

# BRINGING CLARITY TO PRIVATE DEFENCE: THE SINGAPORE EXPERIENCE

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*This paper provides a detailed explanation of the judicial guidelines on private defence and exceeding private defence laid down recently by the Singapore Court of Appeal. By streamlining the numerous provisions on private defence in the Indian Penal Code, the guidelines have injected precision and comprehensibility to a notoriously disorganized and complex area of the law.*

## I. INTRODUCTION

Spanning over eleven sections,<sup>1</sup> the law on private defence is one of the most untidy and convoluted parts of the Indian Penal Code. This weakness was acknowledged by none other than the Code framers themselves who said that:

“No portion of our work has cost us more anxious thought or has been more frequently re-written. Yet we are compelled to own that we leave it still in a very imperfect state; and though we do not doubt that it may be far better executed than it has been by us, we are inclined to think that it must always be one of the least exact parts of every system of criminal law.”<sup>2</sup>

The judges of the Republic of Singapore, like their Indian counterparts, have had to deal with these imperfect provisions to the best of their abilities ever since the Indian Penal Code was introduced into that jurisdiction.<sup>3</sup> With no attempt by present-day legislators to express the law in more comprehensible and manageable terms,<sup>4</sup> the volume of case law on private defence has grown immensely, adding to the complexity of the law.<sup>5</sup>

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<sup>1</sup> From §§ 96 to 106 of the Indian Penal Code. Additionally, there is Exception 2 to s 300 of the Indian Penal Code which provides for the partial defence to murder of exceeding private defence.

<sup>2</sup> T.B. MACAULAY, J.M. MACLEOD, G.W. ANDERSON AND F. MILLETT, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS 82 (1838).

<sup>3</sup> Penal Code, Cap 224, Rev Ed, 2008. The Code came into force in 1872 when Singapore was part of the Straits Settlements. For a detailed historical description, see Chan Wing Cheong and A Phang, “The Development of Criminal Law and Criminal Justice” in ESSAYS IN SINGAPORE LEGAL HISTORY (K. Tan, ed., Marshall Cavendish Academic and Singapore Academy of Law, 2005), Chapter 10.

<sup>4</sup> The wording of the Singapore Penal Code provisions on private defence and exceeding private defence are identical to those in the Indian Penal Code, which have remained virtually unaltered since their inception.

<sup>5</sup> For example, RATANLAL AND DHIRAJLAL’S LAW OF CRIMES (CK Thakker and Mc Thakker, eds, Bharat Law House, 26<sup>th</sup> ed, 2007) devotes 75 pages to the general exception of private defence compared to 30 pages for unsoundness of mind, the next most discussed defence in that commentary.

Dissatisfied with this situation, the Singapore Court of Appeal recently decided to streamline and clarify the Code provisions on the general exception of private defence and the special exception to murder of exceeding private defence.<sup>6</sup> The court did this in the case of *Tan Chor Jin v Public Prosecutor*, after describing the provisions as “complex, disorganized and illogical in sequence”.<sup>7</sup> The court relied heavily on a recent textbook<sup>8</sup> on the Penal Code written by local academics who applied the criminal law theory of justifications and excuses to explain the underlying rationales of private defence and exceeding private defence.<sup>9</sup>

This paper draws upon both the said textbook and the decision of *Tan Chor Jin* to explain how the convoluted Code provisions on private defence and exceeding private defence could be better understood and applied. It would be instructive for Indian judges to study developments of this nature from jurisdictions such as Singapore which have adopted the Indian Penal Code. Part A of the paper considers the general exception of private defence, and Part B discusses the special exception to murder of exceeding private defence. Selected Singaporean case authorities supporting various propositions appearing in the paper will be cited in the footnotes for the benefit of the interested Indian reader.<sup>10</sup>

## II. THE GENERAL EXCEPTION OF PRIVATE DEFENCE

To more fully understand the set of guidelines on private defence set down by the Singapore Court of Appeal in *Tan Chor Jin*, it will be necessary to briefly describe the theory of justification and excuse, and to explain more fully the court’s categorisation of preconditions and conditions of private defence ensuing from that theory. It would also be helpful to elaborate upon the preconditions and conditions of the defence and to view them in the light of the said theory.

### A. THEORETICAL PERSPECTIVES ON THE GENERAL EXCEPTION OF PRIVATE DEFENCE

Private defence is traditionally recognised as a justification because society regards the conduct of the defender as preferable to the conduct of his or

<sup>6</sup> In contrast, in the recent case of *Darshan Singh v State of Punjab*, AIR 2010 SC 1212, the Supreme Court of India was content to provide a brief enumeration of important cases on the defence over the years.

<sup>7</sup> [2008] 4 SLR(R) 306, ¶ 35. The judgment of the court comprising Andrew Phang JA, Tan Lee Meng J and VK Rajah JA was delivered by VK Rajah JA.

<sup>8</sup> S. YEO, N. MORGAN & CHAN WING CHEONG, CRIMINAL LAW IN MALAYSIA AND SINGAPORE (LexisNexis, 2007).

<sup>9</sup> R.C. NIGAM, LAW OF CRIMES IN INDIA (Asia Publishing House, 1963), one of the finest Indian criminal law texts to have been published, also categorizes the Penal Code defences in this way. The theory received renewed interest in Western common law jurisdictions as a result of the seminal work by G. FLETCHER, RETHINKING CRIMINAL LAW (Little, Brown & Co, 1978).

