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Right of Private Defence under the Bharatiya Nyaya Sanhita, 2023: Causing Death in Defence of Body and Property: A Critical Analysis of Sections 34 to 44 of the BNS and Leading Supreme Court Decisions

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ABSTRACT

Every legal system must decide how far a person may go in resisting an unlawful attack when the State cannot protect them in time. This article studies the right of private defence in Sections 34 to 44 of the Bharatiya Nyaya Sanhita, 2023 (BNS), with attention to the point at which defensive force may lawfully cause death. It explains how the Sanhita protects the body and property, sets out the seven kinds of offence against the body and four kinds of property offence that can justify a fatal response, and describes the limits imposed by Section 37. The analysis is tested against three Supreme Court decisions, Darshan Singh*,* James Martin *and* Vidhya Singh*, which were decided under the Indian Penal Code but still guide the reading of the new provisions. The article argues that courts must judge the defender's conduct as it appeared in the moment of danger, while refusing to let defence become a cover for revenge. It closes with recommendations on adjudication, evidence and public awareness.*

Keywords: *Private defence, Bharatiya Nyaya Sanhita, self-defence, criminal liability, lethal force, judicial interpretation*

I. INTRODUCTION

Criminal law exists to protect life, bodily integrity and property. Attacks, however, rarely wait for the police. When a person is met with sudden violence in a place where no officer can arrive in time, a rule that demanded passivity would leave the protection of the law empty. The right of private defence fills that gap by letting the threatened person resist, for the moment, on their own account.

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The right is a shield and not a licence to punish. It exists to prevent or repel an attack and never to avenge one. The difference matters most where the defender's response kills the attacker, because the law must then set the defender's security against the value it places on every human life, including the aggressor's.

In India the right is regulated by Sections 34 to 44 of the Bharatiya Nyaya Sanhita, 2023 (BNS).[1] These sections name the interests that may be defended, mark out the limits of defensive force and state when the defender may lawfully cause death.

This article examines those sections together with leading Supreme Court decisions on the subject. It asks how the law reconciles a person's instinct for self-preservation with the need to prevent excessive violence.

II. Meaning and Foundation of the Right

Private defence is a legal justification for using necessary force against unlawful aggression aimed at a person's own body, at the body of another, or at property. Its premise is that protective action may be needed in the moments before public authority can step in.

Section 34 provides that nothing done in the lawful exercise of the right is an offence.[2] Section 35 states what may be defended: the body of oneself or of any other person against offences affecting the human body, and movable or immovable property, whether one's own or another's, against theft, robbery, mischief and criminal trespass, including attempts to commit them.[3]

The right is preventive rather than punitive.[4] A person is not required to wait for the first blow where a reasonable apprehension of danger has already arisen within the conditions laid down by the statute.[5] Equally, a quarrel, an old grudge or an insult does not by itself justify violence.

Section 36 deals with acts that would be offences but for the youth, want of maturity of understanding, unsoundness of mind or intoxication of the person committing them, or a misconception on that person's part. The right remains available against such acts.[6] This shows that it turns on the nature of the threatened harm and not on whether the attacker could eventually be convicted.[7]

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[1] Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, §§ 34–44 (India) [hereinafter BNS].
[2] BNS § 34.
[3] BNS § 35.
[4] *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333, [2010] 1 SCR 642, ¶ 30 (India).
[5] BNS § 40; *Darshan Singh*, *supra* note 4, ¶¶ 22, 58(iii).
[6] BNS § 36.
[7] BNS § 36, illus. (a).

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The right must be used within limits fixed by law. Once the danger has passed, further violence loses its defensive character and becomes retaliation.[8]

III. THE STATUTORY SCHEME OF SECTIONS 34 TO 44

Sections 34 to 44 form a connected scheme and are best understood in groups.

