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RIGHT OF PRIVATE DEFENCE UNDER THE LAWS OF INDIA AND AUSTRALIA

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Abstract

Self-preservation is a basic but complicated right in India, England, the US, and Australia. The right to self-defense is recognised. However, legal systems and society struggle to execute and understand this right. The toughest thing is separating self-defense from vengeance or hostility disguised as defence. When contemplating excessive self-defense force, this difference is crucial. Self-defense defends one's and others' health and property against imminent danger. We usually recognise that people have the moral and legal right to use force to protect themselves or their family against immediate threats or violent assaults. In severe situations, humans may employ deadly force. However, the law separates self-defense from revenge, which is punishing wrongdoing. Although vengeance and self-defense may overlap in real life, the legal system strives to differentiate between them. Vengeance is understandable emotionally, but it is not a legal justification for employing force, especially fatal force. The judicial system's legitimacy and vigilantism prevention depend on distinguishing these two conceptions. The defender's belief in the threat's imminence typically determines self-defense legitimacy. Rational arguments must persuade the defender's thinking to believe there is an urgent danger and that force is necessary to defend against it. A person is legally allowed to prevent a crime if there is no time to call the police. This allows the use of lethal force as a last choice for self-defense even when there is a reasonable fear of death or severe harm. Need is necessary to justify fatal action in self-defense. The defence must demonstrate an unlawful and impending threat of serious damage to justify their use of deadly force. This requirement requires self-defense to be motivated by a defined aim and



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justified by the defender's injuries to protect their legally recognised interest, notably their right to life. The legislation seeks to balance the right to self-defense with the communal purpose of preventing unjustified violence. The right to self-defense is only invoked when the defender's legal rights are infringed by a legally obliged aggressor. Understanding the moral and legal justifications for self-defense requires this foundation. Self-defense reacts to and may hurt the person who created and represents the dangerous situation. This conceptual paradigm distinguishes self-defense from other violence and underlines its responsiveness. However, self-defense laws are hard to enforce, particularly when force is extreme. Courts must carefully assess the apparent immediacy of the threat, the reasonableness of the response, and the defendant's mental state. Self-defense laws in many jurisdictions show ongoing efforts to address these issues. Several legal systems have expanded self-defense to include protecting non-relatives. This recognises the social duty people may have to protect the vulnerable. There is also a growing awareness of the needs of those who have undergone protracted abuse and may utilize self-defense in non-confrontational situations. These occurrences demonstrate the ongoing effort to combine individual safety rights with society interests in order and preventing violence. As cultures struggle with personal safety, domestic violence, and governmental protection, self-defense is anticipated to grow. It will handle complex human conflict dynamics while upholding justice and human rights. In fact, the rule of law does not enable private defence without a legal right infringement.

1. Introduction

Defence is preventative, not retributive. By proving his act is self-defense, one can be exempt from culpability, but the right to self-defense depends on many factors, such as immediate or imminence of danger, time of apprehension, dangerous form of assault, necessity, reasonableness of the force used, duty to retreat, time to reach public authorities, etc. Countries have different factors. In general, Indian, English, American, and Australian laws need the following factors for self-defense:

First, the accused must not have caused the problem.

Second, there must be realistic fear of life or grave physical injury.

Third, there must be no safe way of escape by retreat.

Fourth, there must have been a necessity for taking life.

Lastly, no more force than necessary should be used.

These are the pillars upon which the right of self-defence stands.

A full comparison of Indian and Australian self-defense legislation follows:

Jerome Hall, *General Principles of Criminal Law*, Indian polis, (1947), p. 401

2. Essential Elements Under Indian Law

Since private defence is a right to self-defense, not punishment, the damage committed must be limited to what is required for defence. Further, the right begins and exists when there is reasonable concern of bodily harm from an effort or threat to conduct the offence. It only works against genuine, present, and



urgent threats.¹ Every individual has the right to stand firm and not flee like a coward. His counterattacks, which may be disproportionate to the hurt, are warranted.² An act of killing must be shown to be justifiable murder in the exercise of private defence, not culpable:

- a) The dead assaulted the accused, which was illegal.
- b) Such an attack may legitimately induce the accused to fear death or grave harm unless he used his right to private defence.
- c) That deliberately killing his attacker was essential for defence.³