<sup>10</sup> Some Malaysian cases will also be cited since the provisions on private defence in the Malaysian Penal Code are identical to those in Singapore and India.

her aggressor.<sup>11</sup> This may be because society regards the aggressor's wrongful conduct as rendering his or her life less valuable than the defender's. Or it may be that society views the defender as protecting the general peace of the community as well as his or her person and/or property. Such a person is deserving of praise rather than blame for undertaking what law enforcement agents would do had they been present. But before society is prepared to praise or condone the defender's action, several requirements must be satisfied. Some of these requirements concern the nature of the threatened attack confronting the defender such as the need for the impending attack to be of a particular kind and for the attack to have been imminent. Other requirements concern the degree of force applied by the defender to counter the threatened attack. They include the requirement that the force used by way of private defence was necessary and proportionate to the threatened danger. All these requirements have the purpose of ensuring that the defender's actions resulted in less harm (sometimes described in terms of "a lesser evil" or conversely "a greater good") than what would have transpired from the threatened attack.<sup>12</sup>

It is important to observe that a justification such as private defence modifies the substantive criminal law by declaring the defender's conduct to be lawful when it would otherwise amount to an assault.<sup>13</sup> Since private defence has this effect of norm modification, one would expect the law to specify certain preconditions (or prerequisites) before the right will arise. Specification of these preconditions establishes the precedents for future cases to follow. Furthermore, the norm modifying effect of a justification requires these preconditions to be objective in nature in order to restrict the right of private defence to a fixed set of circumstances. Subjective considerations such as the defender's perception of the existence of those circumstances are not allowed to be featured in the preconditions because those considerations would unduly disrupt the norm bearing nature of a justification.

Unless the preconditions to a justification such as private defence are met, the law will refuse to embark on an evaluation of the conditions of the exercise of private defence, such as the defender's perception of the danger and his or her response to it. However, once those preconditions are present, the law can afford to introduce some subjectivity into the conditions of the defence. Certainly, the justificatory nature of private defence will insist on a fairly high degree of objectivity in relation to these conditions. But the law will now want to inject some subjectivity into the conditions to take account of the innumerable circumstances and ways by which people may justifiably exercise their right of private defence.

<sup>11</sup> See generally, N Omichinski, *Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense* 33 WAYNE LAW REVIEW 1447 (1997); S. Kadish, *Respect for Life and Regard for Rights in the Criminal Law* 64 CALIFORNIA LAW REVIEW 871 (1976); S. YEO, *COMPULSION IN THE CRIMINAL LAW* (Law Book Company, 1990), Chapter 1.

<sup>12</sup> KADISH, *id.*, 882; G. Fletcher, *supra* note 9, 788-798.

<sup>13</sup> See Fletcher, *id.*, 104.

## B. THE PRECONDITIONS OF PRIVATE DEFENCE

An examination of the Penal Code provisions shows that there are two preconditions of private defence, namely, the need for the defender to be the subject of an offence; and to have resorted to the protection of public authorities if there was a reasonable opportunity to do so.

### 1. Defender must be subjected to an offence

This first precondition is prescribed in § 97 of the Penal Code which states that the right of private defence only arises when an offence affecting the human body or property was being committed against the accused or another person. It is the prerogative of the law and not the accused to determine the existence of such an offence. Whether or not a set of circumstances will be regarded as an offence for the purposes of private defence will be determined by the law without input from the accused.

That it is the law alone which decides this issue is affirmed by the specificity of § 98 of the Penal Code in identifying those circumstances when the law will recognise the right of private defence even though the act confronting the accused was not an offence. That section provides that the right of private defence extends to acts which would otherwise be an offence except for the aggressor's youth, want of maturity of understanding, unsoundness of mind, intoxication or mistake of fact. In the same vein, it is the law and not the accused which determines the types of property offences which the accused may take defensive action. Thus, § 97(2) stipulates a limited number of offences affecting property which are subject to the Code provisions on private defence.<sup>14</sup> Based on this precondition, there is no right to defend a person or property against an act which itself was done in the exercise of private defence.<sup>15</sup>

### 2. Defender must have recourse to public authorities

This second precondition to private defence is contained in § 99(3) of the Penal Code which states that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities". The wording of the provision makes it an objective inquiry as to whether there was time for the accused to seek police protection from his or her assailant. The law will not tolerate any assertion by the accused that he or she believed that there was no time to do so and this is the case even if the accused had reasonable grounds for his or her belief.

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<sup>14</sup> That is, theft, robbery, mischief and criminal trespass, or an attempt to commit these offences.

<sup>15</sup> Mohd Sulaiman v Public Prosecutor [1994] 2 SLR(R) 528.

The Penal Code has separate provisions covering the requirement to seek the protection of public authorities: § 99(3); and the requirement that no more harm than necessary is permitted for the purpose of private defence: § 99(4). Quite clearly, the subject-matter of § 99(3) and § 99(4) is closely similar since both specify what the law expects people to do when they are threatened with violence. However, for the very reason that they are so similar, it is important to note their different functions since, if both provisions served the same function, § 99(3) would be otiose given the wider ambit of § 99(4). § 99(3) should be read as denying the existence of the right of private defence in situations where someone was threatened with violence in the future.<sup>16</sup> In such a case, the person threatened is not permitted to seek out and harm his or her potential assailant, but must report the threat to the police.<sup>17</sup> As such, § 99(3) is a precondition of the right of private defence so that, as a preliminary matter, if the accused was found to have had a reasonable opportunity to have recourse to the police when confronted with a future threat, the inquiry into private defence is at an end.<sup>18</sup>

It is only where the accused did not have a reasonable opportunity to have recourse to the public authorities, that the court will need to consider § 99(4). This is because § 99(4) is a condition of the exercise of the accused's right of private defence which is relevant only after the preconditions of that right, namely, being subjected to an offence (§ 97) and not to have recourse to public authorities (§ 99(3)), have been met. As will be discussed in detail below, § 99(4) limits the exercise of the right of private defence by requiring the force used to be necessary in defence.