Section 34 gives basic protection to acts done in private defence. Section 35 defines the right over body and property, and Section 36 extends it to acts that are not offences only because the actor enjoys a legal exemption.[9]

Section 37 lists the cases in which the right does not exist and fixes its outer limit. There is no right against an act of a public servant done in good faith under colour of office, or against an act done on the direction of such a public servant, where the act does not cause a reasonable apprehension of death or grievous hurt.[10] There is also no right where there is time to seek the protection of public authorities.[11] In every case the right does not extend to inflicting more harm than is necessary for the purpose of defence.[12]

Sections 38 and 39 govern the extent of defence of the body. Section 38 lists seven kinds of offence in which the right extends to voluntarily causing the assailant's death or any other harm.[13] Section 39 applies where the case falls outside Section 38 and confines the right to harm short of death.[14]

Section 40 fixes when the right of defence of the body begins and how long it lasts.[15] Section 41 lists the cases in which defence of property may extend to causing death, and Section 42 covers cases in which it may extend only to harm other than death.[16] Section 43 governs the commencement and continuance of the right over property.[17] Section 44 addresses the situation in which a person defending against a deadly assault cannot effectually exercise the right without risk of harm to an innocent person, and extends the right to the running of that risk.[18]

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[8] *James Martin v. State of Kerala*, (2004) 2 SCC 203 (India); *see also Darshan Singh*, *supra* note 4, ¶ 55 (quoting *Jai Dev v. State of Punjab*, AIR 1963 SC 612).
[9] BNS §§ 34–36.
[10] BNS § 37(1)(a)–(b).
[11] BNS § 37(1)(c).
[12] BNS § 37(2).
[13] BNS § 38.
[14] BNS § 39.
[15] BNS § 40.
[16] BNS §§ 41–42.
[17] BNS § 43.
[18] BNS § 44.

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These sections must be read as a whole. A right to defend the body or property does not by itself carry a right to kill. The kind of danger, the statutory category it falls into and the limits in Section 37 must all be considered.

IV. Defence of the body

Defence of the body protects a person against unlawful acts that threaten physical safety. The protection extends equally to another person who is under attack.[19]

Under Section 38 the right may reach the voluntary causing of death in the listed cases. Where those conditions are not met, Section 39 permits harm other than death, always subject to Section 37.[20]

Section 40 provides that the right begins as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence, even though the offence has not been completed.[21] The law therefore does not force a person to suffer injury before acting to prevent it.

Suppose an assailant advances with a deadly weapon in circumstances that point to an imminent attack. The intended victim may act in defence before being struck. Whether the act is justified will depend on the facts, the gravity of the threat and the statutory limits.

Courts must also remember how hard it is to respond to sudden danger. A person facing an immediate attack cannot be expected to calculate the exact amount of force needed.[22] That allowance, however, does not authorise force that is plainly unnecessary.[23]

The right lasts only as long as the apprehension of danger lasts.[24] If the aggressor withdraws and the threat ends, pursuing and attacking him falls outside the protection of private defence.

V. Defence of property

Section 35 allows a person to protect movable and immovable property, whether their own or another's, against theft, robbery, mischief and criminal trespass, and against attempts to commit those offences.[25]

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[19] BNS § 35(a).
[20] BNS §§ 37–39.
[21] BNS § 40.
[22] *Darshan Singh*, *supra* note 4, ¶ 58(v).
[23] BNS § 37(2); *Darshan Singh*, *supra* note 4, ¶ 58(vi).
[24] BNS § 40; *Darshan Singh*, *supra* note 4, ¶ 58(iv).
[25] BNS § 35(b).

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Section 41 names four situations in which defence of property may go as far as causing the wrongdoer's death, subject to Section 37.[26] The first is robbery.[27] The second is house-breaking after sunset and before sunrise, which the Penal Code called house-breaking by night.[28] The third is mischief by fire or an explosive substance committed on a building, tent or vessel used as a human dwelling or for the custody of property.[29] The fourth is theft, mischief or house-trespass committed in circumstances that reasonably raise an apprehension that death or grievous hurt will follow unless the right is exercised.[30]

Each category must be read according to its own terms. It cannot be assumed that every theft or trespass permits lethal force. The facts must fall squarely within a listed category, and the limits in Section 37 must still be observed.

The distinction matters because the protection of property must not become an excuse for needless violence. The law accepts that some property offences carry real danger to human life, but it does not give owners an unrestricted power to punish offenders.

VI. When defence of the body may cause death

Section 38 lists seven kinds of offence in which the right of private defence of the body extends to voluntarily causing the assailant's death or any other harm, subject to Section 37.[31]

A. Assault causing reasonable apprehension of death

The right covers an assault that may reasonably cause the apprehension that death will otherwise be the consequence.[32] The circumstances must support a genuine fear of fatal danger. Hostility between the parties is not enough.

B. Assault causing reasonable apprehension of grievous hurt

The right also covers an assault that may reasonably cause the apprehension that grievous hurt will otherwise be the consequence.[33] The defender need not wait for the serious injury to occur, but the apprehension must be reasonable on the facts.

