

STAYING TRUE TO THE INDIAN PENAL CODE: A CASE STUDY ON JUDICIAL LAXITY

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This article examines an unfortunate judicial tendency to depart from the precise wording of the Indian Penal Code by referring to non-Code sources of authority and introducing words and concepts which differ from the Code provisions. This is well illustrated by studying the recent Supreme Court of India judgment in Darshan Singh v. State of Punjab, (2010) 2 SCC 333: AIR 2010 SC 1212 concerning the plea of private defence. The dangers created by this tendency are highlighted and suggestions have been made as to the proper approach that our courts should take.

I. INTRODUCTION

The Indian Penal Code ('IPC') was intended by its principal drafter, Thomas Babington Macaulay, to have the qualities of precision, comprehensibility and to be the product of active legislative engagement rather than judicial law-making with associated features of comprehensiveness and accessibility.¹ Its provisions should therefore be viewed as clear and exhaustive statements of the law, with judicial elucidation or elaboration required only when the provisions are ambiguous or otherwise deficient in some way. For many years now, however, there has been an unfortunate tendency by the judiciary, not least members of the Supreme Court of India ('the Court'), to go beyond the wording of the IPC when it was not called for. These unnecessary embellishments have taken several forms, notably, references to English common law developments; reliance on commentaries on English law; replacing words used in an IPC provision with terms which may confer a different meaning; and introducing concepts which are alien to the IPC provisions under consideration.

This article comprises a study of the recent decision of the Court in *Darshan Singh v. State of Punjab*² ('*Darshan Singh*') as an example of this regrettable tendency. The case has been singled out for attention since it is very

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¹ T.B. MACAULAY, J.M. MACLEOD, G.W. ANDERSON & F. MILLET, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS (Pelham Richardson ed., 1838). In particular, Macaulay thought that the criminal law should be a creation of the legislature comprising democratically elected representatives of the community, as opposed to non-elected judges.

² (2010) 2 SCC 333: AIR 2010 SC 1212.

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likely to become a frequently cited authority on account of the list of principles on private defence appearing at the end of the judgment.³ The facts were rather typical of cases where private defence was pleaded in answer to a murder charge. The appellant's father and the deceased were brothers who had a dispute over rights to land. In the course of a confrontation involving weapons, the appellant shot and killed the deceased, claiming that he had done so because the deceased was advancing towards him with a *gandasa* which he had just used to strike the appellant's father on the head. The trial court had acquitted the appellant on the basis of §100 of the IPC which exculpates an accused for causing death to an assailant who had caused the accused to reasonably apprehend that death or grievous hurt would otherwise be the consequence of such assault. The High Court on appeal reversed the judgment of acquittal, which was reinstated by the Court upon finding that the High Court had not properly comprehended the entire evidence on record.

The ensuing analysis will be confined to the Court's discussion of the nature and requirements of private defence, and without concern for the application of the defence to the particular facts of the case since this is unwarranted for the purposes of this article. Besides showing the Court's laxity in handling the IPC provisions on private defence and the dangers which this poses, suggestions will be made of how the Court could have better handled the provisions so as to remain true to their wording and intentment.

II. INAPPROPRIATE REFERENCES TO NON-IPC AUTHORITIES

Under the heading "Scope and Foundation of the Private Defence", the Court in *Darshan Singh* commenced its discourse by quoting the following comment by J.W.C. Turner, the editor of the 11th edition of the English commentary *Russell on Crime*:

... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable.⁴

³ The Court derived these principles from a scrutiny of several important judicial pronouncements on the defence.

⁴ J. RUSSELL, *RUSSELL ON CRIME* Vol-I 491 (J.W.C. Turner ed., 1958) as cited in *Darshan Singh*, *supra* note 2 at ¶24. The Court may well have drawn its inspiration for citing this quotation from RATANLAL & DHIRAJLAL, *LAW OF CRIMES* (2007) which begins its chapter on private