### 3. The basis for regarding §§ 97 and 99(3) as preconditions

That the Code framers intended §§ 97 and 99(3) to be regarded as preconditions to private defence is evident in their description of these requirements as affecting the *existence* of the right. This may be contrasted with the provisions stipulating the conditions of private defence which are described in terms of the *extent* of the right. For example, § 99(4) states that “the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.”

<sup>16</sup> For a case example, see *Public Prosecutor v Seow Khoon Kwee* [1989] 2 MLJ 100 involving a prison inmate who was threatened by another inmate.

<sup>17</sup> Since § 99(4) involves the exercise of the right of private defence, the law properly recognises the doctrine of pre-emptive strike. See, for example, *Public Prosecutor v Dato Balwant Singh (No 2)* [2003] 3 MLJ 395 at 445, citing *Beckford v R.* [1987] 3 All ER 425; and *Govindan v State of Kerala* [1960] 47 AIR 258. See further § 102 which also concerns the exercise of the right and therefore properly recognises the doctrine by the words “the right of private defence commences ... though the offence [against the accused] may not have been committed”.

<sup>18</sup> This constitutes a very strong reason for rejecting any move to delete § 99(3), such as was proposed by the Law Commission of India in its Forty-Second Report, *The Indian Penal Code* (Government of India, 1971) ¶ 4.51-4.52, and 4.54-4.55.

The classification of the private defence provisions into preconditions to the right of private defence and conditions of the defence is amply borne out by the following comment by John Dawson Mayne, a leading legal historian and early commentator on the Indian Penal Code:

The whole law of self-defence rests on these propositions: (1) that society undertakes, and, in the great majority of cases, is able to protect private persons against unlawful attacks upon their person or property; (2) that, where its aid can be obtained it must be resorted to; (3) that, where its aid cannot be obtained the individual may do everything that is necessary to protect himself; but (4) that the violence used must be in proportion to the injury of vindictive or malicious feeling. It is evident that proposition (1) is the basis of the entire law. No one would dream of applying the refinements of the Indian Penal Code to an unsettled country where everyone carries his life in his hand; and proposition (2), rests upon and assumes proposition (1).<sup>19</sup>

That Mayne's first proposition equates with § 97(1) is clear when we note that an "unlawful attack" invariably comprises an offence, and his second proposition is an obvious reference to § 99(3). As Mayne states in his concluding sentence, these two propositions form the underlying justification of the defence of private defence. Put in another way, they are the preconditions for the existence of the right of defence. They stand in contrast to Mayne's third and fourth propositions which stipulate the conditions or extent of the exercise of private defence, assuming that the right exists.

At this juncture, an important clarification needs to be made. It is that the preceding discussion is concerned solely with private defence as a justification and not with putative (or mistaken) private defence. The latter is excusatory in nature and is therefore subject to different considerations from the private defence provisions standing alone. Putative private defence is recognised under the Penal Code by reading § 79<sup>20</sup> together with the private defence provisions. Unlike justifications which focus on the *acts* of the accused, excuses are concerned primarily with the accused's mental state and personal circumstances which make it unfair to punish her or him. This concentration on the accused as *actor* explains the greatly increased subjectivity permitted in respect of putative private defence. Accordingly, it is entirely proper for accused persons to be allowed to successfully plead private defence if they were reasonably mistaken that an offence was being committed against them, or that they had no time to have recourse to the protection of the public authorities.

<sup>19</sup> J.D. MAYNE, THE CRIMINAL LAW OF INDIA 437 (Higginbothams, 1901).

<sup>20</sup> § 79 reads: "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it."

## C. THE CONDITIONS OF PRIVATE DEFENCE

Assuming that the preconditions under §§ 97(1) and 99(3) are satisfied, there are certain conditions of private defence which will have to be proven by the accused before the defence will succeed. These can be categorised in terms of (i) the need for a reasonable apprehension of the danger; (ii) the duration of the right of defence being commensurate with the continuation of the danger; and (iii) the need for the force used to be necessary in defence.

### 1. Reasonable apprehension of danger

The Code provisions on private defence of the person or property expressly or impliedly require the accused to have reasonably apprehended the particular danger which he or she claims to have compelled him or her to take defensive action. In relation to defence of the person, § 100 expressly provides that the right of private defence extends to the causing of death if the accused reasonably apprehended a threat of death<sup>21</sup> or grievous hurt<sup>22</sup> or, reasonably apprehended that he or she would be unable to have recourse to the public authorities for his or her release in the case of an assault for the purpose of wrongful confinement.<sup>23</sup> In respect of defence of property, s 103 expressly provides that the right of private defence extends to the causing of death if the accused reasonably apprehended death or grievous hurt to be a consequence of theft, mischief or house-trespass.<sup>24</sup>

The other limbs of §§ 100 and 103 specify types of danger without express reference to reasonable apprehension of those dangers. For example, an assault with the intention of committing rape, gratifying unnatural lust or kidnapping under § 100; or the offence of robbery, house-breaking by night or mischief by fire committed on a human dwelling under § 103. Likewise, no express reference is made of reasonable apprehension in the provisions dealing with the causing of harm other than death in defence of person (§ 101) or property (§ 104). There is no good reason for differentiating these circumstances from those where the Code requires the danger to have been reasonably apprehended by the accused. Consequently, the explanation is likely to be a matter of poor drafting, with the Code framers not intending any such differentiation. This contention is strongly supported by the provisions which state that the right of private defence of the person (§ 102) or of property (§ 105(1)) commences when “a reasonable apprehension of danger” to the person or property commences. Accordingly, it is submitted that, for every case where private defence is pleaded, the nature of the danger is to be assessed in terms of the accused’s reasonable apprehension of

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<sup>21</sup> § 100(a).

