

# THE PRAGMATIC NATURE OF PRIVATE DEFENCE UNDER CRIMINAL JURISPRUDENCE IN NIGERIA

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## ABSTRACT

*The study aimed at examining the practical operation of the right to private defence in Nigeria by virtue of the various constitutive legal instruments operating in the field of criminal jurisprudence. The sources of information relied upon here, are relevant statutes, texts, journals (both local and international) and conference papers. The finding is that the enabling provisions on the subject matter is not smooth sailing. This is because the exercise of the right to private defence is further tied to the satisfaction of certain conditions which ordinarily the user will not advert his mind too and if case is not taken, in the attempt to prevent the commission of an offence which is about to be done to him, he becomes criminally liable in the reverse. In this regard, the study concluded that there is the problem of uncertainty as far as the instruments of self defence are concerned. In order to erase the problem of uncertainty, the user of the right must exercise caution in order to succeed in the courts. Pending when an amendment is made.  
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## INTRODUCTION

The right of private defence, otherwise known in English law as self-defence, is dated back to the period of antiquity as an inherent right of man which enables him to protect his interest against wrongdoers. In this regard, it forms an aspect of human right which is constitutionally guaranteed as follows:

*a person shall not be regarded as having been deprived of his life in contravention of this section<sup>2</sup>, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force, as is reasonably necessary... (a) for the defence of any person from unlawful violence or for the defence of property<sup>3</sup>.*

In the light of the above provision, it is clear that the right of private defence deals with the right such as ones protection of life and property and as such one may be correct to refer to the right of private defence more as a right than as a defence. However, the theoretical provision of self-defence is so nice to such an extent that it could be assumed that it completely exonerates the accused from criminal liability but practically, it operates with certain conditions, by virtue of the enabling provisions of both the criminal code and the penal code placing restrictions on the enjoyment of

the right. Thus, the objective of this study is to successfully highlight the practical nature of the right to private defence in Nigeria.

#### **THE CONCEPT OF PRIVATE DEFENCE**

Private Defence has not been given statutory definition in Nigeria, but has to be understood in the common Law context of which there are two aspects<sup>4</sup>. First, a man may, in defence of liberty, person or property, use such force as is necessary to obtain its object, and which does cause injury that is disproportionate to the injury sought to be prevented<sup>5</sup>. Secondly, a man may use so much force as is necessary in repelling an unlawful attack on his person or liberty but may not cause grievous bodily harm or death except in defence of life, limb or permanent liberty<sup>6</sup>.

The right of Private Defence extends to the protection of one's property and that of others from unjustifiable interference. In this regard, the right is not narrowly construed but embraces the defence of other persons<sup>7</sup> and their property<sup>8</sup> from wrongful invasion even though such persons are outside the relationship of master and servant, parent and child, and husband and wife. In *R. v. Duffy*<sup>9</sup>, the English Court of Appeal held that a woman could claim the right in defence of her sister, not because they are sisters, but because there is a general liberty as between strangers to prevent a felony. It must be noted that the right to private defence is not defeated by reason of the victim's immaturity of age, or of understanding, or unsoundness of mind or state of intoxication<sup>10</sup>. This is because such persons could be aided by others<sup>11</sup>.

In Nigeria, the statutory provisions governing the right to private defence are sections 282, 286 - 294 of the criminal code<sup>12</sup> and section 59 - 67 of the Penal Code<sup>13</sup> considered below as the constitutive instruments of the Right to Private Defence. It must be stressed here that, the provisions of the two codes to this effect are not identical but importantly they convey a similar message on the subject matter.

#### **THE CONSTITUTIVE INSTRUMENTS ON PRIVATE DEFENCE AND THEIR PRAGMATIC NATURE**

The Right to Private Defence deals with the protection of life and property but the enjoyment of the right is strictly based on complying with certain conditions which are in turn based on the consideration of what is reasonably necessary in the wordings of constitutional provision cited above and which also features in the following provisions of the criminal code<sup>14</sup>:

*A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances: (a) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence; (b) when he does or omits to do the act in order to save himself from immediate death or grievous harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats in to execution.*

It further provides<sup>15</sup>:

*It is lawful for any person who is in peaceful possession of a dwelling house, and for any person lawfully assisting him or acting by his authority, to use such force as he believes, on reasonable ground, to be necessary in order to prevent the forcible breaking and entering of the dwelling house, either by night or day, by any person whom he believes, on reasonable grounds, to be attempting to break and enter the dwelling house with intent to commit a felony or misdemeanor therein.*