As a preliminary matter, this edition of *Russell on Crime* was published in 1958 and much of the English law on private defence has changed since then.⁵ As the above comment was quoted with apparent approval in *Darshan Singh*, the Court has given the impression that it describes the law of private defence under the IPC. This is not the case. To begin, the opening words limit the scope of the defence by confining it to circumstances when the assailant “intends ... to commit a known felony against either his person, habitation or property”. By contrast, §97(1) of the IPC gives every person the right to defend his own body and the body of any other “against any offence affecting the human body”; and §97(2) affords the right to defend one’s property or that of another against theft, robbery, mischief or criminal trespass”. Consequently, the IPC defence is wider in scope by not requiring the assailant to have *intended* the bodily harm. For example, a person has a right to defend himself against the offence of voluntarily causing hurt under §321 of the IPC, which can be committed by a person who had “knowledge that he was thereby likely to cause hurt”. The IPC defence is also wider than the English common law as described in the quotation because there are forms of mischief and criminal trespass recognised by the IPC which are only misdemeanours and not felonies under English law.⁶ On the other hand, as stated in *Russell on Crime*, English law is wider than the IPC in empowering a person to kill in defence against his habitation.⁷ This may be contrasted with §103(d) of the IPC which permits the causing of death in defence of house-trespass only where the circumstances were such as to reasonably cause apprehension that death or grievous hurt will be the consequence.

Comment may also be made with respect to the part of the quotation from *Russell on Crime* that the defender is not obliged to retreat but may pursue his adversary until the danger is ended. This is also clearly the law in India by virtue of the IPC stipulating that the defender could cause harm which was “necessary to inflict for the purpose of defence” (§99(4)); and that the right of private defence “continues as long as such apprehension of danger ... continues” (§102, and see also §105). Why then was it necessary for the Court in *Darshan Singh* to refer to the English position? The reference to the English law

defence with this same quotation. Notably, the editor of this edition was Justice C.K. Thakker of the Court, which creates the impression that this unfortunate practice is being promoted by members of Court both in their judgments and in leading commentaries on the IPC.

⁵ For the current position, see Criminal Justice and Immigration Act, 2008, §76 and the explanatory notes thereto, available at <http://www.legislation.gov.uk/ukpga/2008/4/notes/division/5/1/8/1> (Last visited on August 12, 2011).

⁶ The classification of crimes under English law into felonies and misdemeanours depend on their gravity as evidenced by the stricter penalties provided for the former such as long terms of imprisonment. The IPC does not have such a classification.

⁷ See the English Court of Appeal case of *R. v. Hussey*, (1924) 18 Cr App R 160, although recent English commentators contend that it no longer represents the law in England given the modern means of legal redress available in their nation to a dispossessed householder: see D. ORMEROD, SMITH AND HOGAN CRIMINAL LAW 340 (2009).

is also apt to confuse because, as noted by the Court,⁸ there are some English case authorities which have held (contrary to what was stated in *Russell on Crime*) that there is a duty to retreat before the right of private defence becomes available.⁹

In sum, it would have been far better for the Court not to have referred at all to *Russell on Crime* or the English common law rule requiring a duty to retreat, since the matters covered are clearly spelt out in the IPC provisions and are, in many respects, different to the English law.

Lest the wrong impression be created, the point should be made that references to commentaries and case authorities from other jurisdictions are entirely permissible, even to be welcomed, provided they satisfy two conditions. First, these sources of law should have a shared basis and history with the IPC; and second, they should elucidate some aspect of the IPC which is unclear on the face of the IPC provision being discussed. This is well illustrated by reference to the requirement under §99(4) that the defender must not have inflicted “more harm than it is necessary” for the purpose of defence.¹⁰ As will be elaborated further below, the meaning of “necessary” in this provision could be broadly or narrowly construed. It was therefore quite appropriate for the Court in *Darshan Singh* to look beyond §99(4) for clarification. To support its stance of interpreting the concept of “necessary” broadly, the Court stated that “the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger”.¹¹ Unfortunately, the Court did not accredit its source for this assertion to the following extract from the Notes of Macaulay, accompanying his draft code:

In this country ... the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society of India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence¹²

⁸ *Supra* note 2, ¶28.

⁹ See the discussion by the English Court of Appeal in *R. v. Julien*, [1969] 2 All ER 856, 858.

¹⁰ IPC 1860, §99(4): “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.”

¹¹ *Supra* note 2, ¶24.

¹² MACAULAY, MACLEOD, ANDERSON & MILLET, *supra* note 1, 82.

The clause “rouse and encourage a manly spirit among the people”, appearing in this quotation is virtually identical to that used by the Court in *Darshan Singh*. The Court’s assertion concerning the legislative intention would therefore have been considerably strengthened by explicit reference to Macaulay as the source of authority for it.