Private defence holds that a person or his property is entitled to protection when governmental machinery is unavailable. Averting the harm requires a corresponding amount of power. Whether private defence is accessible depends on the accused's injuries, imminence of a danger to his safety, and time to seek public aid.⁴

Private defence holds that a person or his property is entitled to protection when governmental machinery is unavailable. Averting the harm requires a corresponding amount of power. Since the basis of this right is defence against offences of violence, it follows that where the defendant had no reasonable ground to anticipate such a killing, the killing in self-defence was not justifiable.⁵ The Supreme Court ruled in *George Dominic Varkey v. State of Kerala* that private defense is based on these ideas:

- (i) There must be no more hurt than required for defence.
- (ii) An attempt or threat to conduct a crime must pose a realistic risk to the body.
- (iii) Right begins with a legitimate fear of harm.

neighbour dead after believing he had a knife and pistol. Zecevic was convicted when the court deemed self-defense irrelevant. The High Court ordered a retrial after Dawson and Toohey JJ defined self-defense:

"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self- defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide."

The Criminal Code 1994's 10.4(2) self-defense criteria are:

A person acts in self-defense only if they feel it is necessary:

- i) To defend oneself or others.
- ii) To prevent or end unlawful detention.
- iii) Protecting property against illicit acquisition, destruction, injury, or interruption.

¹ Onkarnath Singh v. State of U.P., AIR 1974 SC 1550

² Mehendi v. Emperor, AIR 1930 Lah. 93

³ Hakim v. Emperor, 41: P.R. 1884 Cr

⁴ Queen v. Hussainuddy, 17 W.R. 46

⁵ John Wilder May, *The Law of Crimes*, Boston, (1905), p. 98



- iv) To prevent unlawful entrance into property or businesses.
- v) To remove a criminal trespasser from a property.

Self-defense in Australian law has expanded to embrace more circumstances and groupings. Despite the narrow definition of self-defense, Australian courts have recognised the necessity for a more comprehensive approach. In the past, common law confined self-defense to parent-child, husband-wife, and master-servant relationships. Formalized rules in modern Australian legislation like the Crimes Act 1900 in New South Wales and the Crimes Act 1958 in Victoria have broadened knowledge. This law allows individuals to legally defend themselves and others regardless of relationship. Social approval of self-defense legislation illustrates that the ethical obligation to defend others may transcend family or professional connections, reflecting the complexity of interpersonal interactions and the necessity for involvement in varied circumstances.

Despite strong deadly force laws, self-defense includes property protection. Zecevic set a basic condition for self-defense deadly action. Fatal force is only authorised by the High Court if an assault generates a realistic fear of death or severe injury. Property protection laws like Queensland's Criminal Code 1899 assist this. These property protection standards ban killing or hurting people by demanding reasonable and necessary force. This approach balances property rights with human lives. Unless life is at danger, it responds proportionately to property threats without killing.

3. Appraisal

From the aforesaid analysis it is evident that the following elements are essential when the plea of self-defence may be sustained:

- (i) The accused must be without fault.
- (ii) A reasonable fear of life or serious harm is required.
- (iii) Nobody should be able to withdraw safely.
- (iv) The urge to kill must have been strong.
- (v) Use minimal force.

4. Scope

English self-defense laws show a shift in legal theory and culture. Self-defense once only allowed individuals to protect themselves from impending harm. The restricted emphasis of this approach was that personal safety was mostly the responsibility of people, with the state providing secondary protection. However, as civilization advanced and human interactions grew more complex, the legal system expanded its concept of self-defense. Nowadays, self-defense includes everyone, regardless of their relationship to the defender. This expansion acknowledges that individuals may have a moral obligation to help family, acquaintances, or even strangers in danger. The phrase "under a man's immediate protection" implies that the right to defend others includes anybody in one's vicinity or care in a dangerous situation. This movement in self-defense law acknowledges community interdependence and the communal obligation to provide security with a more sympathetic and



pragmatic approach to individual and society safety.⁶ American law has two self-defense doctrines: the Castle Doctrine and the Stand Your Ground Doctrine. Australian law considers the urgency of the expected attack when assessing self-defense.