However, generally, S.59 of the Penal Code provides that nothing is an offence which is done in the lawful exercise of the right of private defence. Ordinarily, the golden interpretation of the above provision seems to be a happy one in favour of the accused person but strictly speaking its technical application is not smooth sailing because the provision must be read in line with other provisions of the code for the purpose of application, in this regard S. 60 of the Penal Code provides that:

*Subject to the restrictions set out below, every person has a right to defend: (a) His own body and the body of another person against any offence affecting the human body. (b) The property, whether movable or immovable, of himself or any other person against any other act which is an offence falling under the definition of theft, mischief or criminal trespass or which is an attempt to commit any of these offences.*

Thus, the restrictions mentioned in the above provision are set-out in sections 62 and 63 of the Penal Code. Sections 286 - 294 of the Criminal Code state all of which seem to be taking away what has been given in the aforementioned provision<sup>16</sup>. For example S. 62 of the Penal Code provides:

*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.*

In the light of the above provision, self-defence must be proportional to the harm that is intended to be prevented, otherwise the use of the right will not be justified. Furthermore, S. 63 of the Penal Code provides 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. On the other hand, S. 32 of the Criminal Code generally offers its own restriction in the following words:

*But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous to the person of another, or an intention to cause such harm is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him.*

No doubt the above provisions restricts the use of the right of private defence to satisfy the condition of last resort after considering all the available options instantly

at hand. And it is at this juncture that the accused person reaction will be treated as a necessity in line with expressions of the provisions (above) demanding for what is reasonably necessary to justify the exercise of the right of private defence. In essence, where self-defence could not be used as a last resort, then, it will not be reasonably necessary to use particularly where the accused person has an option to run away and (or) preferably have recourse to the protection of the public authorities. But, then it must be appreciated that reasonableness or otherwise depend on the circumstances of each case.

However, this protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person; not to a case in which person using force which caused death or grievous harm endeavoured to kill or to do grievous harm to some person before the necessity of so preserving himself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict and quitted it or retreated from it as far as was practicable<sup>17</sup>. At this juncture, it is worth pointing out that S. 298 of the Criminal Code<sup>18</sup>, emphasizes a greater restriction, on the use of the right to private defence when compared with the aforementioned provisions of the codes, as it provides as follows:

*Any person authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.*

For all intents and purposes the above provision must be taken as a warning which absolutely creates fear in the mind of the user of the right to private defence. This is because every right thinking person cannot imagine the possibility of using force in a state of anger against his victim without injuring the victim. One imagines further, whether a person in such a state of another could control himself in the use of force to be within the range allowed by law without exceeding the limit intended by the law. Thus, the provision of S. 298 of the Criminal Code above completely worsens the whole issue of depending on the use of the right to Private Defence because if care is not taken, there exist the risk of the accused person being in danger of committing a crime instead of preventing a crime to be committed on him and protecting himself. Thus, for a vivid understanding of the pragmatic nature of the use of the right to private defence, the recent case of *Agbonwanre Omoregie v the state*<sup>19</sup> must be brought into limelight, as such it is used as the case study below:

#### **A CASE STUDY OF THE RIGHT TO PRIVATE DEFENCE IN NIGERIA**

*Agbonmwanre Omoregie v. the State* (supra) shows the recent decision of the Supreme Court on the pragmatic nature of the right to private defence while considering the following issues<sup>20</sup>:

1. *Whether the defence of self-defence raised by the appellant in his second statement to the police (exhibit p3) was belated as to justify the failure of the police to investigate same.*

2. *Whether the learned Justices of the Court of Appeal were right to hold that the learned trial Judge properly disbelieved the appellant's evidence of self-defence.*

Briefly, the facts of the above case was that, the 1st accused person and two others alleged to have killed the deceased (known as Friday Agborghae), in a fight between the 2nd accused and the deceased. They were therefore, charged on a two-count charge of conspiracy to commit murder and murder in the High Court of Justice, Edo State. The trial court discharged the 2nd & 3rd accused for lack of evidence, but found the 1st accused guilty and sentenced him to death<sup>21</sup>. Aggrieved, the accused appealed to the Court of Appeal where the decision of the trial court was confirmed. Yet, aggrieved he appealed to the Supreme Court<sup>22</sup>. In the determination of the appeal, the Supreme Court considered the provision of section 32 (4) of the Criminal Code (cited above) for the interpretation of the practical use of the right to private defence and subsequently dismissed the appeal by affirming the decisions of the lower courts<sup>23</sup>. In arriving at the decision, the supreme court lays down certain conditions as ingredients that must be present before the defence of self-defence can avail an accused person. These are:

- (a) The accused must be free from fault in bringing about the encounter.
- (b) These must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity.
- (c) There must be no safe or reasonable mode of escape by retreat.
- (d) There must have been a necessity for taking life<sup>24</sup>.