As for references to non-Indian case authorities, the Court could have usefully referred to judicial decisions from jurisdictions like Malaysia and Singapore¹³ which have adopted the IPC and, as a result, have dealt with identical provisions to ours. As we shall see in the next part, there are Malaysian and Singaporean cases which have interpreted and applied the concept of “necessary” under §99(4) to mean “reasonably” necessary which affords the defender greater allowance over the force used than the interpretation that the force must have been the minimum amount that was necessary for private defence. The Court in *Darshan Singh* could also have referred to cases from these jurisdictions possessing the IPC to further support its ruling that our law of private defence does not impose a duty to retreat.¹⁴ Such a reference, though not strictly required since the IPC provisions are sufficiently clear that there is no legal duty to retreat, would have been infinitely better than the Court’s reference to the English common law.

III. NON-COMPLIANCE WITH THE PRECISE WORDING OF THE IPC

It is a cardinal rule of statutory interpretation that judges should adhere strictly to the clear and plain wording of a statute and not deviate or modify it in any way.¹⁵ This is even more so for a code such as the IPC which drafters intended it to be a clear and comprehensive statement of the law covered by it. Sadly, the Court has set a bad example by not always complying with this rule insofar as the IPC is concerned. Several examples of this are found in *Darshan Singh* and will be presented below, with suggestions as to what the Court should have said or done instead.

¹³ For a brief historical account, see W.C. CHAN & A. PHANG, *The Development of Criminal Law and Criminal Justice* in ESSAYS IN SINGAPORE LEGAL HISTORY 247-250 (K. Tan ed., 2005).

¹⁴ *Musa bin Yusof v. Public Prosecutor*, [1953] MLJ 70; *Public Prosecutor v. Balwant Singh* (No. 2), [2003] 3 MLJ 395.

¹⁵ *See State of Bombay v. Jal K. Patel*, AIR 1951 Bom 205 where it was stated that courts had a paramount duty to put the words of a statute into effect “honestly and faithfully, its plain and rational meaning and promote its object.”

A. AS MAY REASONABLY CAUSE THE APPREHENSION

Before evaluating the Court's handling of it, we need to closely examine this clause as it appears in the IPC provisions on private defence.¹⁶ The wording is susceptible to 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. In the light of Macaulay's view that the right of private defence should be available to members of the community with as few restrictions as possible,¹⁷ the first and more subjective interpretation is the correct one.

While the Court in *Darshan Singh* expressed, for the most part, the clause in the way it is set out in the IPC, the Court let its guard down on several occasions. One such occasion was when it said that "[a] person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm".¹⁸ This statement could be read as supporting a purely objective appraisal of the danger and therefore more akin to the second interpretation of the clause. At the other extreme, the Court said that the "clause is attracted where a person has a genuine apprehension that his adversary is going to attack him";¹⁹ and similarly, that "it is enough if the accused apprehended that such an offence is contemplated".²⁰ These statements express the inquiry in purely subjective terms, that is, the accused's belief as to the danger whether or not his or her belief was based on reasonable grounds. As such, they are contrary to the clear prescription of the clause that the accused's apprehension must have been reasonable.

Furthermore, the Court may be criticized for using different adjectives in place of "reasonable" to describe the apprehension of danger. An

¹⁶ See §100(1); §100(2); §102; §103(4); §105(5); and §106. For example, §100 reads in part as follows: "The right of private defence of the body extends, under the restrictions mentioned in §99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:

- (1) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
- (2) such as assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;"

¹⁷ See *supra* text accompanying note 12.

¹⁸ *Supra* note 2, ¶36.

¹⁹ *Id.*, ¶22.

²⁰ *Id.*, ¶58, principle (iii).

example is where it said that “the apprehension was justified”.²¹ Conceivably, describing the apprehension as “justifiable” indicates that it was socially acceptable and thus involves a moral or value judgment; whereas the “reasonableness” of the apprehension involves an appraisal of whether there were factually objective grounds to support the accused’s apprehension. The Court also created unnecessary uncertainty when it used the expressions “real apprehension”²² and a “serious apprehension”.²³ Who determines if the apprehension was “real” or “serious”- the accused or the trier of fact (representing the reasonable person)? And does “serious” suggest that there could be lesser degrees of apprehension which would not support the defence? These questions would not have arisen if the Court had stuck to the wording of the clause. Better still, it could have used the expressions “the accused’s reasonable apprehension” or “the accused’s apprehension based on reasonable grounds”. By doing so, the Court would have clearly invoked the more subjective and correct interpretation of the clause.