C. Assault with intent to commit rape

[26] BNS § 41.
[27] BNS § 41(a).
[28] BNS § 41(b); Indian Penal Code, 1860, § 103 (India).
[29] BNS § 41(c).
[30] BNS § 41(d).
[31] BNS § 38.
[32] BNS § 38(a).
[33] BNS § 38(b).

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An assault committed with the intention of committing rape falls within Section 38.[34] The category reflects the gravity of the violation of bodily autonomy and personal security that such an attack threatens.

D. Assault with intent to gratify unnatural lust

The section also lists an assault committed with the intention of gratifying unnatural lust.[35] This is the wording of the enacted text, and it must be applied in line with the law now in force.

E. Assault with intent to kidnap or abduct

The right may extend to causing death where the assault is made with the intention of kidnapping or abducting a person, subject to the statutory limits.[36]

F. Assault with intent to wrongfully confine

This category applies where the assault is meant to confine a person wrongfully, in circumstances that may reasonably cause the person to apprehend that they will be unable to seek release through public authorities.[37]

G. Throwing or administering acid

The provision lastly covers throwing or administering acid, or attempting to do so, in circumstances that may reasonably cause the apprehension that grievous hurt will otherwise be the consequence.[38]

Each of these seven categories has to be examined on its facts. Falling within one of them does not lift the restrictions in Section 37 or justify every act that results in the assailant's death.

VII. JUDICIAL ANALYSIS

Decisions given under the Indian Penal Code, 1860 continue to guide the reading of the corresponding BNS provisions.[39] Their principles must nevertheless be applied with attention to the wording of the new Sanhita and to the facts of each incident.

A. *Darshan Singh v. State of Punjab*

Darshan Singh v. State of Punjab[40] arose from a land dispute that ended with a gunshot death. The accused pleaded that he had fired in defence of himself, after his father had been struck on

[34] BNS § 38(c).
[35] BNS § 38(d).
[36] BNS § 38(e).
[37] BNS § 38(f).
[38] BNS § 38(g).
[39] Indian Penal Code, 1860, §§ 96–106 (India), the provisions to which BNS §§ 34–44 correspond, section for section and in the same order. The Code was repealed by BNS § 358(1).
[40] *Darshan Singh*, *supra* note 4, ¶¶ 4–5, 8.

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the head with a gandasa.[41] The trial court acquitted him, the High Court reversed that decision and convicted him, and the Supreme Court allowed his appeal.[42]

The Court stressed that self-preservation is a basic human instinct and that a person in imminent danger cannot be expected to weigh the force of a response with mathematical exactness.[43] It also held that a reasonable apprehension can bring the right into existence before any injury is inflicted, and that the accused need not prove the plea beyond reasonable doubt.[44] The acquittal was restored.[45]

The decision supports a realistic assessment of defensive conduct. It does not, however, license disproportionate force in every confrontation.[46] The facts and the statutory limits remain decisive.

B. *James Martin v. State of Kerala*

In *James Martin v. State of Kerala*[47] the Supreme Court dealt with violence linked to a bandh. The accused claimed private defence after firing at persons who had entered the premises, and the incident left two persons dead and others injured. The trial court and the High Court held that he had exceeded the right.

The Court examined whether the accused had gone beyond the limits of the right. It held that the availability of the right is a question of fact to be decided on the whole incident and its surroundings, and that the plea need not be put in any particular words if the evidence supports it. It further explained that the accused must establish the plea only on a balance of probabilities, and that support may come from the prosecution's own evidence.[48] On the facts, it found that the threat to the life and property of the accused was imminent and continuing, held that he had acted within the reasonable limits of the right, and set aside his conviction.[49]

The case shows that a defender's response is to be judged against the threat as it stood on the spot, and not by the lives lost in the end. It does not mean that unlawful entry or aggression automatically justifies every later act of force. The court must still ask whether the response stayed within what was needed for protection.[50]

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[41] *Id.* ¶ 14.
[42] *Id.* ¶¶ 2, 59, 65.
[43] *Id.* ¶ 58(i), (v).
[44] *Id.* ¶¶ 22, 58(iii), (viii).
[45] *Id.* ¶ 65.
[46] *Id.* ¶ 58(vi).
[47] *James Martin*, *supra* note 8.
[48] *Id.* (applying Indian Evidence Act, 1872, § 105 (India), now Bharatiya Sakshya Adhiniyam, 2023, No. 47 of 2023, § 108 (India)).
[49] *James Martin*, *supra* note 8.
[50] *Id.*

