



# THE DIFFERENCE BETWEEN JUSTIFIABLE AND EXCUSABLE DEFENSES IN THE INDIAN PENAL CODE

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## INTRODUCTION

Criminal law outlines different punishments for various crimes. But a person may not always be punished for a crime that he/she has committed. The law offers certain defenses that exculpate criminal liability. These defenses are based on the premise that though the person committed the offence, he cannot be held liable. This is because at the time of commission of the offence, either the prevailing circumstances were such that the act of the person was justified or his condition was such that he could not form the requisite *mens rea* for the crime. The defenses are generally classified under two heads- justifiable and excusable. Thus, as John Gardner puts it, for committing a wrong, a person must be responsible for doing a wrongful act without having any justification or excuse for it.<sup>1</sup>

A justified act is a one which otherwise, under normal conditions, would have been wrongful but the circumstances under which the act was committed make it tolerable and acceptable. The person fulfills all the ingredients of the offence but his conduct is held to be right under the circumstances. For example, a man while protecting his fields shot an arrow at a moving figure honestly believing it to be a bear but caused the death of a man who hiding in the bushes. He cannot be held liable since his conduct was justified under the circumstances.<sup>2</sup> In case of an excuse, though the person has caused harm, it is held that the person should be excused because he cannot be blamed for the act. For example, if a person of unsound mind commits a crime, he cannot be held responsible for being mentally sick. The two terms do not mean the same thing. As Joshua

<sup>1</sup> John Gardner, *Offences and Defense: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 227 in AP Simester, 'Wrongs and Reasons'[2009] 72(4) The Modern L Rev 648.

<sup>2</sup> *State of Orissa v Khora Ghasi* 1978 CrLJ 1305 (Ori).

Dressler says in his article, ‘A justification does not excuse conduct; an excuse does not justify conduct.’<sup>3</sup>

The Indian Penal Code, 1860 (*hereinafter* the IPC) recognizes defenses in chapter four under the heading ‘General Exceptions.’ Sections 76 to 106 of the IPC cover these defenses. Though there is no such express classification of defenses under justifiable and excusable given in the code, the distinction between the two categories has nevertheless been regarded as an important topic in criminal law. The primary aim of writing on this topic is to highlight this distinction and present the views of various legal scholars on the issue. This project seeks to ask the need for classifying defenses under these two headings. The views have been presented in the next part of the project under ‘Literature Survey’. It discusses a general overview of the justifiable and excusable defenses. The different defenses featured in the IPC and under what category they fall have been discussed. The next section expresses my views on the attempt to classify the defenses.

## I. LITERATURE SURVEY

According to Glanville Williams, the term justification was earlier used for cases where the object of the law was not frustrated. An excuse was used where the court thought that it would not be correct to punish the actor.<sup>4</sup> It was important to distinguish between the two categories because justification protected from the criminal charge but an excuse was simply an ‘occasion for a royal pardon.’<sup>5</sup> As law evolved with the passage of time, the need to distinguish justifiable and excusable defenses found its application into judicial decisions. The distinction also helped during law making since the success of a defense raised by the defendant was based on the manner in which the court characterized it. For example, if the court was looking for a justification for the conduct of the person and nothing less than that, the defense may have failed. However, if it was looking only for an excuse, it may have succeeded.<sup>6</sup> A clear distinction between the two categories of defenses can help in a better understanding of criminal law and bring in systematic reforms.<sup>7</sup> It also plays a role in demarcating clearly the scope of defenses. A defense that exonerates the conduct of a person must be either a justification or an excuse.<sup>8</sup> Eminent scholar Paul H Robinson asserts that to understand the definition of triggering conditions that warrant the use of defensive force, the defenses need to be distinguished from one another.<sup>9</sup> He emphasizes on the practical advantages that the distinction creates. A lack of a clear demarcation between these categories leads to ambiguous acquittals where the court is unable to differentiate between the two. According to him, justifications elucidate the rules of conduct while excuses address the principles of adjudication.<sup>10</sup> An absence

<sup>3</sup> Joshua Dressler, ‘Justifications and Excuses: A Brief Review of the Concepts and the Literature’ [1987] 33(4) Wayne L Rev 1155.

<sup>4</sup> Glanville Williams, *Textbook of Criminal Law* (2<sup>nd</sup> edn, Universal Law and Publishing Co. Pvt. Ltd. 1999) 51.