5.Scope Of Self- Defence In Indian

Sections 99, 98, and 100 establish the right's boundaries, who may exercise it, and how much damage can be done lawfully.

Section 97 allows people to safeguard their bodies and others against crime.⁷

In *Jai Dev v. State of Punjab*, the Supreme Court defined private defence:⁸

“This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet the attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available; the individual citizen is entitled to protect himself and his property.”

The Punjab High Court in *Het Ram Lallu Singh v. State*⁹ observed:

“So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require as Mayne has observed that ‘he should modulate his defence step by step, according to the attack, before, there is reason to believe the attack is over’ the law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force.”

In *Jai Dev. v. State of Punjab*¹⁰ the Supreme Court while dealing with the right of defence of property and person observed:

“In appreciating the validity of the appellant’s argument, it would be necessary to recall the basic assumptions underlying the law of self-defence. In a well ordered civilized society, it is generally assumed that the state would take care of the persons and properties of individual citizens and that normally it is the function of the state of affords protection of such persons and their properties. This, however, does not mean that a person suddenly...his property. That being so, it is a necessary corollary to the doctrine of private defence, that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.”

Justice Arijit Pasayat briefly and clearly pointed out the private defence concept in *James Martin v. State of Kerala*¹¹, in the following words:

⁶ Foster, Crown Law, (1762), p.274

⁷ *Nga Thau v. Emp.*, AIR 1933 Rang. 273

⁸ AIR 1963 SC 612

⁹ AIR 1970 Punj. 85

¹⁰ AIR 1963 SC 612

¹¹ (2004) 2 SCC 203



"Self-preservation is the fundamental instinct inherent in every individual." In criminal law, private defence is a right. Acts of self-defense are not crimes under Section 96 of the Indian Penal Code, 1860. Questions arise over whether such privileges have exceeded the 'Lakshman Rekha'. Privileges are limited under Section 99 of the IPC.

The accused must prove they were in danger and used legitimate force to protect themselves or their property in India to claim the right to self-defense. An accused person may practice self-defense before being physically assaulted. He may utilise his right if he believes a person or property is in immediate danger.

6. Scope Of Self- Defence In Australia

Whether self-defense is a justification depends on the imminence of the feared assault. UK and Australian positions seem to vary significantly, at least theoretically. The UK views defence as only available if an assault is imminent. Though crucial, imminence is one of several criteria in Australia. The latter method is preferable and should be used throughout the UK. Hopeful that the courts will rule that the powerful must protect the vulnerable.¹²

7. Appraisal

Self-defense laws in India and Australia show how legal systems adapt to human interactions and the need for personal protection. The original definition of private defense focused on self-defense. This phrase has expanded to embrace more circumstances and people throughout time. Indian and Australian laws allow individuals to employ self-defense to defend themselves and others, including family, friends, and strangers. This addition acknowledges the ethical and social duty to help those in danger. Self-defense now includes protecting personal and others' property as well as bodily damage. The danger must be real, not abstract or remote. The court considers when the defence became aware of the risk since it impacts their reasonableness. In dangerous assaults, the defensive reaction should match the risk. The defender's reasonable perception of danger must be rational and justified given the circumstances. These factors balance self-defense with vigilantism or excessive force. They want to ensure that self-defense is only utilized as a last resort when official protection is unavailable. Self-defense laws in India and Australia demonstrate a sophisticated understanding of justice, admitting that rigid laws may not always advance justice in complex, realistic situations. These legal systems protect people's rights to safety while minimizing abuse by expanding self-defense within specific limits. This strategy shows a comprehensive understanding of human conduct and the different circumstances that demand defensive reactions.

