

BATTERED WOMEN: THE GENDERED NOTION OF DEFENCES AVAILABLE

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Battered Women Syndrome is a psychological theory propounded by Dr. Lenore Walker that explains why battered women who are compelled to kill their partners continued to stay in the relationship in the first place. While focusing on the evolution of the Battered Women Syndrome in other countries, especially United Kingdom; this paper studies the interpretation of the corresponding 'Nallathangal Syndrome' as applied in the Indian context.

However, the legal recognition of the Battered Women Syndrome is at its nascent stage in India. While a lot is written in India about the shortcomings of the Protection of Women from Domestic Violence Act, 2005 there is little or no focus on battered women who retaliate. Even the official statistics relating to crimes in India do not account for it. The only available legal framework for them is the gendered Indian Penal Code and the defences available therein.

This paper explores the defences available to battered women compelled to cause the death of their partners in self-preservation. It will study the essentials of self-defence, provocation and diminished responsibility/insanity to explain how battered women are excluded from the criminal justice system. It will also study the application of the Battered Women Syndrome theory within the existing essentials of the abovementioned defences. It will conclude with suitable policies to keep in mind while dealing with battered women to bridge the gap between the criminal justice system and battered women.

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I. INTRODUCTION

Battered Woman Syndrome ('BWS') is a psychological theory that explains why battered women continue to stay in abusive relationships, and why they may be compelled to kill their partners despite other options of escape ostensibly being available to them.¹ Acknowledging that battered women may be compelled to cause the death of their husbands due to domestic violence, the Guwahati High Court set aside murder charges in the case of *Manju Lakra v. State of Assam*,² and instead convicted Manju Lakra for culpable homicide not amounting to murder. In this case, Manju Lakra was subjected to persistent acts of domestic violence. On one such occasion, failing to bear the violence any longer, she snatched the piece of wood with which her husband was beating her and hit him. He succumbed to his injuries. This is a landmark judgment because it is the first reported case in India,³ where provocation has been used as a defence for a battered woman who killed her partner. The case refers to 'Nallathangal syndrome', which is judicially recognized as the Indian equivalent of the BWS.⁴ 'Nallathangal syndrome' is based on the Nallathangal ballad, an ancient piece of Tamil literature. The ballad narrates the heart wrenching trials and tribulations of a rich lady who succumbs to unfathomable and agonizing misery due to unexpected poverty and commits suicide along with her children to escape the misery.⁵ It is interesting that the court relies on a ballad that has no reference to domestic violence to draw an analogy with BWS.

¹ LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 45 (Harper, 1980).

² *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207: (2013) 4 GLT 333.

³ As available on legal databases.

⁴ *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86.

⁵ There is no authoritative source available for the ballad, though many media reports refer to it and movies have been made on this. See *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86 for

However, the legal recognition of BWS is at its nascent stage in India and cases such as the *Manju Lakra* case appear to be an exception. While a lot is written in India about the shortcomings of the Protection of Women from Domestic Violence Act, 2005 there is little or no focus on battered women who retaliate. Even the official statistics relating to crimes in India do not account for it.⁶ Offences such as murder are reported under various categories such as murder due to illicit affairs, honour killings, and vendetta, amongst others; yet there is no category for battered women who retaliate. The only available legal framework for them is the gendered Indian Penal Code and the defences available therein.

While critiquing the law, feminist scholars often look beyond the written word to determine the gendered constructions of the law. They criticise laws for echoing the male point of view, and for excluding the myriad experiences of varied communities, including women.⁷ A common criticism of the Indian criminal justice system by the feminist school of thought is of the underlying biases in the defences to homicide in the Indian Penal Code, 1860.⁸ The argument is that the qualifying 'imminent attack', 'reasonable person' and 'grave and sudden' attached to the defences of self-defence and provocation have been shaped without taking into consideration the perspectives and experiences of women.⁹

For instance, courts rely upon the social context and the emotional background of society to determine the reasonableness of one's actions.¹⁰ In the past, they have made exceptions for violence by men and reduced the sentence awarded by accepting reasons of "sexual jealousy and injured vanity"¹¹ for murder. They have also applied 'grave and sudden provocation' for men who commit murder to protect patriarchal notions of honour, such as adultery.¹² However, there is a stark difference in its application for battered women who retaliate. The application of grave and sudden provocation fails to incorporate responses of women, especially in relation to domestic abuse. By not reading in the BWS theory, the defence tends to exclude battered women who retaliate after a cooling down period. Further, there are no cases in India where the benefit of self-defence has been availed in such instances.¹³ This exclusion in the formulation of laws leads to questions relating to the legitimacy, equality and universality of the law.

reference to the syndrome.

⁶ Motives of Murder and Culpable Homicide not Amounting to Murder During 2015, NATIONAL CRIME RECORDS BUREAU, (2015), <http://ncrb.nic.in/StatPublications/CII/CIIT2015/FILES/Table%203.2.pdf>.

⁷ Nicola Lacey, *Feminist Legal Theories And The Rights Of Women*, in GENDER AND HUMAN RIGHTS, 13, 26 (Karen Knop ed., 2004).

⁸ Ved Kumari, Gender Analysis of The Indian Penal Code, in ENGENDERING LAWS: ESSAYS IN HONOUR OF LOTIKA SARKAR (Eastern Book Company, 1999).

⁹ *Id.*

¹⁰ *Budhi Singh v. State of H.P.*, (2012) 13 SCC 663.

¹¹ *Amruta v. State of Maharashtra*, (1983) 3 SCC 50; AIR 1983 SC 629.

¹² *Raghavan Achari v. State of Kerala*, 1993 Supp (1) SCC 719; AIR 1993 SC 203.

¹³ As per e-legal databases.

I intend to analyse and contribute to the discussion on battered women from a feminist perspective in India by comparing it to the evolution of BWS in the United Kingdom. While heavy reliance is placed on the United Kingdom, references are made to Canada, Australia and the United States as well, where substantial progress has been made in this regard. The reliance on United Kingdom is due to the development in law on Battered Woman Syndrome. Further, the application of defences in India mirrors the application of the defences as they were in United Kingdom. The courts in India often refer to the application of defences in United Kingdom, as seen in *K.M. Nanavati v. State of Maharashtra*¹⁴ and *Manju Lakra v. State of Assam*.¹⁵ References are made to United States; Victoria, Australia; and Canada to substantiate my arguments through the course of the paper.

To this end, I will first discuss the concept of BWS and explain why battered women may be compelled to kill their partners as against other alternatives such as retreating from the relationship or approaching legal authorities. I will also study the interpretation of the corresponding 'Nallathangal syndrome' as applied in the Indian context. Thereafter, I will address the defences of self-defence, provocation and diminished responsibility/insanity available to battered women who are coerced to kill their partners. I will also study the application of BWS theory within the existing essentials of defences. In this context, I intend to critically analyse the applicability of diminished responsibility and BWS in such cases as certain sections of feminist scholars are concerned that these defences cause more harm than good. I will conclude with suitable policies to keep in mind while dealing with battered women to bridge the gap between the criminal justice system and battered women.