B. RECOURSE TO THE PROTECTION OF THE PUBLIC AUTHORITIES

This requirement appears in §99(3) of the IPC which states that “[t]here is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities”. In *Darshan Singh*, the Court does not expressly refer to the provision but merely alludes to it, such as by saying that “when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property”.²⁴ The better course would have been for the Court to have followed up this statement with an explicit reference to §99(3).

Additionally, the Court could have usefully compared that subsection with the requirement under §99(4) that no more harm than necessary is permitted for the purpose of private defence. 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. For the very reason that they are so similar, however, 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). Consequently, the Court could have taken the opportunity to explain that §99(3) denies the right of private defence in situations where someone is threatened with violence in the future. 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. Only when §99(3) is satisfied so as to give the accused the right of private defence, does the inquiry turn to

²¹ *Id.*, ¶23.

²² *Id.*, ¶30.

²³ *Id.*, ¶37.

²⁴ *Id.*, ¶33.

the *exercise* of that right, which is where §99(3) becomes operative. In other words, whereas §99(3) is a *pre-condition* of the right of private defence, §99(4) comprises one of the *conditions* of the exercise of that right. The Court could have found support for this analysis of §§99(3) and 99(4) in the recent Singapore Court of Appeal case of *Tan Chor Jin v. Public Prosecutor*.²⁵

Rather than adopting the above analysis which would have brought clarity to the law, the Court in *Darshan Singh* blurred the distinction between §§99(3) and 99(4) by introducing the concept of “imminence” of the danger.²⁶ The Court did not cite its source of authority for doing this. One suspects that the Court had simply relied on earlier cases where the concept of “imminence” was mentioned,²⁷ and which original source may have been the English common law.²⁸ Alternatively, the Court may have had in mind §99(3) or §99(4), in which case it should have situated its discussion of “imminence” in the context of those provisions, rather than present the concept as if it were a separate legal requirement. Thus, the Court could have explained that the imminence of the danger would be a factor (as opposed to a distinct legal requirement) to be taken into account when deciding whether the accused had time to have recourse to the protection of the public authorities as required by §99(3). The Court could have said the same in relation to the question of whether the force used by the accused was necessary for the purpose of defence under §99(4). In this way, the Court would have remained true to the wording of these IPC provisions.

C. IN NO CASE EXTENDS TO THE INFLICTING OF MORE HARM THAN IT IS NECESSARY

As noted earlier, the concept of “necessary” harm (or response) embodied in §99(4) of the IPC is open to varying interpretation and application. Given this state of affairs, it was entirely proper for the Court in *Darshan Singh* to elaborate on the concept. When doing so, however, the Court should have been vigilant in keeping as closely as possible to the internal or underlying principles which underpin the IPC. As one commentator on the IPC has said, “[w]here the legislature intended a code to be exhaustive, a court will have to solve novel problems by use of analogy or through the discovery and extension of principles that are basic to the Code.”²⁹

²⁵ [2008] 4 SLR (R) 306. For a detailed examination of this case and its relevance to India, see S. Yeo, *Bringing Clarity to Private Defence: The Singapore Experience*, (2010) 3 NUJS L. REV. 33.

²⁶ *Supra* note 2, ¶ 36, 40 and 58, principle (x).

²⁷ See e.g., *State of Orissa v. Rabindranath Dalai*, 1973 Cri LJ 1686 as cited in *Darshan Singh*, *id.*, ¶40.

²⁸ See e.g., *Devlin v. Armstrong*, [1971] NI 13 at 33 per Lord MacDermott L.C.J.

²⁹ M. Sornarajah, *The Interpretation of the Penal Codes*, [1991] 3 MALAYAN LAW JOURNAL CXXXIX at CXXXIV.