<sup>5</sup> *ibid.*

<sup>6</sup> J C Smith, *Justification and Excuse in the Criminal Law* (Stevens and Sons 1989) 12.

<sup>7</sup> Kent Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ [1984] 84(8) Columbia L Rev 1897.

<sup>8</sup> Peter Alldridge, ‘The Coherence of Defenses’ [1983] CrLR 665.

<sup>9</sup> Paul H Robinson, ‘Four Distinctions That Glanville Williams Did Not Make: The Practical Benefits of Examining the Inter-relation Among Criminal Law Doctrines’ in Dennis J Baker and Jeremy Horder (eds) *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (Cambridge University Press 2013) 106.

<sup>10</sup> *ibid.*

of differentiation results in an overlap of the two principles which in turn leads to ambiguity in understanding the concept.

While some scholars have preferred the classification of defenses under justifiable and excusable, others have not favoured the approach. Glanville Williams finds the distinction to be of little practical significance. Even though Kent Greenawalt accepts the distinction when done by scholars for academic purposes, he does not support the law in making the same distinction.<sup>11</sup> According to him, the two terms are conceptually vague and the moral standards differ in every society. Therefore, it will be futile to define which defense is an excuse or a justification. It is also argued that the distinction will not serve the purpose since many of the defenses are ‘complex amalgamations’ of justifications and excuses.<sup>12</sup> Another argument against distinguishing justifiable and excusable defenses is that there will always be a temptation to class every defense as either of the two.<sup>13</sup>

## JUSTIFICATIONS AND EXCUSES- AN OVERVIEW

### (A) JUSTIFICATIONS

To avail the defense of justification, the response of the person under the given circumstances must be to protect the interest at stake and it must also be proportional to the harm that is threatened. There are four theories of justification that have been proposed by Dressler.<sup>14</sup> The first theory is the moral forfeiture theory. It states that if a person knowingly and voluntarily commits an offence then he cannot expect the law to protect him. For example, if a person voluntarily attempts to kill another and in the process of self-defense is himself killed, then this act of self-defense is justified. The second theory is the ‘rights theory.’ It states that a person’s conduct will be justified if he has a legal right to protect a moral interest. The third ‘lesser harm’ theory says that if an act is done to prevent a greater harm from occurring, it is justified. For example, if a person trespasses on the property of another in order to save a child trapped in a fire inside the property, his act of trespassing will be justified. The last theory labels a conduct as justifiable if it is done in greater public interest.

### (B) EXCUSES

In case of an excusable defense, the actor is not punished as he lacks the necessary *mens rea* for the offence either by reason of an honest mistake of fact, infancy, insanity or intoxication.<sup>15</sup> There must be a disability to cause the condition that excuses the conduct. As stated by Paul Robinson, a conduct is punishable

<sup>11</sup> Greenawalt (n 7).

<sup>12</sup> Mitchel N Berman, ‘Justification and Excuse, Law and Morality’ [2003] 53(1) Duke LJ 1. Available at <<http://www.jstor.org/stable/1373189>> accessed 6 October 2013.

<sup>13</sup> Jonathan Herring, *Criminal Law* (Palgrave MacMillan 2011) 385.

<sup>14</sup> Joshua Dressler (n 3).

<sup>15</sup> KD Gaur, *A Textbook on The Indian Penal Code* (1<sup>st</sup> edn, Universal Law Publishing Co. Pvt. Ltd. 1992) 94.

not because the person acted in that manner but because he *chose* to act in that manner.<sup>16</sup> Dressler mentions three non-utilitarian theories of excuses to highlight the circumstances under which a person can make use of an excusable defense.<sup>17</sup> The first of these theories is the causation theory of excuses which says that a person should not be punished for an act that was caused because of a condition over which he exercised no control. Therefore a person who is intoxicated or of unsound mind cannot be held guilty for his act. The second theory, called character theory, says that a person should not be punished for committing an offence unless he has a bad character. Excusable defenses are invoked when one cannot infer the bad character of a person from the act that he has committed. The next theory is based on the ‘personhood principle’ which states that if a person lacks a sense of reason due to certain condition and does not behave as a reasonable human being would, he cannot be blamed for his acts. To consider a defense as an excuse will depend on which of the above theories is accepted.