<sup>22</sup> § 100(b).

<sup>23</sup> § 100(f).

<sup>24</sup> § 103(d).

that danger, and not whether the danger was an objectively demonstrable fact (ie. was real). Of course, where the danger was real, the accused's reasonable apprehension of that danger would be automatically assumed.

It is necessary to examine closely the clause "as may reasonably cause the apprehension" of danger or its variations appearing in the Code provisions on private defence. The wording is susceptible of two interpretations. The first regards the clause as stating that the accused's apprehension must be based on reasonable grounds. The second regards the clause as saying that a reasonable person in the accused's position could have experienced such apprehension. The difference between these two interpretations is the more subjective nature of the first since the court is required to begin with who the particular accused is, before proceeding to determine whether such a person could have had reasonable grounds for apprehending the danger. In contrast, the second interpretation is more objective since reference is made to the "reasonable person" as opposed to the accused. Based on the theoretical premises of the private defence provisions considered previously, it is submitted that the courts should opt for the first and more subjective interpretation.

## 2. Duration of the right of private defence

The justificatory nature of private defence of person or property means that people are afforded the right only so long as the danger continues. Where the danger has passed, the justification afforded by the law to commit what would otherwise be an offence, no longer exists. In these circumstances, the accused should report the offence committed on him or her to the public authorities and leave it to them to bring the offender to book.

The law will regard any harmful response of the accused which is committed after the danger has ceased to be unnecessary, thereby failing to satisfy the condition of necessary force, to be discussed in detail below. Such a harmful response may be viewed by the courts as an act of revenge so as to fall outside the scope of the right of private defence.<sup>25</sup> The duration of the right of private defence is commensurate with the duration of the danger, as reasonably apprehended by the accused. The qualification at the end of this statement deserves to be highlighted. The relevant Code provisions (namely, § 102 for defence of the person, and § 105 for defence of property) do not require the danger to be real nor for the offence, which has given rise to the exercise of private defence, to have been actually committed. This is clearly borne out by the wording of § 102 that the right of private defence of the person commences "as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed." Likewise, after stipulating that the right of private defence to property arises "when a reasonable apprehension of danger to property commences", § 105(3) goes on to provide for

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<sup>25</sup> Soosay v Public Prosecutor [1993] 2 SLR(R) 670, ¶38 –39.

the right against a person who caused fear of instant death, hurt or personal restraint while attempting to effect a robbery.

### 3. Use of necessary force

The primary provision governing this condition of private defence of person and property appears in § 99(4) of the Penal Code which states that “[t]he right of private defence in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of defence.” The expressed description of this condition clearly states that it involves an objective appraisal of the force used by the accused to counter the danger confronting him or her.<sup>26</sup> However, bearing in mind the theoretical considerations of the Code provisions on private defence as previously described, the courts should interpret § 99(4) in a way which takes, as full an account as possible, the subjective circumstances of the accused. Fortunately, the Singapore courts have largely done so as is shown by the following oft-quoted passage from the Supreme Court of India decision of *Jai Dev v State of Punjab*:

In dealing with the question as to whether more force is used than is necessary or than is justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means by which a threatened person adopts or the force which he uses should not be weighed in golden scales.<sup>27</sup>

A person need not wait till the attack has begun to exercise his or her right of private defence. Depending on the circumstances, such a response, described as a pre-emptive strike, could satisfy the requirement under § 99(4).<sup>28</sup> However, for this to happen, the accused must have reasonably apprehended that he or she was about to be attacked; it is insufficient if the accused was unsure if this was the case.<sup>29</sup>

The partially subjective interpretation of § 99(4) is greatly facilitated if the sub-section is read as being concerned with a *reasonably* necessary response as opposed to the *minimum* necessary response. Although the provision simply refers to “necessary”, the theoretical underpinnings of the law strongly suggest

<sup>26</sup> The largely objective nature of this condition is in keeping with the objective precondition under § 99(3) since both are concerned with the response to the danger.

<sup>27</sup> AIR 1963 SC 612 at 617.

<sup>28</sup> See, Public Prosecutor v Dato Balwant Singh (No 2) [2003] 3 MLJ 395 at 445, citing Beckford v R. [1987] 3 All ER 425 and Govindan v State of Kerala AIR 1960 Kerala 258.

<sup>29</sup> Chang Yam Song v Public Prosecutor [2005] SGHC 142 at ¶ 42.

that the Code framers intended that term to be read as “reasonably necessary”.<sup>30</sup> The concept of reasonableness here obviously allows the inquiry to go beyond the least harmful response to consider a number of possible responses all of which could be regarded as being reasonably necessary. It is for this reason that the Code provisions on private defence do not require the accused to have retreated first before acting in defence.<sup>31</sup> While retreating may be regarded as the most desirable response, the law accepts that there may be other responses which may satisfy the test of reasonable necessity.

#### *D. JUDICIAL GUIDELINES ON THE GENERAL EXCEPTION OF PRIVATE DEFENCE*

Having described the theoretical foundations, preconditions and conditions of the general exception of private defence, we are in a position to examine the Singapore Court of Appeal’s set of guidelines for that defence in *Tan Chor Jin*. The court declared that the following sequence of conjunctive requirements represented a faithful rendition of §§ 96 to 106 of the Penal Code insofar as the right of private defence of the body<sup>32</sup> was concerned:-

- (a) Save for the situation where the defender is defending himself against an act of a person of unsound mind [etc] (see § 98 of the Penal Code), the defender must show that an offence affecting the human body has been committed or is reasonably apprehended. This is to conform to the first of the preconditions ... *viz.* § 97 of the Penal Code.
- (b) The defender must show that there was no time to seek the protection of public authorities. This is to conform to the second precondition ... *viz.* § 99(3) of the Penal Code. The test for whether the defender had time to have recourse to the protection of the public authorities is an objective one. In this regard, it should be noted that the Indian cases appear quite correctly, to equate the words “Time to have recourse to the protection of the public authorities” (see § 99(3) of the Penal Code) with “reasonable opportunity of redress by recourse to the public authorities” (see *Ratanlal and Dhirajlal's Law of Crimes*, 26<sup>th</sup> ed, 2007, p 406). Further, the defender should not be expected to seek the protection

<sup>30</sup> For a case interpreting § 99(4) in terms of reasonably necessary force, see *Public Prosecutor v Lee Poh Chye & Anr.* [1997] 4 MLJ 578. See also *Lee Tian Beng v Public Prosecutor* [1972] 1 MLJ 248.