II. BATTERED WOMAN SYNDROME

The 'Battered Woman Syndrome' is a psychological theory propounded by Dr. Lenore Walker to help explain why abused women choose to kill their abusive partners instead of simply leaving them.¹⁶ She developed a theory studying the cycle of abuse known as the 'Walker Cycle Theory'.¹⁷ The 'Walker Cycle Theory' explains the three distinct phases of a typical battering relationship. The first is the 'tension building phase', during which there are verbal fights between the man and the woman. This leads to an 'acute battering incident',¹⁸ i.e. the second phase, where the batterer is filled with uncontrollable anger and rage. These two phases are then followed by a 'loving contrition' phase during which the batterer

¹⁴ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605: 1962 Supp (1) SCR 567.

¹⁵ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207: (2013) 4 GLT 333.

¹⁶ Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN'S L.J. 99, 101 (1997); LENORE E. WALKER, *supra* note 1.

¹⁷ LENORE E. WALKER, *supra* note 1.

¹⁸ LENORE E. WALKER, *supra* note 1, at 95-104.

repents his acts and profusely apologizes, promising to never do it again.¹⁹ This operates as a 'positive reinforcement to remain in the relationship'.²⁰ However, this is a continuous cycle of violence, which soon leads to the 'tension building phase'.²¹ This cyclical violence leads to 'learned helplessness', a psychological state of mind introduced by psychologist Martin Seligman where battered women believe that they are in a helpless situation.²² Considering themselves to be in a hopeless situation over which they have no control, they do not leave their abusers.²³

According to Walker, battered women, having no control over their abusive situation, gradually become passive and believe that it is impossible to escape, even when escape is objectively a possibility.²⁴ The drive and determination to get out of the situation or the relationship diminishes.²⁵ Bound by socio-economic factors beyond their control, these women are trapped within the cycle of violence.²⁶ Further, BWS creates a sense of helplessness in battered women, where they believe that legal recourses will fail them.²⁷ Hopelessness and 'learned helplessness' may lead battered women to consider the death of the abuser to be a final and clear solution to their vicious cycle of violence.²⁸

Not all battered women kill their abusive partners to escape the relationship. However, it is critical to note that the differences between battered women who are compelled to kill and those who do not kill are grounded in the man's behaviour as opposed to that of the woman.²⁹ The frequency and severity of violence that a battered woman has had to endure determines whether a battered woman is compelled to kill her abusive partner.³⁰ Thus, 'learned helplessness', desperation and self-preservation may compel a battered woman to kill her abusive partner, depending on the sensitivity of the situation.

III. NALLATHANGAL SYNDROME: THE BWS OF INDIA

The law for battered women is still at its nascent stage in India and BWS is not legally recognised. The Madras High Court was the first court to recognize

¹⁹ LENORE E. WALKER, *supra* note 1.

²⁰ LENORE E. WALKER, *supra* note 1, at 65.

²¹ LENORE E. WALKER, *supra* note 1, at 96.

²² LENORE E. WALKER, *supra* note 1.

²³ LENORE E. WALKER, *supra* note 1.

²⁴ LENORE E. WALKER, *supra* note 1.

²⁵ Rebecca D. Cornia, *supra* note 16, at 103.

²⁶ Bess Rothenberg, "We don't have time for Social Change": *Cultural Compromise and the Battered Women Syndrome*, 17(5) GENDER & SOC'Y 771-787 (2003).

²⁷ *Id.*

²⁸ Michael R. Slaughter, *The Battered Woman Syndrome and Self Defense*, 1 WOMEN'S L.J. 78 (1997).

²⁹ Lenore E. Walker, *Who are Battered Women?*, 2(1) FRONTIERS: A JOURNAL OF WOMEN'S STUDIES 52-57 (1997).

³⁰ *Id.*

‘Nallathangal syndrome’ as the Indian version of BWS.³¹ Using the Nallathangal ballad, the Madras High Court conceptualized ‘Nallathangal syndrome’ for women who are coerced to commit suicide and kill their kids to escape the misery of the violence they are subjected to.³² Following the Madras High Court rulings, the Guwahati High Court set aside the murder charge against Manju Lakra, considering it as an act done due to sustained provocation.³³ By stating that in the same facts and circumstances, a battered woman might turn on her aggressor as opposed to committing suicide, the Court held that a similar exception should be applicable.³⁴

The common refrain asks why battered women do not walk out of a violent domestic situation and seek the protection of law enforcement agencies. However, deeply ingrained traditional socialization processes make battered women go to great lengths to sustain the relationship and hide the violence.³⁵ In some instances, battered women do love their partner despite the abuse and often blame themselves for upsetting their partner.³⁶ Further, in addition to their state of ‘learned helplessness’, the lack of psychological and physical support within the socio-cultural context of India makes it even more difficult for Indian women.³⁷ Legal remedies and law enforcement agencies in India often fail battered women and exclude their lived experiences, perspectives and realities. Battered women are often strong-armed into compromising or reconciling in cases of domestic abuse.³⁸

Thus, this context provides grounding for why battered women may not walk out of the relationship or consider alternate remedies until they see no other option but to retaliate violently. BWS can be used to demonstrate the impact of domestic violence on a woman’s state of mind to justify the act of homicide. Establishing BWS through expert testimony was first introduced in the United States,³⁹ and Canada.⁴⁰ The Supreme Court of Canada considers expert testimony relevant and necessary for the jurors to understand and determine the actions of

³¹ *Supra* note 4.

³² *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86; *Poovammal v. State of T.N.*, 2012 SCC OnLine Mad 489; *Amutha v. State*, 2014 SCC OnLine Mad 7364: (2014) 3 MLJ (Cri) 562.

³³ LENORE E. WALKER, *supra* note 1.

³⁴ LENORE E. WALKER, *supra* note 1.

³⁵ *Who are Battered Women?*, *supra* note 29.

³⁶ *Who are Battered Women?*, *supra* note 29.

³⁷ Leela Khanna, *The State and Domestic Violence: The Limitations of India’s Dowry Prohibition Laws*, SENIOR PROJECTS SPRING BARD COLLEGE (2015); Vidya Venkat, *No Country for Women*, THE HINDU, Mar. 8, 2015, <http://www.thehindu.com/sunday-anchor/no-country-for-women/article6969953.ece>.

³⁸ Read Flavia Agnes, *Section 498A, Marital Rape and Adverse Propaganda*, L(23) ECON. & POL. WKLY. 12 (June 6, 2015); Flavia Agnes and Audrey D’ Mello, *Protection of Women from Domestic Violence*, L(44) ECON. & POL. WKLY. 76 (Oct. 31, 2015) for an analysis of domestic violence laws and cases in India.

³⁹ *Ibn-Tamas v. United States*, 407 A 2d 626 (DC 1979).