The Supreme Court re-emphasised that in order to sustain the defence, all the above ingredients must co-exist and be established. In the instant case, none of the above ingredients was present, therefore, the trial court rightly convicted the accused person<sup>25</sup>. Also, the Supreme Court held that the defence of self-defence, if successful is a complete defence or answer to the charge of murder or manslaughter. All an accused person is required to do is to raise the defence in his plea, leaving the prosecution with the burden of showing without any reasonable doubt that by the evidence called by it, what the accused did in causing the death of the deceased, completely ruled out the defence of self-defence. In other words, the prosecution has to show that the defence was not available to the accused person having regard to the circumstances of the case. In the instant case, the prosecution was able to prove that the defence raised by the 1st accused was not available to him, therefore, the trial court was right to convict him<sup>26</sup>. Nevertheless, by virtue of the above cited authorities, one is right to conclude with judicial authorities that, the law permitting the use of the right to private defence is tantamount to what may be called "a give and take", as it gives on one hand, and completely takes away with the other hand, by imposing restrictions on the use of the right. In view of that, Okonkwo and Naish<sup>27</sup> submit as follows:

*The effect of these provisions is obscured since in many cases, a person cannot defend his property effectively without causing any harm, however, trivial, to the person from whom he defends it...*

### **THE SCOPE OF THE APPLICATION OF THE RIGHT TO PRIVATE DEFENCE IN NIGERIA**

The right may be exercised against any person committing or attempting to commit any offence against the human body<sup>28</sup>. And of course subject to the restrictions highlighted above, it extends to killing where the act being repelled is one of the following categories<sup>29</sup>.

- (a) An attack which causes reasonable apprehension of death or causing grievous hurt.
- (b) Rape or assault with intent to gratifying unnatural lust.
- (c) Abduction or kidnapping.

It means that, if the assault does not come within the categories enumerated above the right of private defence will not extend to causing death. Specifically, it follows that an unnatural offences committed on an animal cannot justify killing. The right of private defence is also exercisable against a person committing or attempting to commit property offences, of course, here too, the right of private defence of property (subject to the restriction considered above) extends to killing when the act being repelled is one of the following offences<sup>30</sup>.

- (a) Robbery
- (b) House breaking and burglary
- (c) Mischief by fire committed on any building, tent or vessel used as a human dwelling or a place for the custody of property.
- (d) Theft, mischief of house trespass in such circumstances as may reasonably cause apprehension that if such right of private defence is not exercised, death or greavious hurt will be the consequence.

Generally, in the use of the right of private defence if the right is exceeded and it caused death where it is exercised in good faith, without premeditation and without intending to do more harm than necessary, it becomes culpable homicide not punishable with death. However, the right of self-defence will succeed in circumstances permitted by the law if the accused (user) could put into account in each case, the amount of force threatened and the nature of crime committed. In that regard, it means that there will be no defence for a man who commits an offence (no matter how simple) in an attempt to prevent a threat of serious harm made to him because he could not comply with the restrictions set by the law.

Then, here, it seems, the law is too harsh, as such it calls for a more flexible and sensible approach in the rule. Thus “the effect of these provisions is obscure since in many cases a person cannot defend his property effectively without causing any harm, however trivial, to the person from whom he defends it”. This is especially so, in view of the fact that "harm" means any bodily hurt, disease, or disorder, whether permanent or temporary<sup>31</sup>. It is suggested that these provision ought to be amended so as to allow the owner of property to use reasonable force to defend it provided he does not inflict grievous harm<sup>32</sup> or manslaughter<sup>33</sup>. Also the exercise of private defence may extend to the risk of injuring a third party<sup>34</sup>. Finally, there can be no right of private defence against any act which does not reasonably cause the

apprehension of death or grievous hurt, if done or attempted to be done:<sup>35</sup>

(a) by a public servant doing an act justifiable by law and in good faith, or

(b) by the direction of a public servant acting lawfully in good faith.

But, the defence is not available against extortion<sup>36</sup>, criminal misappropriation<sup>37</sup>, criminal breach of trust<sup>38</sup> receiving stolen property<sup>39</sup>, or cheating<sup>40</sup>. Again the defence is not available in criminal intimidation<sup>41</sup> or insult<sup>42</sup>.

