

THE CASE FOR INCLUSION OF 'BATTERED WOMAN DEFENCE' IN INDIAN LAW

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The Battered Woman Syndrome ('BWS') was developed as a psychological tool to understand the mental state of battered women who kill their batterers. This article examines the BWS with the objective of placing it within the specific statutory framework of the Indian Penal Code ('IPC'). It firstly describes the theoretical basis for BWS, as developed by Dr. Lenore Walker and relies on two key concepts, the cyclical theory of violence and learned helplessness. It then presents a defence of BWS against a few points of criticism that the syndrome has attracted over the years. These include, inter alia, its negative impact on the deterrence of crimes against batterers and its symptomatic approach to the behaviour of battered women. Secondly, a cross-jurisdictional analysis of BWS cases in the USA, UK and Australia reveals how it has been used to fit battered women's behaviour into existing legal defences such as provocation and self-defence by revealing insights from their mental state at the time of commission of the offence. After a consideration of three exceptions under IPC, namely private defence, provocation and necessity, it is concluded that since the experience of battered women does not fit within the literal requirements of these exceptions, there is a need to apply BWS to all the three exceptions, to allow women to claim these defences. This requires changes to the current form of these exceptions to expand their scope of applicability. To that end, the article concludes with a proposal for an amendment to the existing exceptions, and framing a new one generally or under §300 of IPC. It envisages the formal inclusion of the Battered Woman Defence in the Indian legal system.

I. INTRODUCTION

Debates in feminist legal studies have often centred on the desirability of allowing the use of BWS as a legal defence. This theory takes into account the continued violence faced by women who kill their batterers and the psychological impact such battering has on them.¹ This psychological state is considered to dilute the requisite *mens rea* for commission of the offence

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¹ Lenore Walker, *Terrifying Love: Why Battered Women Kill And How Society Responds* 133 (1989).

and operates as a legal defence for these women.² Writers such as Walker and Thyfault have argued for its incorporation as a means to explain the reasonability of the actions of women who have killed their batterers in response to intimate partner violence.³ On the other side of the debate, the theory has been criticised for denying the battered women a sense of agency, by perpetuating stereotypes and existing societal notions of the behaviour of battered women.⁴ While there is exhaustive literature on the use of BWS as a legal defence in North American and Australian journals, critical discourse in India on this subject is yet to catch up.⁵

The present literature on the subject has been woefully inadequate in envisioning the inclusion of BWS within the specific statutory framework of India.⁶ This paper seeks to conceptualise the theory as a ground for legal defence within the framework of existing statutory defences available under the Indian Penal Code. In doing so, it is argued that it is imperative that the theory be applied in the Indian context to evolve a more gender-just dispensation of criminal law. While there are alternative theoretical conceptions of the responses exhibited by battered women, most notably Charles Ewing's model of ontological insecurity which relies on the woman's need to protect her psychological self,⁷ the scope of this paper is limited to an analysis only of Walker's theory of 'Battered Woman Syndrome' for two key reasons. The first is its ability, unlike other models such as Ewing's, to comport with existing legal doctrines of justification and excuse.⁸ The second is due to the limited

² The Battered Woman Syndrome negates or excuses the necessary *mens rea* by showing that the continuous battering led the woman to commit the crime and not a guilty mind or intention to kill. It often does so by bringing the woman's psychological state within the scope of an established legal exception. See Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defences*, 7 (1) MICHIGAN JOURNAL OF GENDER AND LAW, 107-139, 111 (2000).

³ Lenore Walker, Roberta K. Thyfault & Angela Browne, *Beyond the Juror's Ken: Battered Women*, 7 (1) VERMONT LAW REVIEW, 1-14 (1982).

⁴ Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 3 (3 & 4) WOMEN'S RIGHTS LAW REPORTER, 195-222 (1986); C.K. Gillespie, *Justifiable Homicide, Battered Women, Self-Defence And The Law* 68 (1989).

⁵ Few writers have explored the application of BWS in the Indian context. For an indicative view of Indian literature, see Dr. Shalu Nigam, *Battered Women Syndrome: Applying this Legal Doctrine in the Indian Context* (August 6, 2016), available at <https://dx.doi.org/10.2139/ssrn.2819322> (Last visited on December 18, 2017).

⁶ Most research articles examine case law in other jurisdictions without arguing for the inclusion of BWS in the framework of the IPC. See Paramita Nandy, *Battered Woman Syndrome* (October 8, 2010), available at <http://dx.doi.org/10.2139/ssrn.1689521> (Last visited on June 27, 2017).

⁷ Such women are faced with the choice of either killing their batterer or being reduced to a psychological state where their existence will have little or no value. See Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 (6) LAW AND HUMAN BEHAVIOUR, 579-594, 587 (1990).

⁸ Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defences*, 7(1) MICHIGAN JOURNAL OF GENDER AND LAW 107-139, 122 (2000).

reliance placed on it by Indian courts thus far, which makes it most suited for a study of judicial opinion on the issue.