⁴⁰ *R. v. Lavallee*, (1990) 1 SCR 852.

the battered women.⁴¹ Several courts have upheld the admissibility of BWS and appellate courts have remanded cases to trial courts for not adequately examining the relevance of such evidence.⁴² The United Kingdom followed suit, establishing the defences of cumulative provocation, loss of self-control or diminished responsibility through BWS theory.⁴³ In India, however, the instances of BWS or the 'Nallathangal syndrome' being taken into account by the Courts in India are few and far between. The legal defences available in India are incapable of dealing with cases of BWS, thus making it critical to discuss the legal defences available to battered women who are compelled to kill their partners.

IV. SELF DEFENCE

It is surprising that no battered woman has been able to successfully plead self-defence in court in India or in UK despite the fact that a battered woman is compelled to kill her abusive partner in act of necessity or self-preservation.⁴⁴ Self-defence is neither referred to nor argued in *Manju Lakra*.⁴⁵

The four essential characteristics to be satisfied for a successful plea of self-defence are:⁴⁶ i) Belief that the defendant was in *imminent danger* of unlawful bodily harm ii) Use of *reasonable amount of force* to counter the threatened danger iii) Defendant *cannot be the aggressor* iv) *No opportunity to retreat safely*. This defence is traditionally used in cases where a defendant is facing imminent threats and lashes out to harm the aggressor,⁴⁷ thereby using physical force to protect his/her self from physical harm.⁴⁸

The application of self-defence is not considered feasible because the facts of battered women who kill their partners do not conform to the traditional conception of self-defence. For example, a battered woman often kills her batterer after the attack has ended or at a time when there is no apparent immediate threat.⁴⁹ It is also argued that the act of killing her husband, especially after the attack

⁴¹ *R. v. Lavallee*, (1990) 1 SCR 852.

⁴² *Smith v. State*, 247 Ga 612: 277 SE 2d 678 (1981); *Bonner v. State*, 740 So 2d 439, 444 (Ala Crim App 1998); *People v. Humphrey*, 921 P 2d 1, 2 (Cal 1996); *Ibn-Tamas v. United States*, 407 A 2d 626, 639 (DC 1979); *State v. Hickson*, 630 So 2d 172 (Fla 1993); *People v. Minnis*, 455 NE 2d 209 (Ill App Ct 1983); *State v. Hundley*, 693 P 2d 475 (Kan 1985); *State v. Anaya*, 438 A 2d 892, 894 (Me 1981); *Commonwealth v. Rodriguez*, 633 NE 2d 1039 (Mass App Ct 1994); *People v. Christel*, 537 NW 2d 194, 194 (Mich 1995).

⁴³ *R. v. Humphreys*, (1995) 4 All ER 1008; *R. v. Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.

⁴⁴ LENORE E. WALKER, *supra* note 1.

⁴⁵ LENORE E. WALKER, *supra* note 1.

⁴⁶ PEN. CODE, No. 45 of 1860, India Code (1860), <http://indiacode.nic.in>, § 99; Criminal Law Act 1967, c. 58, § 3, <http://www.legislation.gov.uk/ukpga/1967/58>.

⁴⁷ M.J. Bredemeier, *Dwelling Defense Law In Missouri: In Search of Castles*, 50 UMKC L. REV. 64, 66 (1981).

⁴⁸ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 855-75 (2000).

⁴⁹ *State v. Leidholm*, 334 NW 2d 811 (ND 1983): where a battered woman killed her batterer husband when he was sleeping.

has ended, does not amount to use of reasonable force and battered women are often asked why they have not walked out of the relationship.⁵⁰ The omission to walk out of the relationship is treated as an argument in favour of the use of an unreasonable amount of force because the woman did not utilize the opportunity to retreat safely.⁵¹ This highlights the gendered bias of the defence insofar as battered women are considered. The construction of the defence is based on aggressive, spontaneous, and masculine force of a male, which is incompatible with battered women defendants.⁵² Thus to counter this, battered women who have caused the death of their partners in USA and Canada, use BWS to support their claims.⁵³

A. Battered-Woman Syndrome and Self -Defence

According to the BWS theory, a battered woman perceives danger during interim periods of peace between episodes of abuse because she is in a perpetual state of fear and anxiety during the first two phases of the cycle.⁵⁴ Considering periods of peaceful intermission as her only opportunity to defend herself against a larger and stronger man, a battered woman may decide to strike then.⁵⁵ This is reflected in *State v. Wanrow*⁵⁶ where the Supreme Court of Washington extended the objective test to take into consideration the circumstances surrounding the defendant as well. According to the Court, this extension was important for the jury to “stand as nearly as practicable in the shoes of the defendant, and from this point of view determine the character of the act”. Therefore, from this viewpoint any reasonable person in her position would be in a constant fear of imminent harm, thereby satisfying the first element of self-defence.

Further, the cycle theory helps clarify the use of reasonable force against the aggressor. Anticipating the aggression of a stronger and larger man or an otherwise physically intimidating and abusive man, a battered woman may be compelled to resort to deadly force when she is trapped in a cycle of potentially deadly violence.⁵⁷ Subtle changes in mannerisms of the abuser are indications to a battered woman of another imminent attack, while a third party may consider the

⁵⁰ Lenore E. Walker et al, *Beyond the Juror's Ken: Battered Women*, 7 VERMONT L.J. 1, 5 (1982).

⁵¹ *R. v. Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.

⁵² See, Kumari, *supra* note 8; Phyllis L. Crocker, *The Meaning of Equality For Battered Women Who Kill Men In Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 143 (1985).

⁵³ David L. Faigman, *The Battered Woman Syndrome And Self Defense: A Legal and Empirical Dissent* 72 VIRGINIA L. REV. 619 (1986); *People v. White*, 90 Ill App 3d 1067, 1068-71: 414 NE 2d 196, 198-200 (1980); *State v. Lynch*, 436 So 2d 567, 568-69 (La 1983); *People v. Giacalone*, 242 Mich 16, 19-22: 217 NW 758, 759-60 (1982); *People v. Tortes*, 128 Misc 2d 129, 131-35: 488 NYS 2d 358, 360-63 (1985); *R. v. Lavallee*, (1990) 1 SCR 852.

⁵⁴ Lorraine P. Eber, *The Battered Wife's Dilemma: To Kill Or To Be Killed*, 32 HASTINGS L.J. 895, 928 (1981).

⁵⁵ LENORE E. WALKER, *supra* note 1, at 142.

⁵⁶ *State v. Wanrow*, 88 Wash 2d 221: 559 P 2d 548 (1977).

⁵⁷ David L. Faigman, *The Battered Woman Syndrome And Self-Defense: A Legal and Empirical Dissent*, 72 VIRGINIA L. REV. 619 (1986).

change insignificant and insufficient to create reasonable fear,⁵⁸ thereby fulfilling the second essential characteristic.