### **DIFFERENCE BETWEEN JUSTIFIABLE AND EXCUSABLE DEFENSES**

A close perusal of literature and the nature of these defenses will reveal some clear distinctions between the two categories of defenses. Justified acts do not necessarily lack intention. But the intention under the prevailing circumstances at the time of commission of the offence does not qualify as criminal intent. Excusable defenses apply only if the act is done without any intention. Justifications focus on the wrongful nature of the act. On the other hand, excuses look at the blameworthiness of the actor. An act is justified under the circumstances regardless of the fact whether the defendant is aware of them or not. However, circumstances that can excuse conduct will not excuse the person unless he is aware of them.<sup>18</sup> Justifications negate the social harm of the offence whereas excuses exonerate the actor of moral blameworthiness for the offence.<sup>19</sup> Justifications also arise from balancing of harms. For example if a police officer uses force to search for evidence under a judicial search warrant, he will be justified even if his conduct amounts to an offence. Excuses, on the other hand, do not involve any such balancing of harms.

### **GENERAL EXCEPTIONS UNDER THE IPC**

Sections 76 to 106 of the IPC provide general exceptions to offences. These include mistake of fact, judicial acts, accident, necessity, infancy, insanity, intoxication, consent, duress, trivial acts and the right of private defense. This section will discuss each of these exceptions and their applicability under the IPC.

<sup>16</sup> Paul H Robinson, *Fundamentals of Criminal Law* (2<sup>nd</sup> edn, Little Brown and Company 1995) 525.

<sup>17</sup> Dressler (n 3).

<sup>18</sup> JC Smith (n 6).

<sup>19</sup> Dressler (n 3).



**(i) Mistake of Fact (Sections 76 and 79)**

Section 76 exculpates a person from criminal liability who is bound by law to do an act or who does an act in good faith under a mistake of fact that he was bound by law to do it. Mistake is considered *excusatory in nature* since the person did not intend nor foresee the consequences of his act. The mistake should be of such a nature that had the circumstances that the person believed to exist indeed prevailed, he would have been absolved from liability. The mistake must be a mistake of fact and not of law. The facts should be material to constitute an offence. Two cases that illustrate the application of Section 76 are *State of West Bengal v Shiv Mangal Singh*<sup>20</sup> and *Dakhi Singh v State*.<sup>21</sup> In the first case, an Assistant Commissioner of Police was injured by a mob. The Deputy Commissioner of Police ordered the constables to open fire. They shot at some people from a point blank range. The court held that the constables were protected under Section 76 and it subsequently acquitted them. In the next case, the accused shot at a thief while chasing him. He pleaded that he believed that he was bound by law to do it. The court held the accused liable since he exceeded his power of arrest provided by Section 46 of the Code of Criminal Procedure. The defense under Section 76 did not apply to him.

Section 79 of the IPC excuses an act that the person felt was justified by law. It can be best elucidated in Justice Krishna Iyer's judgment in *Raj Kapoor v Laxman*<sup>22</sup>:

The position that emerges is this. Jurisprudentially viewed, an act may be an offence, definitionally speaking but; a forbidden act may not spell inevitable [guilt,] the law itself declares that in certain special circumstances it is not to be regarded as an offence. Section 79 makes an offence a non-offence. When? Only when the offending act is actually justified by law or is bona fide believed by mistake of fact to be so justified.

Thus a person will be protected under Section 79 only if there was a legal justification available for his actions and he applied the law to the best of his judgment in good faith.

**(ii) Judicial Acts (Section 77 and 78)**

These provisions protect judges and judicial officers when acting judicially in exercise of powers given to them by law or which they believe in good faith to be vested in them by the law. The acts are *justified by law*. The rationale behind these provisions is that judges and judicial officers should not be under any external influence so that they can act in a fearless and just manner.<sup>23</sup> Judicial acts extend to orders passed in the chambers of a judge. If a judicial officer is involved in a criminal case, his arrest has to be in accordance with the directions issued by the Supreme Court in *Delhi Judicial Service Association, Tis Hazari Court v State of*

<sup>20</sup> AIR 1981 SC 1917.

<sup>21</sup> AIR 1955 All 379.

<sup>22</sup> AIR 1980 SC 605.

<sup>23</sup> See Hari Singh Gour, *Penal Law of India* (vol 1, 11<sup>th</sup> edn, Law Publishers 1998) 434; *Anowar Hussain v Ajoy Kumar Mukherjee* AIR 1965 SC 1651.