<sup>31</sup> So noted by the courts: see, for example, *Musa bin Yusof v Public Prosecutor* [1953] MLJ 70; *Ya bin Daud v Public Prosecutor* [1997] 4 MLJ 322; *Public Prosecutor v Balwant Singh (No 2)* [2003] 3 MLJ 395.

<sup>32</sup> It would be safe to assume that a closely similar set of guidelines could be developed in respect of the right of private defence against property except that, in relation to step (e), § 103 replaces § 100, and § 104 replaces § 101.

of the public authorities if the time needed to do so would result in the mischief being completed (see *Ratanlal and Dhirajlal's The Indian Penal Code*, 31<sup>st</sup> ed, 2006, p 459).

- (c) If the defender was the [initial] aggressor at the material time, it is *prima facie* less likely that he had a right of private defence ... Much would depend on the factual matrix of the case: if, for instance the defender was armed with a deadly weapon from the outset, it is very unlikely that the right of private defence would ever arise.<sup>33</sup>
- (d) The defender must prove that, at the time of acting in private defence, he reasonably apprehended danger due to an attempt or a threat by the victim to commit an offence affecting the body. This is a subjective test ...<sup>34</sup>
- (e) Where the defender has killed the victim, he has to prove that the offence which occasioned the exercise of the right of private defence was one of the offences listed in § 100 ...

If the defender is unable to show that he exercised his right of private defence owing to one or more of the offences listed in § 100, his right of private defence will not extend to the causing of the victim's death, although § 101 would still permit him to cause "any harm other than death" to the victim.

- (f) The defender must prove that the harm caused to the victim was reasonably necessary in private defence. Due allowance should be given to the dire circumstances under which the defender was acting.<sup>35</sup>

This set of guidelines endorses all the major propositions presented in the earlier parts of this paper. In particular, there is the categorisation of the requirements of private defence into preconditions (steps (a) and (b)) and

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<sup>33</sup> The court observed that Indian case authorities seemingly make no room whatsoever for a defender/aggressor to invoke the right of private defence, citing HALSBURY'S LAWS OF INDIA, VOL 5(1) (LexisNexis Butterworths, 2006) at ¶ 105.172; and RATANLAL AND DHIRAJLAL'S THE INDIAN PENAL CODE 411 (YV Chandrachud *et al*, eds, Wadhwa & Company, 2006). For a case authority, see Chacko v State of Kerala (2001) 10 SCC 640. The court could have buttressed its ruling by referring to § 97(2) of the Penal Code which states that "every person has a right ... to defend his own body or the body of any other person, *against any offence* affecting the human body" (emphasis added). Consequently, the right to private defence will be available to a defender who may have been the initial aggressor so long as the facts were such as to render the assailant's attack an offence. Such an attack would not be so described if the assailant was applying force which was reasonably necessary to defend himself, in which case, he or she would have been lawfully acting in private defence and, therefore, not committing an offence.

<sup>34</sup> The court noted that the Indian position was the same on this matter, citing RATANLAL AND DHIRAJLAL'S THE INDIAN PENAL CODE, *id.*, 406. For a case authority, see Wassan v State of Punjab (1996) 1 SCC 458.

<sup>35</sup> [2008] 4 SLR 306(R) at ¶ 46.

conditions (steps (c) to (f)). Furthermore, the defender must have “reasonably apprehended” the danger,<sup>36</sup> as opposed to a reasonable person apprehending the danger, or for the danger to have been real. Additionally, the harm caused to the victim must have been “reasonably” necessary,<sup>37</sup> as opposed to the minimum harm necessary. The court commented on the set of guidelines as follows:-

This approach seeks to strike an appropriate balance between *criminally* harmful conduct and *justifiably* harmful conduct arising out of the defence of the person. We would like to stress that, notwithstanding the foregoing guidelines, whether the right of private defence has arisen and, if so, whether it has been exceeded in a particular case ultimately depends on all the relevant circumstances of the case.<sup>38</sup>

Notably, the description “*justifiably* harmful conduct” appearing in this comment is a clear reference to the theory of justification and excuse which the court recognised as underpinning the general exception of private defence.

### III. THE SPECIAL EXCEPTION TO MURDER OF EXCEEDING PRIVATE DEFENCE

Exceeding private defence comprises a special exception to murder under the Penal Code. If successfully pleaded, the defence results in a conviction of the lesser offence of culpable homicide not amounting to murder. As its name suggests, this form of defence is integrally connected with the general exception plea of private defence. The plea of exceeding private defence is contained in Exception 2 to § 300 of the Code and reads as follows:

Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without an intention of doing more harm than is necessary for the purpose of such defence.

#### *Illustration*

Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots Z dead. A has not committed murder, but only culpable homicide.

<sup>36</sup> See steps (a) and (d).

<sup>37</sup> See step (f).

<sup>38</sup> [2008] 4 SLR 306(R) at [46]. Original emphasis.