Additionally, battered women develop 'learned helplessness', a condition akin to depression,⁵⁹ due to which they do not retreat from the relationship.⁶⁰ In *State v. Kelly*,⁶¹ the Supreme Court of New Jersey recognized this, stating that some women "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation."⁶² The socio-economic and cultural standards of a battered woman play a key role in determining whether the battered woman has the capacity to retreat.⁶³ Thus, 'learned helplessness' coupled with socio-economic and cultural pressures, in India especially, causes a battered woman to stay in an abusive relationship, satisfying the remaining essential characteristics of the defence.

Acknowledging this, courts in the United States and Canada accept BWS as a basis for self-defence when established through expert testimony. The Victoria Law Reform Commission in Australia also placed reliance on recognizing self-defence in such cases. It provided legislative guidance relating to the relevance of domestic abuse and family violence in relation to defences to homicide.⁶⁴ In addition to this, the Victorian Government introduced the offence of 'defensive homicide' to provide a safety net for women stuck in a domestic violence situation. Initially appreciated for providing a middle ground between self-defence and provocation, it proved to be more problematic than intended. Statistics indicated that the eventual application of 'defensive homicide' served as a safety net for men to 'excuse' their violent behaviour. The reliance of men on 'defensive homicide' in non-family situations went against the purpose of enactment of defensive homicide.⁶⁵ Hence, the Victorian Government abolished the offence of defensive homicide and provided self-defence for all offences.⁶⁶

⁵⁸ Phyllis L. Crocker, *supra* note 52, at 127.

⁵⁹ Abramson *et al.*, *Learned Helplessness In Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49, 50 (1978).

⁶⁰ LENORE E. WALKER, *supra* note 1, at 86.

⁶¹ *State v. Kelly*, 97 NJ 178: 478 A 2d 364 (1984).

⁶² *State v. Kelly*, 97 NJ 178: 478 A 2d 364 at 372 (1984).

⁶³ Elizabeth Kenny, *Battered Women Who Kill: The Fight Against Patriarchy*, U.C. LONDON JURIS. REV. (2007).

⁶⁴ Thomas Crofts and Danielle Tyson, *Homicide Law Reform in Australia: Improving Access to Defenses for Women Who Kill Their Abusers*, 39(3) MONASH U.L. REV. 864 (2014)

⁶⁵ Kate Fitz-Gibbon and Sharon Pickering, *Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond*, 52 BRITISH J. OF CRIMINOLOGY 159, 168 (2012).

⁶⁶ *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*, pt 1C div 2 s 322M. It provides for family violence and self-defense:

"(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if-

(a) the person is responding to a harm that is not immediate; or

However, contrary to the discussions and amendments in other countries, the situation in India remains dismal. The gendered essentials of self-defence remain, making the application of the defence difficult in these cases. Like I mention, the defence has not even been raised in *Manju Lakra*. Therefore, it is critical for the legislature and the judiciary in India to begin understanding and theorizing the BWS within the criminal justice system to help battered women overcome the legal impediments concerning application of self-defence.

V. PROVOCATION

This is one of the most commonly used defences by a battered woman in a murder charge. It is a partial defence that reduces the charge of murder to that of culpable homicide not amounting to murder in India.⁶⁷ The essentials of the traditional defence of provocation are similar in UK and in India, but the defence has evolved differently in the UK, eventually leading to its replacement with the defence of loss of self-control.⁶⁸ The advancement of the BWS theory has also contributed significantly to amendments in law and evidentiary practices in the Australian state of Victoria.⁶⁹ Previously, provocation in Victoria included within its ambit the cumulative acts of provocation and the context in which the provocative act occurred - immediate loss of control was not necessary.⁷⁰ Despite this, the defence was found to be inherently male-oriented and 'beyond redemption',⁷¹ and eventually abolished.⁷² Acknowledging that the defence may benefit battered women who retaliate, the Victorian Government agreed with the Victoria Law Reform Commission, which held that the "costs of its retention outweigh any

(b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether-

(a) a person has carried out conduct while believing it to be necessary in self-defence; or

(b) the conduct is a reasonable response in the circumstances as a person perceives them."

⁶⁷ PEN. CODE, No. 45 of 1860, India Code (1860), <http://indiacode.nic.in>, § 300 explanation 1:

"When culpable homicide is not murder: Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

⁶⁸ Coroners and Justice Act 2009, c. 25, § 54, http://www.legislation.gov.uk/ukpga/2009/25/pdfs/ukpga_20090025_en.pdf; Kate Fitz-Gibbon, *Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control*, 40(2) J.L. & Soc'y 280-305 (2013).

⁶⁹ *The Crimes (Homicide) Act 2005*.

⁷⁰ *R. v. Mui Ky Chhay*, (1994) 72 A Crim R 1, 13; *Mehemet Ali v. R.*, (1957) 59 WALR 28; *R. v. R.*, (1981) 28 SASR 321.

⁷¹ Thomas Crofts, *supra* note 64.

⁷² *The Crimes (Homicide) Act 2005*. THE VICTORIAN LAW REFORM COMMISSION, DEFENSES TO HOMICIDE FINAL REPORT, 2004: "failed to be persuaded by arguments that provocation is a necessary concession to human frailty or that provoked killers are not murderers".

potential advantages”.⁷³ Instead, they focused on the application of self-defence for all offences.

The traditional definition of provocation comes from *R. v. Duffy*,⁷⁴ in which it was held that “provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his [or her] mind.” Further, Section 3 of the Homicide Act amended this to the extent that it was left to the jury to determine whether a ‘reasonable man’ would have behaved in such a manner.

A. Sudden and Temporary Loss of Self-Control

The jury ought to consider the relevant circumstances, nature of provocative act, relevant conditions in which the act took place, the sensitivity or otherwise of the defendant and the time, if any, which elapsed between the provocation and the act which caused death to determine whether the defendant was provoked to the extent of losing self-control.⁷⁵ Ostensibly all-encompassing in nature, this defence overlooks the ‘slow burning effect’ due to which women retaliate after long periods of abuse.⁷⁶ The essentials of sudden and temporary loss of self-control fall short in protection of battered women, as explained below:

(a) *Nature of the Provocative Act*

Battered women often resort to violence after long periods of victimization by their partners.⁷⁷ However, it is not clear whether the judicial understanding of this test would include cumulative violence throughout the period of the relationship or whether it would arbitrarily include only the most recent battering.⁷⁸ In *Thornton*,⁷⁹ the Court of Appeal showed no inclination to include Thornton’s exposure to violence for months and concentrated merely on the events of the night leading up to her resorting to violence. In *R. v. Davies*,⁸⁰ it was held that it would be “too generous to take account of the deceased’s course of conduct throughout the whole year preceding the homicide”. The requirement of a ‘sudden’ reaction illustrates the masculine nature of this defence, by relying on the ‘heat of the

⁷³ *Id.*, at xxviii.

⁷⁴ *R. v. Duffy*, (1949) 1 All ER 932.

⁷⁵ JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 354 (7th ed. 1992).

