent threat or the attack within exact time frame.

5. Delayed Justice: Because the plea requires detailed examination of context, these trials take at length as witnesses may recalled, medical experts called.

7. Comparative Study

India’s approach aligns with global standards.

United States: Most states follow “Stand Your Ground” or “Castle Doctrine”. Once self-defence is raised, the Prosecution must disprove it beyond reasonable doubt.⁹

United Kingdom: Under Section 3, Criminal Law Act 1967, the test is “reasonable force”. The burden remains on the Prosecution.¹⁰

Canada: Section 34 of the Criminal Code requires the act to be reasonable in the circumstances. Burden on Prosecution. This global convergence shows that liberal democracies accept that the State must justify punishment, not just the act.

8. Private Defence And Human Rights

The right to life under Article 21 of the Constitution of India includes the right to defend life. Denying private defence would make Article 21 illusory. At the same time, Article 21 of the “victim” must also be protected. The court’s role is to balance these. The “qualified adversarial” model does this by keeping the ultimate burden on the State.

International Human Rights Law in Universal Declaration of Human Rights (UDHR) under Article 3 said that Everyone has the right to life, liberty and security of person. International Covenant on Civil and Political Rights (ICCPR) under Article 6 says to Right to life. The United Nations Human Rights Committee says states must protect life, but also that use of force in self-defence is not a violation. Core Principle is that the International law recognizes that individuals have a right to protect themselves when the State cannot.

9. Conclusion

The relationship between the Prosecution and the Accused pleading private defence is not a simple contest. It is a structured dialogue on justification. The Prosecution’s burden is twofold: to prove the crime and to prove the absence of justification. The Accused’s role shifts from silent defendant to active claimant. The court becomes an arbiter of reasonableness, not just a fact-finder. This model ensures that criminal law does not become mechanical. It recognizes that not every killing is murder, and not every hurt is assault. Sometimes, the law itself authorizes the act.

As the Supreme Court observed, “The law does not require a man to be a coward.”¹¹ Private defence is the legal recognition of that principle. The health of a criminal justice system can be measured by how fairly it adjudicates this relationship protecting society without crushing the individual’s right to survive.

References

1. Ratanlal & Dhirajlal, The Bharatiya Nyaya Sanhita 1st ed. 2024, LexisNexis.
2. K.D. Gaur, Textbook on the Indian Penal Code 6th ed. 2022, LexisNexis.
3. R.V. Kelkar, Criminal Procedure 6th ed. 2023, Eastern Book Company.
4. Bharatiya Nyaya Sanhita, 2023, Bare Act, Government of India.
5. Bharatiya Sakshya Adhiniyam, 2023, Bare Act, Government of India.
6. Glanville Williams, Textbook of Criminal Law 2nd ed. 1983, Steven

Footnotes

- ¹ K.M. Nanavati v. State of Maharashtra, AIR 1962 SC 605.
- ² State of U.P. v. Ram Swarup, AIR 1974 SC 1570.
- ³ Woolmington v. DPP, (1935) AC 462, as applied in Indian law.
- ⁴ Deo Narain v. State of U.P., AIR 1999 SC 758.
- ⁵ Munshi Ram v. Delhi Administration, AIR 1968 SC 702.
- ⁶ Darshan Singh v. State of Punjab, (2010) 2 SCC 333.
- ⁷ Vijay Singh v. State of M.P., (2021) 7 SCC 461.
- ⁸ Laxman Singh v. State of Bihar, (2021) 12 SCC 353.
- ⁹ District of Columbia v. Heller, 554 U.S. 570 (2008).
- ¹⁰ R v. Palmer, (1971) 1 All ER 1077.
- ¹¹ Deo Narain v. State of U.P., AIR 1999 SC 758.