## A. THEORETICAL PERSPECTIVES ON EXCEEDING PRIVATE DEFENCE

The underlying rationale of this defence is that the culpability of a person who kills another in defence of person or property, and who honestly believes the force to be necessary when it was not, falls short of the culpability normally associated with murder. The Code framers expressed their reason for recognising in Exception 2 this half-way house between a murder conviction and a complete acquittal in the following way:

That portion of the law of homicide which we are now considering is closely connected with the law of private defence and must necessarily partake of the imperfections of the law of private defence. But, whatever the limits of the right of private defence may be placed, and with whatever accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as culpable homicide in defence.<sup>39</sup>

Support for regarding exceeding private defence as a partial defence to murder may be found in the distinction between the general exception of private defence which is justificatory in nature, and exceeding private defence which is an excuse. In respect of justificatory private defence, we have observed earlier that society will require the defender's conduct to have been objectively necessary and proportionate to the threatened danger before approving of such conduct. A person who has taken objectively excessive defensive action cannot rely on such a justification. Should that person have honestly albeit unreasonably believed that the action was necessary, the doctrine of exceeding private defence is available to him or her. But with what result? If the doctrine operates as a full defence to entirely exculpate the defender, the result is exactly the same as reliance upon the justificatory plea of private defence and, consequently, the moral message conveyed by the law is blurred.<sup>40</sup> Maintaining exceeding private defence as a partial defence ensures that the theoretical distinctions between justificatory private defence and excusatory exceeding private defence are proclaimed through respectively separate verdicts.

## B. SITUATING EXCEEDING PRIVATE DEFENCE IN THE LAW OF PRIVATE DEFENCE

To properly understand the nature and application of Exception 2, it is necessary to briefly reiterate the salient features of the general exception of private defence under the Penal Code. That defence gives everyone the right to defend

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<sup>39</sup> MACAULAY, MACLEOD, ANDERSON AND MILLETT, *supra* note 2, Note M at 110.

<sup>40</sup> D Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49(3) LAW AND CONTEMPORARY PROBLEMS, 109, 110-112 (1986).

themselves or another person against any offence affecting the human body. This right is also given to defend one's own property or that of another against specified property offences. To successfully rely on the defence, the accused must not have caused "more harm than it is necessary to inflict for the purpose of defence" as required by § 99(4) of the Code. This involves a largely objective appraisal of the necessity of the accused's conduct in the circumstances as reasonably perceived by the accused. With regard to protection of the person, killing is permissible only when it was necessary to repel one of the specific types of threats mentioned in § 100. Where property was being protected, killing is permissible only when it was necessary to repel one of the specific types of threats mentioned in § 103.

The above stated limitations or conditions for the general exception of private defence require a court to undertake the following line inquiry in cases where an accused claims to have killed in defence of person or of property. The court first determines whether the killing was done to repel any of the kinds of threats specified in § 100 or § 103. Should none of these threats be present, the killing is excessive and the general exception fails. If one of these threats is present, the court then determines whether the killing was necessary in the circumstances for the purpose of defence, as required by § 99(4). Should the killing be found to be necessary, the general exception operates to acquit the accused of any offence. If the killing was unnecessary (that is, excessive), the general exception fails. Where the accused's conduct of killing was determined by the court to be excessive (either because none of the specified threats were present or the killing was unnecessary), the court proceeds to inquire whether Exception 2 operates to reduce the offence committed by the accused from murder to culpable homicide not amounting to murder. The offence will be so reduced if the requirements of the special exception are satisfied, namely, that the accused had killed without premeditation and without any intention of doing more harm than was necessary for the purpose of private defence.

### C. THE PRECONDITIONS AND CONDITIONS OF EXCEEDING PRIVATE DEFENCE

Exception 2 states that it operates only if the accused has killed "in the exercise in good faith of right of private defence of person or property". This means that the special exception is unavailable where the accused's act of killing was not, according to the law, done in defence of person or property. As noted earlier, the law imposes two preconditions before the right of private defence will arise. These are the need for the defender to be the subject of an offence, and to have resorted to the protection of public authorities if there was a reasonable opportunity to do so. If the circumstances of a case are such that either of these preconditions were absent, the general exception of private defence will fail and so too would Exception 2.

With respect to the clause appearing in Exception 2 of "in the exercise in good faith of right of private defence of person or property", there is the

question of the relevance of the expression “in good faith”. It is submitted that the word “exercise” appearing in Exception 2 should be given the meaning of “invoke” so that the opening words of the provision will in effect read: “Culpable homicide is not murder if the offender, in invoking in good faith the right of private defence …”. Viewing the word “exercise” in this manner makes it understood in terms of *summoning* or relying upon the right of private defence as opposed to *acting* out that right. Under this interpretation, the purpose of the expression “in good faith” is to require the existence of circumstances which avail the accused of the right of private defence. These circumstances are the previously mentioned preconditions of that right.

Use of “in good faith” in the above manner finds some support in *Soosay v Public Prosecutor* where the Singapore Court of Criminal Appeal said that Exception 2 requires that “(a) the right of private defence has arisen, [and] (b) the right was exercised in good faith”. To like effect is the ruling of the Lahore High Court in *Lal v Emperor* that, to attract the application of the Exception, “it is necessary that the person causing the harm must have done so in the *bona fide* exercise of the right of private defence.”<sup>41</sup>

With the expression “in good faith” properly assigned its proper role of being concerned with the exercise of the right of private defence, it is clear that Exception 2 is premised on a purely subjective test. As the remainder of the Exception states, the accused will be able to successfully plead the Exception provided he or she had acted in defence of person or property “without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence”. Both the absence of premeditation and an intention to do more harm than is necessary combine to ensure that the accused’s belief was honestly held concerning the need to use fatal force in private defence.