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C. *Vidhya Singh v. State of Madhya Pradesh*

In *Vidhya Singh v. State of Madhya Pradesh*[51] a quarrel led to an assault that fractured a man's arm, and persons who then intervened were stabbed by the accused, one of them fatally. The trial court held that he had a right of self-defence but had exceeded it, and convicted him under Section 304 Part I of the Penal Code.[52] The High Court altered the conviction to murder.[53]

The Supreme Court agreed with the trial court that the right existed but had been exceeded, and restored the conviction under Section 304 Part I.[54] It added that self-defence serves a social purpose and should not be read narrowly.[55]

The judgment separates the initial right to protect oneself from the limits on the force used in exercising it. Having the right does not excuse every act committed in the course of a confrontation.

Taken together, these decisions require courts to look at the whole factual setting: the seriousness of the threat, the conduct of both sides, and whether the danger continued or had ended.

VIII. CRITICAL EVALUATION

The right of private defence balances individual security against the State's duty to keep public order. Its main strength is that it recognises the cases in which immediate action cannot wait. Its main danger is that retaliation may be dressed up as self-defence.

The central difficulty lies in judging reasonable apprehension. A defender may have seconds in which to act, while a court reviews the incident at leisure. Fairness therefore requires the court to ask how matters reasonably appeared at the time.[56] Even so, subjective fear alone cannot justify lethal force unless the statutory conditions are met.[57]

A second difficulty is the bar on causing more harm than necessary. Section 37 is what prevents private defence from turning into punishment.[58] Courts should not expect unrealistic precision from someone facing immediate danger, and they should not excuse violence that goes on after the threat has ended.[59]

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[51] *Vidhya Singh v. State of Madhya Pradesh*, (1971) 3 SCC 244 (India).
[52] *Id.* The corresponding provision is now BNS § 105.
[53] *Vidhya Singh*, *supra* note 51.
[54] *Id.*
[55] *Id.* ¶ 7.
[56] *James Martin*, *supra* note 8.
[57] BNS §§ 38, 41.
[58] BNS § 37(2).
[59] *Darshan Singh*, *supra* note 4, ¶ 58(iv)–(v); *see also id.* ¶ 57 (discussing *Buta Singh v. State of Punjab*, (1991) 2 SCC 612).

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Property defence needs equal care. Section 41 names particular property offences in which lethal force may be justified.[60] Those categories should not be stretched beyond their wording, and the danger and the limits must be examined in every case.

Evidence also matters a great deal. Medical reports, injuries on both sides, witness accounts, forensic findings and the order of events all help decide whether the right existed and whether it stayed within bounds.[61]

A balanced reading should protect genuine defensive conduct while ensuring that the right does not replace investigation and lawful punishment.

IX. SUGGESTIONS

First, courts should draw a clear line between defence and retaliation by looking at the purpose, timing and circumstances of the force used.

Second, investigating agencies should secure medical records, witness statements, photographs and forensic material at the outset, so that the incident can be reconstructed reliably.

Third, legal awareness programmes should explain the difference between the right to resist unlawful aggression and the power to punish an offender. This may reduce misuse of the plea.

Fourth, judgments dealing with lethal force should state and apply the relevant statutory requirements, especially Sections 37, 38 and 41 of the BNS.

Fifth, courts should assess the facts in context, giving weight to the urgency of the danger while preserving the protection the law gives to human life.

Finally, future research should study how courts apply the BNS in cases of violent robbery, domestic violence, acid attacks and threats to personal liberty. Such work would help clarify the practical limits of private defence.

X. CONCLUSION

The right of private defence of body and property is a settled part of Indian criminal law. Sections 34 to 44 of the Bharatiya Nyaya Sanhita, 2023 protect persons and property against unlawful aggression and, at the same time, set limits meant to prevent excessive violence.

Section 38 allows death to be caused in seven kinds of offence against the body, and Section 41 allows it in four kinds of property offence. Both remain subject to Section 37 and to the facts of the particular case.

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[60] BNS § 41.

[61] *See Darshan Singh*, *supra* note 4, ¶ 56.

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The Supreme Court decisions discussed show that private defence must be judged realistically but within legal bounds. It should not be read so narrowly that people are left helpless against real danger, nor so widely that it excuses revenge.

In the end, a balanced reading of private defence is needed to safeguard personal security, preserve human life and uphold the rule of law.

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