The extent to which the Court in *Darshan Singh* complied with this proposition can be tested by examining the following passage from its judgment:

According to §99(4) of the Indian Penal Code, the injury which is inflicted by the person exercising the right should [be] commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh ‘with golden scales’ what maximum amount of force is necessary³⁰ to keep within the right[;] reasonable allowance should be made for the *bona fide* defender.³¹

The first sentence of this passage suggests that §99(4) imposes a legal requirement of proportionality between the harm inflicted by the accused and the threatened danger confronting him or her. The second sentence goes on to qualify this by saying that when assessing the amount of force used (or harm inflicted), reasonable allowance should be given to the fact that the accused was operating under immense pressure when acting in defence. How are these two requirements reconcilable, if at all? Unfortunately, the Court did not seek to answer this question.

It is submitted that the answer lies in treating proportionality, not as a separate legal requirement as the Court seems to have done, but a factor to be considered along with other factors, when assessing whether the accused’s response was necessary. Hence, the need for the accused’s response to have been “necessary” is the over-arching legal requirement within which considerations of proportionality and the pressured circumstances the accused was experiencing are taken into account. The Court seems not to have appreciated this arrangement since it equated a proportionate response with a necessary one, as is evident in its declaration that “[i]n private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.”³²

The Court was also remiss in failing to acknowledge that the proportionality of the response and the threatened danger is actually incorporated into the relevant IPC provisions in cases where the accused kills his or her assailant in defence of the body or property. §§100 and 103 have this effect by prescribing a list of threats which, if present, enable the accused to kill his or her assailant in defence of the person (§100) or property (§103). Accordingly, by enacting these provisions, the Legislature had determined that the specified

³⁰ The more accurate word is “permissible”, in order to compliment the phrase “maximum amount of force” appearing in the quotation.

³¹ *Supra* note 2, ¶35.

³² *Id.*, ¶58, principle (vi).

types of threats were deemed to be proportionate to the taking of the assailant's life. Given this state of affairs and on account of the facts of the case, the Court in *Darshan Singh* should have confined its discussion of proportionality by referring solely to the first and second limbs of §100, and restrained from speaking about that concept in general terms.

As a final observation, the Court could have usefully clarified that §99(4) should be read as being concerned with a *reasonably* necessary response as opposed to the *minimum* necessary response. While the provision simply refers to “necessary”, the historical underpinnings of the law, described earlier, strongly suggest that the drafters of the IPC intended the term to be read as “reasonably necessary”. This enables the inquiry to go beyond the least harmful response and to consider a number of possible responses all of which could be regarded as reasonably necessary. When reading the judgment in *Darshan Singh*, one has a strong sense that the Court would have agreed to this, in which case, the Court would have done well to advance the law by expressly subscribing to the “reasonably necessary response” interpretation for §99(4). Once again, the Court could have found support for this stance by referring to Malaysian and Singaporean cases which had adopted it.³³

IV. INTRODUCING CONCEPTS ALIEN TO THE IPC PROVISIONS IN QUESTION

Another regrettable practice of the courts has been to introduce concepts which are not at all called for by the IPC provisions under consideration, with the result that the law is unnecessarily confused. An example of this appearing in *Darshan Singh* was the reference to “in good faith” as if it were a requirement of private defence when it is not.³⁴ The Court had this to say:

When enacting §§96-106 of the Indian Penal Code, excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger.³⁵

³³ See *Wong Teck Choy v. Public Prosecutor*, [2005] 4 MLJ 693, ¶5; *Tan Chor Jin v. Public Prosecutor*, [2008] 4 SLR (R) 306, ¶46.

³⁴ “In good faith” is used in §§99(1) and (2) but with respect to the specific circumstances of a public servant “acting in good faith under colour of his office”. There is also illustration (b) to §98 involving a house occupant who “in good faith” takes a legal entrant for a housebreaker. However, there, the use of the concept relates not to private defence *per se*, but to the defence of mistake of fact under §79 of the IPC which states in part that: “Nothing is an offence which is done by any person ... 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”. Apart from these instances, the term does not appear in the IPC provisions on private defence.

³⁵ *Supra* note 2, ¶24.

In another passage, the Court said that “it is difficult to expect from a person exercising this right in good faith, to weigh ‘with golden scales’” the amount of force required by way of private defence.³⁶ The Court’s description of such a person as a “*bona fide* defender”³⁷ strongly suggests that it was using “in good faith” to describe the genuineness of the accused’s position as a defender and not the technical meaning of that term given under §52 of the IPC which is that “[n]othing is said to be done or believed in good faith which is done or believed without due care and attention”. If this was indeed the case, the Court may be heavily criticized for ignoring the technical meaning of this definitional provision.