⁷⁶ Alison Young, *Conjugal Homicide and Legal Violence: A Comparative Analysis*, 31 OSGOODE HALL L.J. 761 (1993).

⁷⁷ Katherine O’Donovan, *Defences for Battered Women Who Kill*, 18 J.L. & Soc’y 219 (1991).

⁷⁸ Alison Young, *Femininity As Marginalia: Two Cases of Conjugal Homicide*, in CRIMINAL LEGAL PRACTICES (P. Rush et al eds., Oxford University Press, 1997).

⁷⁹ *R. v. Thornton* (No. 2), (1996) 1 WLR 1174.

⁸⁰ *R. v. Davies*, 1975 QB 691; (1975) 2 WLR 586; (1975) 1 All ER 890.

moment' to murder in 'cold blood' excluding the emotions and characteristics of battered women.

(b) Relevant Circumstances of the Act

According to this element, the court is free to take into account all the different aspects of a situation. However, courts tend to exclude various aspects and the history of a case by relying on the act alone.⁸¹ Judges tend to structure their interpretations in a manner that suppresses the perspectives of a battered woman while directing the jury, for instance, by calling the deceased 'defenceless'.⁸²

(c) The Sensitivity of the Accused

As explained above, the emotional and psychological sensitivity of an accused due to BWS and 'learned helplessness' ought to be taken into consideration while determining the applicability of the plea of provocation as a defence.

(d) Lapse of Time Between the Provocation and the Homicidal Act

For a plea of provocation to be successful, it is essential that the defendant lose her self-control soon after the provocative incident by the batterer. The delay between the provocative act and the homicidal act is called 'cooling-off period'-where a reasonable man would decide against taking a particular action in retort. In *Ibrams*,⁸³ the defendant arranged an attack with the help of others because the deceased regularly abused her. After a week-long 'cooling off period', the deceased was attacked and killed. The Court denied the defence of provocation by stating that the accused had the time to cool down and plan the attack with care, thereby establishing the intention to kill the deceased. This however gives an incomplete understanding of battered women. Dr. Walker writes: "Few state later that they ever intended to kill; all say that they simply wanted to stop him from ever hurting them like that again. Almost every battered woman tells of wishing, at some point, that the batterer were dead, maybe even of fantasizing how he might die. These wishes and fantasies are normal, considering the extraordinary injustice these women suffer at their men's hands."⁸⁴

Therefore, the orthodox interpretation of the defence overlooks the experiences of battered women and ignores the fact that men react instantaneously, whereas battered women react keeping in mind men's physical strength and their own incapacity to fight back.⁸⁵

⁸¹ Alison Young, *supra* note 78.

⁸² Alison Young, *supra* note 78.

⁸³ *R. v. Ibrams*, (1982) 74 Cr App R 154.

⁸⁴ LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 106 (HarperCollins, 1990).

⁸⁵ *Who are Battered Women?*, *supra* note 29.

B. Would a Reasonable Man Have Reacted in the Same Manner?: The Objective Element

The objective element of this defence is whether a 'reasonable man' would have behaved the same way as the defendant. In *Director of Public Prosecutions v. Camplin*,⁸⁶ it was held that excluding gender from a 'reasonable man' would be too abstract a notion and since then various judgments have stated that a 'reasonable man' would naturally include within it the concept of a 'reasonable woman'.⁸⁷ However, this conflation is problematic because the 'reasonable man'/'reasonable woman' framework excludes the experiences of battered women.⁸⁸ The 'reasonableness' of a battered woman's act can only be understood within the context provided by the pattern of violence in her life.⁸⁹

C. Advancement of the Defence of Provocation

Acknowledging the need for an overhaul of the orthodox defence, courts in the UK have played an active role in its reform. Subtle changes were made to the 'immediacy' requirement in the UK. It was held that a delayed loss of self-control would not preclude the applicability of the defence of provocation; however, the longer the delay, the higher the chances that provocation as a defence would fail.⁹⁰ Reinforcing the role of the judiciary, courts in the UK have taken into account cumulative provocation. In *Emma Humphrey* case,⁹¹ the defendants were able to successfully argue that the defence of provocation should take into account the 'slow burning syndrome' by considering the entire duration of the relationship, which included acts of violence and threats of rape. Influenced by feminist campaigners, the judiciary considered 'cumulative provocation' within its interpretation of 'provocation'. Another reason why this is a landmark case is because the Court of Appeal held that Emma's 'abnormal personality' and 'attention seeking traits' should be considered relevant characteristics of a 'reasonable man'. Therefore, even if the usage of terms such as 'abnormal personality' is riddled with issues,⁹² this reflects the court's willingness to recognize the impact of long-term abuse on a person and accept that domestic violence and abuse are sufficient grounds for provocation.

⁸⁶ *Director of Public Prosecutions v. Camplin*, 1978 AC 705: (1978) 2 WLR 679: (1978) 2 All ER 168.

⁸⁷ J. Smith, *Commentary on R. v. Thornton*, CRIM. L. REV. 54, 55 (1992).

⁸⁸ Alison Young, *supra* note 78.

⁸⁹ Lee Leonard, *Celeste Commutes Sentences of 25 'Battered' Women*, UPI, Dec. 21, 1990, <http://www.upi.com/Archives/1990/12/21/Celeste-commutes-sentences-of-25-battered-women/3383661755600>.

⁹⁰ *R. v. Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.

⁹¹ *R. v. Humphreys*, (1995) 4 All ER 1008.

⁹² Discussed in the following section.

D. Defence of Loss of Self Control vis-à-vis Provocation in the UK

Defences to murder took a new turn in 2010 in the UK, when the old defence of provocation was replaced with defence of loss of control.⁹³ It is a partial defence applicable only for the offence of murder when someone kills out of fear of serious violence. This defence was introduced due to inconsistency in the interpretation of provocation and due to the gender bias inherent within provocation; therefore, it is particularly helpful for women who commit domestic homicide due to fear and despair.⁹⁴

VI. PROVOCATION IN INDIA

The offence committed amounts to culpable homicide not amounting to murder in India if the offender loses his or her power over self-control due to a grave and sudden provocation.⁹⁵ In *K.M. Nanavati v. State of Maharashtra*,⁹⁶ the Supreme Court laid down guidelines for what constitutes 'grave and sudden' provocation, which are as follows:

1. Whether a reasonable man from the same class of society would lose his self-control in a similarly placed situation;
2. Words and gestures may also, under certain circumstances, cause 'grave and sudden' provocation;
3. The mental state of the accused due to a previous act of the victim may be considered to determine whether the antecedent act provoked the accused to commit the offence;
4. The offence committed should be rooted back to an act of passion and not occur after a lapse of time.

From the analysis so far, the concerns with the traditional definition of provocation are discernible. Acknowledging the problems with the 'grave and sudden' criteria, courts have introduced the defence of 'sustained provocation' within the wider ambit of provocation.⁹⁷ In fact, Indian courts adopted the theory of sustained provocation before the Australian or English Courts.⁹⁸ English courts adopted this principle only later, as 'cumulative provocation', within their criminal jurisprudence.