Obviously, where the evidence shows that the accused’s act of killing had been motivated by premeditated malice towards the deceased, the accused is prevented from claiming that he or she honestly believed that the act of killing was necessary in defence. The same may be said of evidence showing that the killing had been carried out with the intention of causing more harm than was necessary. When assessing the accused’s intention, the court will consider his or her subjective perception concerning the nature of the threat and the need for the force used to counter it. This purely subjective element of “intention” is what distinguishes Exception 2 from the general exception of private defence given the latter’s objective evaluation of whether the accused had inflicted more harm than was necessary for the purpose of defence.

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<sup>41</sup> 1946 Cri LJ 809 at 811. See also *State v Inush Ali* 1982 Cri LJ 1044 at 1046 where “in good faith” appearing in Exception 2 was equated with “committing an act without pretence”.

## *D. RESOLVING AN ANOMALY IN THE LAW OF EXCEEDING PRIVATE DEFENCE*

There is case authority both in Singapore and India which regards the clause “in the exercise in good faith of the right of private defence” in Exception 2 as being concerned with the accused’s defensive action of killing.<sup>42</sup> Under this view, for the Exception to succeed, the accused must have believed in good faith that the killing was necessary. Since the Penal Code defines “in good faith” as connoting the doing of or believing in something with “due care and attention”, it follows that the accused must have honestly and reasonably believed the killing to be necessary for the purpose of defence.<sup>43</sup>

The linking of the expression “in good faith” with the defensive action taken by the accused can be heavily criticized.<sup>44</sup> If an accused must have “with due care and attention” (that is reasonably) believed the harm inflicted by him or her to be necessary in the circumstances, it seems tautological for the Exception to go on to require that the accused’s defensive action must have been done “without any intention of doing more harm than is necessary for the purpose of such defence”. Simply put, how can a person who reasonably believes the harm inflicted by him or her to be necessary at the same instance intend to do more harm than he or she considers necessary? The same may also be said of the other element of “without premeditation” required by the Exception. It is difficult to envisage how a person could harbour a precedent malice against his or her assailant and yet be held to have inflicted only that amount of harm which he or she reasonably believed to be necessary by way of private defence. Another criticism is that, requiring the accused to have reasonably believed that his or her defensive action was necessary runs counter to the underlying rationale of Exception 2. Surely an accused who honestly albeit unreasonably believed in the necessity of killing his or her assailant should be allowed to escape conviction of the most heinous crime in the Penal Code. Although such a person may have been culpable in applying excessive force, the law should require the culpability to be mitigated by the fact that the force was in response to an offence committed by the deceased against the accused.

To give effect to the view that Exception 2 will succeed where the accused honestly believed that the killing was necessary in private defence, the

<sup>42</sup> For example, see *Soosay v Public Prosecutor* [1993] 2 SLR(R) 670; *Mammum v Emperor* AIR 1917 Lah 347; *Jaspal Kunbi v Emperor* AIR 1922 Nag 141.

<sup>43</sup> Another suggested way of stating this is that the accused must not have been reckless in the force applied in private defence: see *Sabal Singh v State of Rajasthan* AIR 1978 SC 1538, 1541. While the concept of recklessness affords a possible interpretation of “good faith” under the Exception, its obvious difficulty is that it is nowhere used or defined in the Penal Code.

<sup>44</sup> For a fuller discussion, see S. Yeo, *Rethinking ‘Good Faith’ in Excessive Private Defence*, 30 JOURNAL OF THE INDIAN LAW INSTITUTE, 443 (1988).

courts have had to dilute considerably the expression “in good faith”. The following statement by the Rangoon High Court in *Po Mye v R* bears this out:

The question here must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to inflict regardless of his right. [Exception 2] punishes a criminal act in excess of the right of private defence, and it is impossible to regard ‘due care and attention’ in the sense which is usually ascribed to it as an element in such criminality.<sup>45</sup>

The Singapore Court of Appeal in *Soosay* gave a similar ruling when it referred with approval to the following comment in *Gour's Penal Law of India*:

[On the issue of good faith] [t]he question must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to be inflicted regardless of his rights.<sup>46</sup>

This interpretation of the expression “in good faith” in Exception 2 is to be commended for removing the requirement of reasonableness from the accused’s belief concerning the need to kill his or her assailant. However, the interpretation suffers from a number of defects. One is that it fails to answer the criticism of tautology. If the Exception already requires, by virtue of the expression “in good faith”, the honest belief by the accused that his or her act of killing was necessary, why does it require further that the accused must have done so “without intention of doing more harm than is necessary” for the purpose of private defence? Furthermore, there is an uneasiness in giving to the expression “in good faith” a meaning clearly inconsistent with that which the Penal Code gives to it. It is one thing to temper an objective standard with subjectivity, as has been done in relation to § 99(4) by the qualification that the harm inflicted by the accused should not be weighed on golden scales. It is quite another thing to replace an objective measurement such as “in good faith” with the completely subjective concept of “honestly”.

The preceding discussion reinforces the correctness of the earlier suggestion of interpreting “in good faith” in Exception 2 as being concerned with the existence of the right of private defence. That is, the two preconditions of private defence must first be met in order to call up the right of private defence, before a court will consider the manner in which an accused had exercised that

<sup>45</sup> AIR (1940) Rang 129 at 132 per Roberts CJ. This case was decided when Burma (now Myanmar) was governed by the Indian Penal Code. See also Sudan Government v Mohamed Adam Onour (1963) SLJR 157 at 158 (Court of Appeal, Sudan) interpreting an identical provision to Exception 2 contained in the Sudanese Penal Code.