Gujarat.<sup>24</sup>

**(iii) Accident (Section 80)**

This defense has been classified as *excusable* since the act lacks intention or knowledge and is done in a lawful manner by lawful means with due care and precaution. All these ingredients have to be satisfied to attract this defense. Lack of intention and knowledge was held to be the exculpatory factor in *State of Madhya Pradesh v Rangaswamy*.<sup>25</sup> In this case, a man shot another person thinking it to be a hyena. The fact that it was raining allowed the person to successfully plead the defense of accident. The court acquitted him since he lacked knowledge that a man was present at that place. In *Raj Karan Singh v State of UP*,<sup>26</sup> the accused constable had an altercation with another constable and shot at him with his gun. The other constable died but some other policemen were also injured, of them later died. The accused pleaded the defense of accident which was rejected by the Court since he acted without any due care or precaution.

**(iv) Necessity (Section 81)**

The defense of necessity is considered to be a *justifiable defense*. The act is done without any criminal intention but not without knowledge. It is acceptable to do an act in good faith that prevents a greater harm from taking place. For example, if the police puts a drunk person under restraint without warrant for carrying a revolver, even though public nuisance is a non-cognizable offence, they will be protected under Section 80 for preventing greater harm to other people and property.<sup>27</sup> An important issue while applying this defense is whether necessity can be used to justify murder. In the old case of *R v Dudley Stephens*<sup>28</sup>, a ship was cast away in a storm. The people on board had nothing to eat for many days. On the twentieth day, the accused decided to kill the cabin boy and feed on his body. After being rescued, they were charged for murder. They pleaded necessity but the court held that self-preservation was not an absolute right and convicted them of murder.

**(v) Infancy (Sections 82 and 83)**

Infancy is classified as an *excusable defense* since it is believed that a child lacks the understanding of the nature and consequences of his actions and therefore cannot form criminal intention. However section 83 presumes that a child above seven but below twelve years of age is capable of understanding the nature and consequences of his conduct depending upon his level of maturity and understanding. The defense of infancy was raised for the first time before the Supreme Court in *Gopinath Ghosh v State of West Bengal*.<sup>29</sup>

<sup>24</sup> AIR 1991 SC 2176.

<sup>25</sup> AIR 1952 Nag 268.

<sup>26</sup> [2000] CrLJ 555 (All).

<sup>27</sup> *Gopal Naidu v Emperor* AIR 1923 Mad 523.

<sup>28</sup> [1884] 14 QBD 273.

<sup>29</sup> AIR 1984 SC 237.

**(vi) Insanity (Section 84)**

This defense of insanity falls under *excuses*. The same logic of incapability of the person to form criminal intent is extended to insanity also. Here, the person, at the time of commission of the act, does not know if his act is wrong or contrary to law. He is incapable of understanding the nature and consequences of the act. This position was upheld in *Shrikant Anandrao Bhosale v State of Maharashtra*<sup>30</sup> where a husband killed his wife while he was suffering from paranoid schizophrenia. The court allowed him the defense of insanity as he was not fully aware of his conduct and its consequences.

**(vii) Intoxication (Sections 85 and 86)**

Intoxication follows the same abovementioned logic and is thus *excusatory in nature*. However, the person must have been administered alcohol without his knowledge or against his will. In case of voluntary intoxication, it has to be examined whether the accused had the specific intent or knowledge required for the offence. The intention of the person has to be gathered from the facts and circumstances of the case and the degree of intoxication.<sup>31</sup>

**(viii) Consent and Duress (Sections 87 to 94)**

These defenses are featured under *justifications*. In case of consent, the accused is protected in causing harm, less than grievous hurt, if the other person consented to it. The person should not have the intention to cause any harm though he may have knowledge of the harm.<sup>32</sup>

Section 94 exempts a person from liability if he acted under any kind of compulsion provided he did not put himself in that situation. If a person faces threat of instant death, his acts are justified under such circumstances. However, this defense does not extend to murder and offences against the State. The threat of instant death must continue throughout the offence.<sup>33</sup>

**(ix) Trivial Acts (Section 95)**

Section 95 states that the law does not take into account trifling matters. This was incorporated to deal with such acts which fell under the letter of the law but not its spirit. The act will be governed by this section only if it amounts to an offence and a person with ordinary temper would not complain of it.<sup>34</sup>

<sup>30</sup> [2003] 7 SCC 748.