⁹³ Coroners and Justice Act 2009, c. 25, § 54, http://www.legislation.gov.uk/ukpga/2009/25/pdfs/ukpga_20090025_en.pdf; Kate Fitz-Gibbon, *supra* note 68, at 280.

⁹⁴ Jenny Morgan, *Critique and Comment, Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them*, 21 MELB. U.L. REV. 256 (1997).

⁹⁵ PEN. CODE, No. 45 of 1860, India Code (1860), <http://indiacode.nic.in>, § 300.

⁹⁶ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605: 1962 Supp (1) SCR 567.

⁹⁷ *Poovammal v. State of T.N.*, 2012 SCC OnLine Mad 489; *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498.

⁹⁸ STANLEY YEO, *UNRESTRAINED KILLINGS AND THE LAW* 27 (Oxford University Press, 2002).

Though the exceptions to Section 300 of the Indian Penal Code seem restrictive in nature, courts have been broadening the exceptions *ejusdem generis* to the existing exceptions and have brought in 'sustained provocation' under Exception 1 to Section 300 of the Indian Penal Code.⁹⁹ After noting that either pre-meditation or ill will is absent in all exceptions, and that an act or omission would not be an exception if both are present, the courts came to the conclusion that sustained provocation can be brought within Exception 1 to Section 300 of the Indian Penal Code.¹⁰⁰ Thus, it was held that a series of acts over a period of time could also cause grave and sudden provocation.¹⁰¹

A. Sustained Provocation and Battered Women in India

Contrary to the evolution of law for battered women in the UK, there has been little discourse on the issue in India. The development of provocation in India is cantered on the general lacunae in the defence and not focused on women, which is apparent when one analyses the cases that brought about reforms in provocation. As the accused in such cases is male, the judicial decisions are influenced by male-centric views to benefit a male accused.¹⁰²

Interestingly, the Madras High Court recognized the 'Nallathangal syndrome' as the Indian equivalent of the Battered Woman Syndrome. Recognising the nallathangal ballad as 'Nallathangal syndrome', the Madras High Court reduced the sentences of abused women who were compelled to attempt suicide along with their kids.¹⁰³ In *Suyambukkani v. State of T.N.*,¹⁰⁴ unable to bear the cruelty of her husband, Suyambukkani jumped into a well along with her children. The children died, whereas she survived. She was charged for murder and attempt to commit suicide. The trial court held her guilty for murder and in appeal the Madras High Court ruled that her act would fall within the sustained provocation exception taking into consideration the compelling circumstances in which she was pushed to commit it. The factual matrix is similar in *Amutha v. State*,¹⁰⁵ where Amutha survived and her daughters did not. The court discussed sustained provocation, and granted anticipatory bail holding that the case was *prima facie* in her favour. This is because the court took into consideration the 'Nallathangal syndrome' as

⁹⁹ *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86; *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605; 1962 Supp (1) SCR 567; *Empress v. Khagayi*, ILR 2 Mad 122; *Boya Munigadu v. Queen.*, ILR 3 Mad 33; *Murugian, In re*, 1957 SCC OnLine Mad 64; (1957) 2 MLJ 9; *Chervirala Narayan, In re*, 1957 SCC OnLine AP 242; (1958) 1 An WR 149.

¹⁰⁰ *Supra* note 4.

¹⁰¹ *R. v. Davies*, 1975 QB 691; (1975) 2 WLR 586; (1975) 1 All ER 890.

¹⁰² *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605; 1962 Supp (1) SCR 567; *Vashram Narshibhai Rajpara v. State of Gujarat*, (2002) 9 SCC 168.

¹⁰³ *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86; *Poovammal v. State of T.N.*, 2012 SCC OnLine Mad 489; *Amutha v. State*, 2014 SCC OnLine Mad 7364; (2014) 3 MLJ (Cri) 562.

¹⁰⁴ *Supra* note 4.

¹⁰⁵ *Amutha v. State*, 2014 SCC OnLine Mad 7364; (2014) 3 MLJ (Cri) 562.

well as the natural reaction of a woman,¹⁰⁶ and her social environment.¹⁰⁷ It was accepted that the intention was not to cause the death of her children, but to put an end to the pain and cruelty that the children would have been subjected to, post her death.¹⁰⁸

In *Manju Lakra* case,¹⁰⁹ the Guwahati High Court, referring to the ‘Nallathangal Syndrome’, took cognizance of the series of acts, which constituted sustained provocation, *ergo* grave and sudden provocation. Further, an interesting observation in this judgment is the analogy drawn between the offence of dowry death as prescribed under Section 304B of the Indian Penal Code,¹¹⁰ and battered women who kill their abusive partners. The court pondered over the possibility that though it is not improbable for circumstances to lead a woman to attempt suicide, it is equally probable that instead of causing hurt to herself, she commits an act of aggression towards the aggressor.¹¹¹

In conclusion, the court held that if the law recognizes that a battered wife may commit suicide due to surrounding circumstances, it should also recognize that proximate surroundings may cause her to kill the batterer. If a woman were to put an end to her life instead of that of her husband, her husband would have been charged with dowry death and here, the intention was more to end the continuing violent acts of violence, rather than to kill her husband. Thus, a victim becoming an aggressor due to surrounding circumstances would be within the ambit of sustained provocation causing ‘grave and sudden provocation’ and would hence be held liable for culpable homicide not amounting to murder.¹¹²

B. ‘Nallathangal Syndrome’: Criticism

It is striking that both the Madras High Court and Guwahati High Court rely on, or refer to a ballad in which a woman commits suicide unable to bear the misery and agony of poverty and has no reference to women being subjected to violence, thereby ignoring violence as a contributing factor. The decision in *Manju Lakra* is not a cause for celebration.

¹⁰⁶ *State of W.B. v. Orilal Jaiswal*, (1994) 1 SCC 73: AIR 1994 SC 1418.

¹⁰⁷ *State of W.B. v. Orilal Jaiswal*, (1994) 1 SCC 73: AIR 1994 SC 1418.

¹⁰⁸ *Supra* note 4.

¹⁰⁹ LENORE E. WALKER, *supra* note 1.

¹¹⁰ PEN. CODE, No. 45 of 1860, India Code (1860), <http://indiacode.nic.in>, § 304B:

“Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that *soon before her death* she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation: For the purpose of this sub-section, “dowry” shall have the same meaning as in Section 2, Dowry Prohibition Act, 1961 (28 of 1961).”

¹¹¹ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207: (2013) 4 GLT 333, para 104.

¹¹² *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207: (2013) 4 GLT 333, para 119.