## CONCLUSION

It is clear that stringent limits have been set to the use of the right to private defence by virtue of the various constitutive legal instruments. Thus, in line, with the aforesaid studies, the following could be construed: (i) A person is only entitled to the right of self defence by the use of reasonable force provided no excessive harm is done to the person against whose conduct the property is being defended otherwise, the accused person will be reversely held liable; (ii) where there is no reasonable apprehension of danger, there is no right of self-defence. When it does arise, it must be exercised for the purposes of defence only, not for retribution; once a person commences to exercise the right, though he must do no harm than necessary, he may continue to exercise it until, he is out of the danger; (iii) in view of 1st and 2nd above, the accused must be very cautions as to the proper time to exercise the right otherwise he would be held liable. Therefore, with regard to the study of the present situation it is suggested that some of the relevant provision studied above, should be modified with certain reservation clauses (particularly S. 298 of the Criminal Code & S. 62 of the Penal Code) so as to make their application less stringent for the user in time of need.

## NOTES

<sup>2</sup>The section is S.33, chapter VI, CFRN, 1999 which relates to the constitutional guarantees of right to life.

<sup>3</sup>S. 33 (2) (a), Ibid.

<sup>4</sup>Ofori, Amankwah, E.H. - Criminal Law. In The Northern State of Nigeria, Gaskiya Corporation Limited, Zaria, Nigeria 1986, P. 252

<sup>5</sup>Ibid

<sup>6</sup>Ibid

<sup>7</sup>S. 60(a) PC, S. 32 (3)

<sup>8</sup>S. 60(b) P.C. & 282 CC, 289 - 294

<sup>9</sup>(1967) Q. B. 63

<sup>10</sup>S. 61 PC, Vol 13, Cap 3, LFN, 2004.

<sup>11</sup>S. 66 (a) P.C op.cit, and also S. 288 cc, volume 4, Cap C 38, LFN, 2004.

<sup>12</sup>Vol. 4, Cap C38, LFN, 2004

<sup>13</sup>Vol. 13, Cap P3, Ibid

<sup>14</sup>S. 32 (3) & (4) CC Op.cit.

<sup>15</sup>S. 282, Criminal Code, Ibid

<sup>16</sup>That is, S. 32 (3) & (4) CC, S. 282 cc, and S. 59 PC generally

<sup>17</sup>287 CC, op.cit.

- <sup>18</sup>Vol. 4, Cap. C38, Ibid.
- <sup>19</sup>(2009) All FWLR, 230
- <sup>20</sup>Op.Cit., P. 230 - 231
- <sup>21</sup>Ibid. P. 231
- <sup>22</sup>Ibid.
- <sup>23</sup>Both the High Court of Edo State and Court of Appeal.
- <sup>24</sup>Omeregie V. The State, Op.Cit, P. 232
- <sup>25</sup>Ibid. See also Liya V. State (1998) 2n NWLR (Pt. 538) 397; Kwaghsir V. State (1995) 3 NWLR (Pt. 386) 651; and Nwambe V. the State (1995) 3.
- <sup>26</sup>Omeregie V. The State, op.cit, P. 231 - 232 See also Baridam V. The State (1994) 4 NWLR (Pt. 233) 17; and Duru V. The State (1993) 3 NWLR (Pt. 281) 283.
- <sup>27</sup>Criminal Law in Nigeria, Spectrum Publication, Sweet & Maxwell, London 1980, p. 226.
- <sup>28</sup>See S. 220 - 285 PC, and 287 CC, S. (32) and (4) CC and S.33 (2) Constitution Fed. Rep. Nig. 1999. See S. 65 P.C.
- <sup>29</sup>Ofori - Amankwah, E.H. - Criminal Law. In The Northern State of Nigeria op.cit. p. 258
- <sup>30</sup>Ibid. P. 259.
- <sup>31</sup>S. ICC
- <sup>32</sup>Okonkwo, C.O. - Okonkwo and Naish: Criminal law in Nigerian First edition, Sweet and Maxwell, London, 1980, P. 226.
- <sup>33</sup>S. 222 (2) PC and S. 217 cc respectively.
- <sup>34</sup>See S. 67 PC
- <sup>35</sup>See S. 64 PC
- <sup>36</sup>S. 291, Penal Code, Op.cit Also see Ofori - Amankwah, E. H., op.cit, P. 254.
- <sup>37</sup>S. 311, Penal Code, Ibid
- <sup>38</sup>S. 317, Penal Code, Ibid.
- <sup>39</sup>S. 317, Penal code, Ibid
- <sup>40</sup>S. 320, Penal Code, Ibid
- <sup>41</sup>S. 396, Penal Code, Ibid.
- <sup>41</sup>S. 399, Penal Code, Ibid.