The correct position is that the IPC provisions on private defence do not rely on the concept of “in good faith” under §52. Instead, they prescribe conditions which are manifestations of that concept but which are tailored to the particular circumstances of private defence. Thus, for the defence to succeed, the accused must have “reasonably apprehended” the nature of the danger (§100); and have applied “[no] more harm than it is necessary” for the purpose of defence (§99(4)). Underlying these conditions is the notion that, for the defence to succeed, the accused’s apprehension of the danger must have been arrived at after due care and attention, and so too must have been his or her response to the danger. Accordingly, the Court in *Darshan Singh* should have restricted itself to discussing these conditions and not have referred at all to the term “in good faith”.

Another example of the Court introducing a concept which was uncalled for with respect to the law of private defence appears in the following passage:

There are cases where the necessity for self-defence arises in a sudden quarrel in which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life.³⁸

It is not entirely clear whether the Court was describing the English law here.³⁹ If it was doing so, one wonders what purpose this would have served. Alternatively, the Court may have had in mind the partial defence to murder of “sudden fight” provided for by Exception 4 to §300 of the IPC.⁴⁰ In which case,

³⁶ *Id.*, ¶35.

³⁷ *Id.* For the full sentence, see *supra* text accompanying note 31.

³⁸ *Id.*, ¶27.

³⁹ That the Court was describing the English law is supported by the fact that this statement follows immediately after the paragraph where the Court described the English law of killing in self-defence as amounting to either justifiable or excusable homicide.

⁴⁰ IPC 1860, §300, Exception 4: “Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

the Court should have expressly referred to that provision and, to enhance our understanding of both the law of sudden fight and private defence, gone on to explain the similarities and differences between these defences.⁴¹

Yet another instance of the Court introducing an alien concept to the IPC provisions on private defence was when it declared that:

The right of private defence is available only to one who is *suddenly* confronted with the necessity of averting an impending danger *and not of self-creation*.⁴²

The implication of this principle is that the plea of private defence is unavailable to the original aggressor. Since such a person had initiated the danger, the confrontation would not have been sudden to him or her, and would also have been created by that person. There is, however, nothing whatsoever in the IPC provisions on private defence which imposes this condition. The requirement that the right of private defence extends only to acts done in defence against an offence under §97 is restrictive enough. Courts should desist from imposing further limits on that right which are not called for by the provisions of the IPC. Accordingly, the above mentioned principle was incorrect to have restricted the right of private defence to circumstances where the offence being defended against was sudden or unexpected. Moreover, the principle was wrong to impose a blanket rule denying the defence to the original aggressor who, by virtue of that fact, had created the danger confronting him or her. Depending on the circumstances, such a person could be allowed to have the benefit of the defence. Take the case of X who initiates the confrontation by punching Y. This would amount to an offence, giving Y the right to defend himself. Y responds by attacking X with a knife. Should X be unarmed, Y's attack is likely to be regarded as an offence against X, enabling X to defend himself. Each escalation of the physical confrontation would then constitute an offence, with the person subjected to the increased violence having the right to defend himself or herself against it. Conversely, there may be circumstances where the defence would not be available. One such example may be the situation where A, in first attacking B, intends B to attack A in return, so that A can then respond by again attacking B in the knowledge that he, A, will be able to rely on private defence in a prosecution for this last attack.

V. CONCLUSION

This article began by predicting that *Darshan Singh* will become a leading case authority on private defence on account of the list of principles on the defence appearing in the judgment. That the Court felt the need to draw

⁴¹ For a comparison between these two defences, see S. YEO, N. MORGAN & W.C. CHAN, *CRIMINAL LAW IN MALAYSIA AND SINGAPORE* ¶¶30.41 – 30.46 (2007).

⁴² *Supra* note 2, ¶58, principle (ii) (emphases added), ¶¶33 and 41.

up this list is not at all surprising, for the reason that the IPC provisions on private defence are highly complex with some parts being confusing or uncertain. Regrettably, several of these principles leave much to be desired because they are judicial pronouncements on matters which the IPC itself is clear about. For example, there is the principle that “[a] mere reasonable apprehension is enough to put the right of self defence into operation ... [and] ... it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence”.⁴³ Contrary to the impression given by the Court, the source of this principle is not from case law but from §102 of the IPC which states that “[t]he right of private defence of the body 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”. Given this state of affairs, the better course would have been for the Court to have simply referred to §102 rather than a judicial pronouncement on the same.