First, 'Nallathangal syndrome' is grounded in the belief that a battered woman kills herself and possibly her children to escape misery. There is no reference to violence and there is no liability on the abusive partner. In *Manju Lakra*,¹¹³ the frame of reference is the woman choosing to kill the perpetrator to end the violence instead of killing herself. Further the decision relies on a certain way being the 'right way' for a woman to react bearing in mind the socio-cultural environment of India. This stereotypical approach discounts the characteristics of a battered woman laid down by Dr. Lenore Walker. The *Nallathangal syndrome* does not factor the potentially varying reactions of women and does not comprehensively grasp the different stages of an abusive relationship, unlike the Battered Woman Syndrome.

Secondly, the judge in *Manju Lakra* held that interpreting 'grave and sudden' provocation to include sustained provocation is judicial overreach.¹¹⁴ This application of the defence will lead to exclusion of battered women who react after multiple instances of continuous abuse. Moreover, the applicability of sustained provocation as laid down in *K.M. Nanavati v. State of Maharashtra*,¹¹⁵ is also primarily influenced by male-centric views. The fourth principle in *K.M. Nanavati* clearly states that there should be no lapse of time between the offense and the provocative antecedent act. *Manju Lakra* retaliated during the period of abuse. According to the law as it currently stands, if there is cooling down period between the last provocative act and the committal of the offence, it is deemed that the accused had enough time to calm down after the provocative act and the offence is not a result of the previous series of provocative acts.¹¹⁶ Acknowledging the BWS theory, the judgment proceeds to state that a lapse of time between the offense and the provocative antecedent act disqualifies a woman from the use of provocation as a defence. The court emphasizes this by relying on the precedent set in the interpretation of "soon before her death" under 'dowry death' jurisprudence to establish that a battered woman should retaliate soon after the battering. Thus, this falls short of analysing the BWS theory and fails to take into account the 'learned helplessness' of a woman due to which she may kill her abuser in a non-combative or non-confrontational state.¹¹⁷

Despite the criticism, this case is the first step towards discussion of battered women who kill their partners in India. The application of 'Nallathangal syndrome' and provocation in such cases has not been tested before the Supreme Court yet, reiterating the need for discussion on protection of battered women.

¹¹³ LENORE E. WALKER, *supra* note 1.

¹¹⁴ LENORE E. WALKER, *supra* note 1.

¹¹⁵ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605; 1962 Supp (1) SCR 567.

¹¹⁶ *Kaliyaperumal v. State of T.N.*, (2004) 9 SCC 157; AIR 2003 SC 3828; *Yashoda v. State of M.P.*, (2004) 3 SCC 98.

¹¹⁷ LENORE E. WALKER, *supra* note 1, at 95-104.

VII. DIMINISHED RESPONSIBILITY

The principle of diminished responsibility is applicable in English Law and has been introduced as a specific provision via Section 2 of The Homicide Act, 1957. According to the principle of diminished responsibility, if a person suffering from abnormality of mind kills another, he or she shall not be convicted of murder. 'Abnormality of mind' has been interpreted to mean "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal",¹¹⁸ and a person is said to suffer from abnormality of mind due to i) arrested or retarded development of mind, or ii) any inherent causes caused by disease or injury, which substantially impairs mental responsibility for his/her acts or omission in doing or being a party to the killing.¹¹⁹

This principle is effectively another partial defence to murder, which if successfully pleaded, converts the charge of murder to that of manslaughter rather than a complete acquittal. The case of *Kiranjit Ahluwalia* was the first to use diminished responsibility as a defence to committing the murder of her batterer.¹²⁰ In this case, Kiranjit Ahluwalia was convicted of murder by the trial court and her trial court lawyer did not plead the defence of diminished responsibility. The Appellate Court perused a significant number of medical reports regarding her mental condition, which proved that her mental responsibility was diminished at the time of the killing. Surprised that important material regarding her mental condition had been disregarded, the Court allowed the appeal and decided to admit fresh evidence under the Criminal Appeal Act, 1968 and ordered a retrial.

Further, in *Robinson*,¹²¹ a woman who was violently attacked several times by her husband eventually attacked him with a hammer and strangled him. She pleaded diminished responsibility successfully and was put on probation for two years. This is a default defence, which is of great importance to battered women in UK because it is the most feasible, accessible and successful defence available when the standards of other defences cannot be met.¹²²

However, diminished responsibility requires a person to prove himself/herself to be in a state of mind that a reasonable person would consider abnormal, unlike the defences of provocation and self-defence, where the person has to display the characteristics of a reasonable man.¹²³ Therefore, though it may be tempting to adopt the defence of diminished responsibility for battered women who kill their abusive partners, the idea of using diminished responsibility and BWS is plagued with certain inherent issues. This is discussed further below.

¹¹⁸ *R. v Byrne*, (1960) 2 QB 396, 403; (1960) 3 WLR 440.

¹¹⁹ The Homicide Act 1957, 65 Eliz. 2 c. 11, § 2(1), <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/11>.

¹²⁰ *R. v. Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.

¹²¹ *R. v. Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.

¹²² Elizabeth Kenny, *supra* note 63.

¹²³ Alison Young, *supra* note 78.

VIII. DIMINISHED RESPONSIBILITY IN INDIA

The principle of diminished responsibility is not applicable in India. Insanity is the only equivalent defence available, which is grounded in the archaic M’Naghten rules.¹²⁴ Moreover, the application of insanity for battered women who kill their partners has not been explored in India, and I do not advocate for application of insanity for such cases either. The test for insanity is to prove that the defendant is suffering from severe mental illness due to which he or she is incapable of appreciating the nature of the crime. The law differentiates between ‘legal insanity’ and ‘medical insanity’, and considers only ‘legal insanity’ for application of insanity. Thus merely suffering from a mental disorder, or weak intellect and emotions due to physical and mental ailments is not sufficient ground to attract the defence.¹²⁵

Interestingly, the High Court of Karnataka has criticized the limitations of the defence of insanity in *Sunil Sandeep v. State of Karnataka*.¹²⁶ It held that the rigidity of the M’Naghten rules falls short of the modern knowledge of psychiatry and that there may be cases where the accused knows the ‘nature and quality of the act’ and yet commits the act due to an ‘irresistible impulse’ by reason of mental defect or deficiency. However, the Supreme Court of India does not recognize the test of ‘irresistible impulse’ and restricts insanity to M’Naghten rules. Further, while certain High Courts in India have acknowledged the principle of diminished responsibility as applicable in English Law in cases of mercy killing,¹²⁷ or battered women killing their abusive partners,¹²⁸ none have gone so far as to apply the principle of diminished responsibility explicitly in the Indian context.

However, the application of defence of insanity for battered women is highly problematic. It would imply that battered women are incapable of appreciating the nature of crime due to their mental condition and the threshold is much higher compared to that of diminished responsibility. To use the defence of insanity or irresistible insanity is a misrepresentation of battered women who are compelled to kill their partners because they appreciate the nature of the crime, and are forced to do so for their own protection. They believe that their lives are in grave danger due to which it is necessary to kill their partners to escape the violence.