8.Application Of Re- Treat Rule

8.1 General

Retreating is better than killing the aggressor, according to the retreat rule. This rule has exceptions. Therefore, it would be unreasonable to require that an individual retreat if they are in imminent risk of death or serious harm from a lethal-armed assailant and are far from safety. Without a doubt,

¹² J.W. Cecil Turner, *Kenny's Outlines of Criminal Law*, (1966), p. 207



withdrawing would have deadly effects¹³. The retreat rule is simple to justify. This position holds that human life, especially the life of an aggressive person, is important enough to rescue, even if it means sacrificing the urge to protect oneself.¹⁴ The retreat rule advocates say that forcing a person in danger to withdraw or penalising them for not doing so may violate their dignity. Further, while human life is unquestionably of much value, one who assaults another under circumstances justifying deadly force in response can reasonably be regarded as having forfeited at least some of the respect to which most persons and their lives are entitled.¹⁵

The retreat rule applies the strict necessity criteria to justify killing. The goal is to assure such necessity. Even the innocent victim of a horrific assault must leave to a safe area if feasible rather than employ defensive action that might kill or injure¹⁶. In this context, Blackstone observes:

“The party assaulted must, therefore, flee as far as he conveniently can either be reason of some wall, ditch, or some other impediment; or as far as the fierceness of the assault will permit him, for it may be so fierce as not to yield a step, without manifest danger of his defence he may kill his assailant instantaneously. And this is the doctrine of universal justice, as well as of the municipal law.”¹⁷

From this, it is evident that the retreat rule exhibits universal justice in the domain of self-defence.

8.2 Under Indian Law

No penal legislation or analogous law addresses the retreat rule. In the absence of such an alternative, evaluate the perspectives of many authors and decision-makers. When outlining the concept's implementation, Mayne said:

“But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable.”¹⁸

The Supreme Court in *G.V.S. Subbrayanam v. State of A.P.*¹⁹ observed:

“The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrong doer for commission of offences. The right of private defence serves a social purpose and as observed by this Court more than once there is nothing more degrading to the human spirit than to run away in the face of peril.”

This privilege prevents, not punishes. The Supreme Court reaffirmed its position in *Mohd. Khan v. State of M.P.*,²⁰ and stated:

¹³ *Laney v. United States*, 54 App. D.C. at 58-59, 294 F. at 414-15 (1923)

¹⁴ Sanford H. Kadish, *Encyclopedia of Crime and Justice*, Vol. III, New York, (1983), p. 949

¹⁵ *Ibid*

¹⁶ George E. Dix and M. Michael Sharlot, *Criminal Law*, St. Paul, (1979), p. 646

¹⁷ Blackstone, *Commentaries on The Law of England*, (1830), p. 185

¹⁸ John D. Mayne, *The Criminal Law of India*, (1904), p. 460

¹⁹ AIR 1970 SC 1079. See also *Munshi Ram v. Delhi Adm.* AIR 1968, SC 702 and *Krishna v. State of Rajasthan*. AIR 1962 SC



“The law does not require a law-abiding citizen to behave like a coward when confronted with an observed by this Court there is nothing more degrading to the human spirit than to run away in face of danger.”

Yogendra Morarji v. State of Gujarat, the Supreme Court discussed private defence principles and restrictions, highlighted this rule.²¹ Since private defence serves a social purpose, Indian courts have not enforced the retreat rule. Laws do not expect law-abiding people to be timid when confronted with criminal assaults.

8.3 Under Australian Law

The modern attitude the retreat rule in Australia is exhibited in *R. v.*

*Howe*²², where it was held that:

“...a man who is subjected to a violent atrocious attack upon his body is not bound, at all costs, to retreat at the risk of being found guilty of murder if he does not do so, but that he should retreat rather than kill if, as the circumstances appear to hi (exercising a reasonable judgment) at the time, he could do so without endangering his own safety or jeopardizing his chances of successfully avoiding the consummation of a violent and felonious attack”.²³ Thus, it is evident from the above decision that in cases of felonious attack or murderous assault retreat rule is not required to be observed in Australia.

Someone in peril “should retreat as far as possible before employing self-help” under the historical responsibility to retreat. Even though it was no longer a legal requirement, the High Court in *Zecevic* emphasized that failing to retreat in the face of danger was a “circumstance to be considered in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defense.”²⁴

9. Conclusion

Australia's self-defense laws have evolved from rigid definitions to more flexible approaches that take into consideration each case's unique circumstances. This amendment recognises the complexity of self-defense cases and strives to improve legal fairness. Any Australian may employ defensive or evasive tactics if necessary. Protection of persons, property, trespass prevention, and removal go beyond self-defense. The definition of self-defense has expanded beyond parent-child and spouse-spouse. The legalization of this growth in New South Wales and Victoria suggests a deeper grasp of human ties and engagement. Self-defense legislation in Australia prioritizes danger immediacy, unlike in the UK. The UK requires imminence for self-defense, whereas Australian courts consider it one of numerous grounds. This method reviews defence action factors more thoroughly, which may lead to fairer decisions in difficult instances.