<sup>31</sup> *Basdev v State of Pepsu* AIR 1956 SC 488.

<sup>32</sup> KI Vibhute, *PSA Pillai's Criminal Law* (11<sup>th</sup> edn, Lexis Nexis 2012) 127.

<sup>33</sup> See *Emperor v Antar* AIR 1925 All 315; *Mirza Zahid Beg v Emperor* AIR 1939 All 91.

<sup>34</sup> *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773.

**(x) Right of Private Defense (Sections 96 to 106)**

This right spells out that a person is *justified* to act in a certain manner to protect himself from a threatened harm. This is based on the human instinct of self-preservation. A person is justified in causing proportional harm to his aggressor to protect himself from a looming threat of injury. In many cases where the accused killed the other person while trying to protect himself, the court allowed the plea of self-defense and acquitted the person. For example, in *Nabia Bai v State of Uttar Pradesh*,<sup>35</sup> the accused person was in the field with her mother and sister when they were attacked by a man with a knife. The accused somehow got hold of the knife from the person and inflicted wounds on him that resulted in his death. The Supreme Court acquitted the accused giving reasons that she never intended to kill the person and was just trying to protect herself.

The person will be justified in exercising force only if it is proportional to the harm threatened by the attacker. In *Jai Dev v State of Punjab*,<sup>36</sup> the accused was attacked by a large mob. He fired in self-defense and killed one person. After that, the villagers started to run away. But he fired again killing another. The court held that he exceeded his right of private defense since there was no justification to open fire again when the villagers had started running.

Thus, the above defenses provided by the IPC either justify the act of a person or excuse that conduct depending upon the facts and circumstances of each case.

## II. CRITICAL ANALYSIS AND RECOMMENDATIONS

Though the distinction between justifiable and excusable defenses has been favoured by many criminal law scholars, in my opinion it does not have major significance in the way cases are decided under the IPC. Both justifiable and excusable defenses, if allowed, lead to the acquittal of a person. As can be seen from the defenses under the IPC, it does not really matter under what category a defense falls. The courts look into the facts and circumstances of each case to determine whether a particular defense is available to the accused. They hardly delve into the discussion of whether a defense is a justification or an excuse. The central question in determining the guilt of a person is the element of *mens rea*. The IPC is only interested in examining whether the person committed the crime with a guilty mind. If the court finds that the person intended the consequences of his acts or that he was fully aware of them, he is held guilty. Conversely, if he did not intend the consequences or was oblivious of them, he is not held liable. Thus, the crux of criminal law is *mens rea*-

<sup>35</sup> AIR 1992 SC 602.

<sup>36</sup> AIR 1963 SC 612.



whether the person had the intention and knowledge of the consequences of his actions.

The attempt to differentiate between justifiable and excusable defenses, in my opinion, is useful as far as bringing in conceptual clarity is concerned. It does help in a better understanding of the defenses for people who are new to the domain of criminal law. But looking at the larger picture and practical application, the distinction does not really have a role to play. I believe the argument that it helps in bringing in better reforms does not have a strong basis. Looking at the various reports of Law Commission of India, it can be seen that they focus on the provisions of the IPC and how a flaw in a provision with respect to a particular exception can be rectified. The recommendations of the Law Commission aim to correct the errors that may have cropped up while drafting the provisions for defenses for smooth application of those provisions to practical situations. These recommendations do not talk about defenses as justifications or excuses. There is no express mention of defenses as justifiable or excusable in the IPC as well. We can say that the distinction does not have a major role to play as far as IPC is concerned. Therefore, too much emphasis should not be laid on segregating defenses as justifiable or excusable.

### III. CONCLUSION

The above discussion highlights that the classification of defenses has been undertaken by various legal scholars for a long time. The debate over their classification still finds its way into the academia. While I do not completely disregard the classification, I also feel that it should not be over emphasized. I agree with the view of Glanville Williams that this distinction is of no practical significance as mentioned in the previous section. But nevertheless, the attempt to differentiate these defenses has found its way into the method in which exceptions are taught to law students. For the sake of conceptual clarity and teaching, categorizing exceptions under justifiable and excusable is welcomed. But it will be futile to give it much attention when it is not really relevant in the practical scenario.

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