¹²⁴ M’Naghten rules were laid down in M’Naghten case: (1843-1860) All ER Rep 229; 8 ER 718. M’Naghten in an attempt to murder the Prime Minister, murdered the Prime Minister’s secretary. He attempted to murder the Prime Minister believing that the Prime Minister is the cause of his personal and financial misfortunes. Witnesses were called who testified M’Naghten is insane and was thus found not guilty. The rules laid down in this case are: The individual who suffered from the “disease of mind” and owing to the disease he didn’t know either: i) the nature and quality of the act the person was committing; or ii) that what the person was doing was wrong.

¹²⁵ *Bapu v. State of Rajasthan*, (2007) 8 SCC 66.

¹²⁶ *Sunil Sandeep v. State of Karnataka*, 1993 SCC OnLine Kar 63; 1993 Cri LJ 2554.

¹²⁷ *Siddheswari Bora v. State of Assam*, 1981 SCC OnLine Gau 39.

¹²⁸ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207; (2013) 4 GLT 333.

Thus there is a general need to relook at the defence of insanity keeping in mind battered women as it runs the risk of being afflicted with the same concerns that the use of 'diminished responsibility' or Battered Woman Syndrome are.¹²⁹

IX. CRITICISM OF THE USE OF DIMINISHED RESPONSIBILITY AND BATTERED WOMAN SYNDROME

The use of Battered Woman Syndrome and diminished responsibility as a defence to murder by battered women has been strongly criticized by certain feminist scholars. The gravity of the consequences of using this defence is evident in that the women who plead successfully to this defence could be designated 'mentally ill' and be detained in an institution or be put on probation.¹³⁰ This is cruelly ironic because battered women may show no signs of post-traumatic stress disorder and live their life without the fear of violence.¹³¹

Further, they are pigeon holed into being 'bad or partially mad',¹³² leading to their 'syndromization'¹³³ and them being considered 'irrational and emotional'.¹³⁴ Justice Claire L'Heureux Dubé correctly notes in *R. v. Malott*,¹³⁵ that:

By emphasizing a woman's 'learned helplessness', her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from 'battered woman syndrome', the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women.

Unfortunately, this reflects the attitude of the State towards domestic violence, which attempts to take a clinical stand on it by punishing the female perpetrator rather than acknowledging and addressing the larger issue of domestic violence. This approach towards these cases takes the attention away from the batterer and his actions, and instead focuses on the abnormality of the woman's mind.¹³⁶ This

¹²⁹ Discussed in the following section.

¹³⁰ Elizabeth Kenny, *supra* note 63; *R. v. Byrne*, (1960) 2 QB 396, 403; (1960) 3 WLR 440.

¹³¹ TERRIFYING LOVE, *supra* note 84, at 176-78.

¹³² TERRIFYING LOVE, *supra* note 84, at 176-78.

¹³³ Janet Loveless, *R. v. GAC : Battered Woman "Syndromization"*, 9 CRIM. L. REV. 655 (2014).

¹³⁴ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman*, 81(1) N. CAROLINA L. REV. (Dec., 2002). See also, CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 179-180 (1990).

¹³⁵ Elisabeth Wells *et al.*, *Rethinking Battered Woman Syndrome Evidence: The Impact of Alternative Form of Expert Testimony On Mock Juror's Decisions*, 36(2) CAN. J. BEHAV. SCI. 127 (2004).

¹³⁶ Alison Young, *supra* note 78.

is clearly noticeable in *Thornton*,¹³⁷ where the Court refused to view the defendant as a victim of her circumstances and considered her actions to be more consistent with aggression and vengeance, than with victimization.¹³⁸ Further, the symbolic value attached to declaring an act justified and reasonable (as would be under self-defence or provocation) is lost while using the defence of diminished responsibility. Another strong objection to diminished responsibility as a defence to murder is that through judicial precedent, it would put a burden on battered women to react in a particular manner (that has been recognized by Courts), which is not possible.¹³⁹

However, it is pertinent to credit BWS for assisting in reinterpretation of some of the defences, which were based on male-male interactions and ignored the unique perspectives of women. BWS played a critical role in bursting myths of masochism and helped explain how the woman's behaviour is entirely rational and justified and why such women have no other choice but to kill in the face of violence.¹⁴⁰ It treats women as having survived acts of violence and lives of grief as opposed to being sick.¹⁴¹ Further, the critique of 'learned helplessness' and how it perpetuates stereotypes about women is misplaced. 'Learned helplessness' is a gender-neutral term which has been previously used to determine the psychological consequences of men who have been held captive in wars or as hostages.¹⁴² Therefore, the term is applicable to individuals who withstand such chronic circumstances and is not a manifestation of pre-existing stereotypes of women or their weakness.

In spite of the criticism, there is a need for the law and courts to be receptive towards BWS. Domestic violence is a deeply socially ingrained phenomenon, and battered women are trapped in violent relationships due to failed institutional responses.¹⁴³ Until this is resolved, it is necessary to address systemic issues accompanying domestic violence.¹⁴⁴ Thus, there is a need to reinterpret the existing defences to take into account situations of battered women attacking their partners. Though questions could be raised regarding creation of a new defence, the fear is that 'syndromization' of women will only increase due to that instead of reconstruction of gender lines in criminal law, thus deepening the fissures in the pre-existing problems.

¹³⁷ *R. v. Thornton* (No. 2), (1996) 1 WLR 1174.

¹³⁸ M. Kelman, *Reasonable Evidence Of Reasonableness*, 17 CRITICAL INQUIRY 798 (1991).

¹³⁹ DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 205-225 (University of Chicago Press, 1996).

¹⁴⁰ Patricia Weiser Easteal, *Battered Women Syndrome: Misunderstood? Response to Article by Julie Stubbs*, 3(3) CURRENT ISSUES CRIM. JUST. 356 (Mar., 1992).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Rebecca D. Cornia, *supra* note 16.

¹⁴⁴ Rebecca D. Cornia, *supra* note 16.

X. CONCLUSION

Currently in India, as the law exists, the only defence that appears to be available to battered women who retaliate is provocation. However, provocation is qualified by no time lag between the provocative act and the retaliation. This explicitly discounts the experiences and the behavioural pattern of a battered woman. Further, Indian jurisprudence on BWS has not progressed beyond the 'Nallathangal syndrome'. Thus there is a need to reflect upon the progress made in other jurisdictions relating to BWS and accordingly initiate a comprehensive discourse on battered women who retaliate and their interaction with the law in India.

I suggest legislative reformulation of the defence of provocation and self-defence in India. Using the BWS, the reformulations should focus on undoing the male-orientation of the defences and take into consideration the experiences of battered women who retaliate, and why they retaliate. The reformulation of the defences should be viewed from a feminist perspective and take into consideration women's experiences of violence.

From a judicial perspective, it is critical to focus on procedural equality and feminist writing of judgments. Focusing on violence and protecting the rights of the battered women will contribute significantly to challenging the traditional stereotypes that delegitimize the experiences of women. This will help 'ungender' the Indian Penal Code and empower the voices of women who are systematically excluded.