²⁰ 1972 CrLJ 661 at 665 (SC)

²¹ AIR 1980 SC 660 at 666

²² (1958) S.A.S.R. 95, 32 A.L.J.R. 213

²³ *Ibid*

²⁴ *Zecevic v DPP* (1987) 162 CLR 645, 663



Australian self-defense laws have evolved due to family violence. Imminence has traditionally determined the legitimacy of a self-defense case, requiring a direct threat-defense relationship. Under these criteria, non-confrontational action against long-term abusers was tough. These persons have particular obstacles; hence Australian jurisdictions have differing imminence procedures in self-defense instances. Ideas include reducing impending danger or substituting it with Queensland's domestic violence history. This alternative self-defense recognises abusive relationships' complexity. Relaxing the time restriction helps the law assess the cumulative consequences of long-term abuse and domestic violence. This legislative amendment acknowledges the psychological repercussions of protracted abuse and victims' restricted options. The traditional notion of imminence may not sufficiently cover the ongoing danger faced by abusive relationship victims.

Reassessing imminence in Australian self-defense laws effects protective actions. After family violence victims murder their abusers, imminence is sometimes used as a replacement for need. Abuse history may need precautionary actions. Australian self-defense laws raise problems regarding governmental protectiveness. Failure to protect recurrent abuse victims may warrant an exemption from the norm that only the state may use force in non-imminent circumstances. In the absence of official protection, citizens may have to adopt defensive actions. In circumstances where family violence victims murder their abusers, self-defense arguments may shift from the immediacy of the threat to the necessity of their acts. This technique lets the defendant's actions be assessed more thoroughly, taking into account past abuse, potential damage, and other safeguards. The law can better serve victims of long-term abuse and sustain a system that prohibits violence by prioritizing the required above the urgent. This change in self-defense ideology indicates a move towards a more empathic and pragmatic judicial system that can better apply justice in complex cases.

The ancient responsibility to retreat required people to avoid danger before using self-defense. Although not required by law, the High Court has ruled that not retiring when faced with danger is important in determining whether the accused thought self-defense was necessary²⁵. According to several Australian court judgments, if an accused person uses excessive force to protect oneself and kills their assailant, they will be prosecuted with manslaughter. The accused must believe their force was justifiable under the circumstances.²⁶

Self-defense laws in different legal systems show an increasing awareness of personal security and the need to protect oneself, others, and property. The expansion of the right to self-defense shows a deeper understanding of human interactions and when protective measures are needed. Self-defense has grown in India, England, Australia, and the US. It now involves protecting one's own and others' physical well-being and property. This expansion acknowledges that people may have to intervene to protect family, friends, or even strangers in danger. However, the broad right to self-defense is subject to other important factors. The law requires a tangible and impending threat to warrant defensive actions. This ensures self-defense is not dependent on guessing or unfounded fears. The

²⁵ *Zecevic v. DPP* (1987) 162 CLR 645, 663

²⁶ *Howe* (1958) 100 C.L.R. 448; *McKay* [1957] V.R. 560; *Bufalo* [1958] V.R. 363; *Enright* [1961] V.R. 663; *Turner* [1962] V.R. 30; *Tikos* (1) [1963] V.R. 285; *Tikos* (2) [1963] V.R. 306.



reasonableness of the defensive reaction depends on the perceived danger's timeliness. The law also considers whether the circumstance is suited for a violent attack, emphasizing that self-defense force should match the danger. Self-defense claims rely on reasonable anticipation of danger. This implies that a person must show that a reasonable person in the same situation would have detected a threat and taken precautionary precautions. Importantly, the law considers whether there was enough time to flee government agents. This acknowledges that self-defense should be a last resort when official help is unavailable. These elements allow people to protect themselves and others while reducing unnecessary force to attain balance. The law incorporates these aspects to ensure that self-defense is used wisely and only when necessary.

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