Certainly some of the principles enunciated in *Darshan Singh* are warranted for elaborating or clarifying an aspect of the IPC provision which is unclear. For these principles, the Court should have expressly referred to the relevant provision and identified the troubling aspect. Take, for example, the principle that “[i]t is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude”.⁴⁴ This principle is important for expanding on the meaning and application of the clause “inflicting of [no] more harm than it is necessary to inflict for the purpose of defence” contained in §99(4) of the IPC. The Court could have enhanced this principle by expressly linking it to this provision and, by that measure, showed itself to endorse the IPC.

Although this study dealt with the IPC provisions on private defence, the unfortunate judicial tendency to depart from the IPC has occurred elsewhere. A good recent example is the case of *Arun Raj v. Union of India*,⁴⁵ where the Court dealt with the defence of provocation under Exception 1 to §300 of the IPC. The Court quoted with approval a lengthy passage by Viscount Simon in the House of Lords case of *Mancini v. Director of Public Prosecutions*⁴⁶ to the effect that the defence of provocation requires the accused’s response to bear a reasonable relationship to the provocation.⁴⁷ This is despite Exception 1 being silent about such a requirement in addition to the fact that this ruling in *Mancini* has been overruled by later English decisions.⁴⁸ Rather than relying on English case law, the Court could have referred instead

⁴³ *Id.*, ¶58, principle (iii).

⁴⁴ *Id.*, ¶58, principle (v).

⁴⁵ (2010) 6 SCC 457.

⁴⁶ [1942] AC 1.

⁴⁷ *Supra* note 45, ¶7.

⁴⁸ *See* *Director of Public Prosecutions v. Camplin*, [1978] 2 All ER 168. Had the Court consulted English commentary, it might have come across trenchant criticisms on several fronts of this requirement in J. RUSSELL, *RUSSELL ON CRIME*, 548-553 Vol.1 (J.W.C. Turner ed., 1963).

to Beg J. in the Allahabad High Court case of *Akhtar v. State* where, in accordance with the wording and conceptual underpinnings of Exception 1, he astutely declared that “once [an accused’s] power of self-control has been lost, it would be futile to expect him to retain such a degree of control over himself as to ... show that his ‘mode of resentment’ bore ‘a reasonable relationship to the provocation’ which operated upon him.”⁴⁹

All this is not to say that the Court has been remiss on every occasion where it has been called upon to interpret and apply the IPC. For instance, in *Puran Singh v. State of Punjab*,⁵⁰ the Court summarized the circumstances when the right of private defence could be exercised as follows:

- i. There is no sufficient time for recourse to the public authorities;
- ii. There must be a reasonable apprehension of death or grievous hurt to the person or danger to the property concerned;
- iii. More harm than necessary should not have been caused.

As previously noted, these three circumstances accord directly with §§99(3), 100 and 99(4) respectively of the IPC and utilise the precise wording of these clauses.

The call is therefore made for the Court to be a model of circumspection when dealing with the IPC provisions. In doing so, the Court should have in mind Macaulay’s goals of precision and comprehensibility when drafting the IPC and his desire for the Code to be the product of active legislative engagement rather than judicial law-making with associated features of comprehensiveness and accessibility. Certainly, there will be ambiguities and gaps in the IPC provisions which justify the Court looking to non-IPC sources of authority for inspiration. In these circumstances, however, the Court should adhere as closely as possible to the basic principles of the IPC. It can do so by firstly seeking out authorities which have a shared basis and history with the IPC, such as cases from jurisdictions which have adopted the IPC. Another good source of authority would be the notes of Macaulay and his fellow Law Commissioners who drafted the IPC. Only when these authorities fail to shed light on the matter, should the Court look further afield to, say, the English common law and even then, with a keen eye to ensuring that the legal principle derived from that foreign source is broadly in keeping with the IPC provision under consideration.

⁴⁹ AIR 1964 All 262 at 266, expressly rejecting Viscount Simon’s ruling in *Mancini*.

⁵⁰ (1975) 4 SCC 518 as cited in Darshan Singh, *supra*, note 2, ¶44.