<sup>46</sup> Vol 3, (Law Publishers, 10<sup>th</sup> ed, 1983), p 2354 and quoted in *Soosay v Public Prosecutor* [1993] 2 SLR(R) 670 at ¶ 39.

right. This interpretation does not strain the meaning of “in good faith” while at the same time enables the Exception 2 to succeed when an accused honestly albeit unreasonably believed the harm inflicted by him or her to be necessary in private defence.

Regrettably, the illustration accompanying Exception 2 constitutes a major obstacle to dealing with the expression “in good faith” in the way suggested. It is observed that the illustration unambiguously applies the expression “in good faith” to A’s infliction of harm upon Z. This automatically compels the same expression appearing in Exception itself to be read in like fashion.

In recognising the important role illustrations serve in interpreting the substantive provisions of the Penal Code, the courts have quite correctly been reluctant to reject them on the ground of repugnancy to the provisions themselves.<sup>47</sup> Yet, they do envisage an illustration being rejected provided that “a very special case” existed and rejection of the illustration amounted to “the very last resort of construction”.<sup>48</sup> It is submitted that the illustration accompanying Exception 2 is just such a special case and should be rejected by the courts for being repugnant to the substantive provision.

In Singapore, the solution to this anomaly has been the removal altogether of the illustration by legislative amendment.<sup>49</sup> While this is acceptable, the interpretation and practical application of Exception 2 would have been better served by amending both the provision and the illustration so as to bring it into line with the doctrine of exceeding private defence. A simple solution would have been to exclude all references to “in good faith” so that the revised provision and illustration would read as follows:

Culpable homicide is not murder if the offender, in the exercise of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such a right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

#### *Illustration*

Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A, in the exercise of the right of private defence, draws out a pistol. Z persists in the assault. A, honestly believing that he can by no means prevent himself from being horse-whipped, shoots Z dead. A has committed only culpable homicide not amounting to murder.

<sup>47</sup> Mahomed Syedol Ariffin v Yeoh Ooi Gark AIR (1916) PC 242 at 244; Ram Lal v Emperor AIR (1928) Oudh 15 at 17.

<sup>48</sup> Mahomed Syedol Ariffin v Yeoh Ooi Gark AIR (1916) PC 242 at 244.

<sup>49</sup> Penal Code (Amendment) Act 2007, Act 51 of 2007.

## *E. JUDICIAL GUIDELINES ON THE SPECIAL EXCEPTION OF EXCEEDING PRIVATE DEFENCE*

Based on the preceding discussion of the place of Exception 2 in the law of private defence, the Court of Appeal in *Tan Chor Jin* said that this special exception to murder could be dealt with by applying the following line of inquiry:

- (1) Were there circumstances giving rise to the right of private defence? If “yes” both the general plea of private defence and Exception 2 may be available. If “no” both pleas are unavailable and the inquiry is at an end.
- (2) Was the accused confronted with one of the specific types of threats mentioned in §§ 100 or 103, and did his or her act of killing constitute no more harm than was necessary to inflict for the purpose of private defence? If “yes” the general plea of private defence is likely to be available. If “no” the general plea is unavailable but Exception 2 may be available.
- (3) Was the accused’s act of killing done without premeditation and without an intention of doing more harm than was necessary for the purpose of private defence? If “yes” Exception 2 is likely to be available. If “no” the defence is unavailable.<sup>50</sup>

The first step of this set of guidelines determines whether there existed circumstances which could give rise to the exercise of the right of private defence. This refers to the preconditions of private defence, namely, that the defender must have been subjected to an offence, and he or she had no time to have recourse to the protection of the public authorities. Turning to the second step, its function is to simply confirm that the court had determined that the general exception of private defence had failed. The third step, which is that the accused must have killed without premeditation and without an intention of doing more harm than was necessary in private defence, constitutes the crux of Exception 2. Effectively, an accused person lacking such premeditation or intention is likely to have honestly believed that it was necessary to kill in private defence. In support of this stance and quite correctly, the requirement of “in good faith”, with its attendant problems of construction, does not feature at all in this set of guidelines.

## IV. CONCLUSION

All told, the sets of guidelines devised by the Singapore Court of Appeal in *Tan Chor Jin* for the general exception and special exception of private defence are certainly worthy of close attention by the Indian courts. This assertion

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<sup>50</sup> [2008] 4 SLR(R) 306 at ¶ 42.

is premised on these guidelines being supported by legal theory, and also because they go a considerable way to making the law precise and comprehensible.<sup>51</sup>

Although a tiny nation both in terms of physical size and population compared to India, the problems encountered by the Singapore courts in interpreting and applying the provisions of the Penal Code are exactly the same as those experienced by the Indian courts. Over the years, the Singapore courts have gained much from studying and often following Indian judicial pronouncements and academic commentaries on the Penal Code. With the recent composition of the Singapore Court of Appeal comprising several judges with a strong academic bent, coupled with their desire to clarify and improve the law, the time may have come when the Singapore courts could return the favour through decisions such as *Tan Chor Jin* for the Indian courts to consider, and perhaps follow.<sup>52</sup>

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<sup>51</sup> This accords with a primary aim of the Code framers. Thus, Macaulay, the principal framer of the Indian Penal Code, wrote in a letter to Lord Auckland, the Governor General of India in Council, that: “There are two things which a legislator should always have in view while he is framing laws: the one is that they should be as far as possible precise; the other that they should be easily understood ...”: Macaulay, Macleod, Anderson and Millett, *supra* note 2 at v.

<sup>52</sup> For another recent attempt by the Singapore Court of Appeal to clarify an aspect of the Indian Penal Code, see S. Yeo, *Common Intention in the Indian Penal Code: Insights from Singapore*, 50 JOURNAL OF THE INDIAN LAW INSTITUTE, 640 (2008).