In Part II of this paper, I will briefly explain the theory of BWS and address certain criticisms levelled against it. These include concerns ranging from its empirical validity to the symptomatic treatment of battered woman violence. In Part III, I shall analytically explore its use as a legal defence in major jurisdictions and conclude with a set of basic principles for its application. In Part IV, I shall evaluate whether the theory can be applied in the Indian context by examining existing statutory defences such as necessity, grave and sudden provocation and the right of self-defence. This shall conclude with a proposal for reform of the existing law. Lastly, I shall attempt to delineate the specific form the inclusion of BWS could take (in the Indian context). It is my claim in this paper that BWS should be included as a statutory defence to be availed of by women exposed to prolonged domestic violence who kill their batterers.

II. BATTERED WOMAN SYNDROME

A. THEORETICAL FRAMEWORK

The term 'Battered Woman Syndrome' was coined by the feminist psychologist, Lenore E. Walker, in the 1970s, to understand and explain the psychological state of women suffering from 'intimate partner violence'.⁹ It refers to a set of behavioural and psychological reactions displayed by women who are subjected to severe, long-term domestic abuse.¹⁰ The element of abuse includes behaviour such as excessive jealousy, extreme verbal harassment, restriction of activity, threats of punishment, sexual and physical assault.¹¹ It is often considered to be a sub-category of the Post-Traumatic Stress Disorder, comparable to situations like being in battle or torture.¹² Continuous physical, sexual or emotional violence contribute to the victim's inability to leave the batterer. Coupled with this is the feeling of shame, loss of self-esteem and isolation that is experienced by being in such an environment for a considerable amount of time.¹³ Ever present is the constant state of terror which leaves a victim fearful and ready to respond to violence.¹⁴

⁹ Lenore Walker, *The Battered Woman Syndrome* 4 (4th ed., 2016).

¹⁰ *Id.*, 3.

¹¹ Lenore Walker, *Battered Woman Syndrome and Self-Defence*, 6 NOTRE DAME J. OF ETHICS AND PUB. POL'Y 321 (1992).

¹² Herbert Levit, *Battered Women: Syndrome versus Self-Defence*, 9(11) AMERICAN J. OF FORENSIC PSYCH. 29-35, 31 (1991).

¹³ Roberta K. Thyfault, *Self-defence: Battered Woman Syndrome on Trial Comments*, 20 (3) CALIFORNIA WESTERN LAW REVIEW, 485-510, 488 (1984).

¹⁴ Patricia Easteal, *Battered Women who kill: A plea of self-defence*, 39, available at <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/16-easteal1.pdf> (Last visited on February 19, 2018).

Two key elements of the syndrome, ‘cyclical violence’ and ‘learned helplessness’ are central to its understanding.¹⁵

Cyclical violence refers to the repetitive pattern of battering that normally occurs in three distinct stages. The first stage of Walker’s cycle involves tension building which consists of gradual escalation of tension through name-calling, psychological abuse and/or physical violence in which the woman attempts to placate the batterer.¹⁶ In the second stage, the battering intensifies to severely damaging levels due to the uncontrollable discharge of tensions built up during the first stage.¹⁷ It is accompanied by explosive rage which culminates in an acute battering incident. The third phase sees the batterer being remorseful and contrite for his actions with the promise that the battering shall stop.¹⁸ This loving contrition acts as a reason for staying with the batterer. The cycle then starts again with the frequency and degree of violence increasing every time.¹⁹ It is the nature of this cycle, especially at the third stage, which makes a woman continue to remain with the batterer.

The theory of ‘learned helplessness’ was co-opted by Dr. Walker from Martin Seligman’s psychological studies to explain the behaviour of battered women.²⁰ It describes a state of paralysis induced by the continuous battering which makes the female feel perpetually trapped in the relationship.²¹ As the woman continues to experience abuse in spite of her attempts to prevent it, she loses the will to escape thinking that no such possibility exists. It creates the feeling that the batterer is all-powerful which restricts the reactions available to the woman.²² This makes the range of responses to the battering unpredictable with some of these being violent.²³ These responses are now geared towards ensuring her survival and not escaping the abuse. This ‘learned’ helplessness leaves her unable to free herself of her partner’s abusive control.

Most cases of battered women killing their partners hinge on determining whether a defendant’s actions in a particular situation were reasonable or not.²⁴ However, more often than not, the use of the word is a guise for

¹⁵ WALKER, *supra* note 3, 88.

¹⁶ *Id.*, 94.

¹⁷ *Id.*, 97.

¹⁸ *Id.*, 98.

¹⁹ *Id.*

²⁰ Martin E.P. Seligman, *Learned Helplessness*, 23 ANNUAL REVIEW OF MEDICINE, 407-412, 407 (1972).

²¹ Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO STATE JOURNAL OF CRIMINAL LAW, 463 (2005-2006).

²² Walker, *supra* note 11, 328.

²³ Kent M. Williams, *Using Battered Woman Syndrome Evidence as a Self-Defence Strategy in Minnesota*, 10 (1) LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE, 111-136, 120 (1992).

²⁴ Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW, 623-647, 630 (1980).

the judge's own subjective conception of what 'reasonable' should be.²⁵ This primarily male idea of reasonable behaviour, embodied in the 'reasonable man' test, does not account for female experiences and the gendered aspect of violence associated with domestic battering.²⁶ For instance, it may not be "reasonable" for a woman to respond violently to hateful words since it is not the behaviour of a reasonable person. However, such a response may be justified by the psychological state induced by the past violence of the person uttering the words. A reasonable man test may fail to consider this dimension to the woman's behaviour.

Therefore, this theory is necessary to evolve a different standard of reasonability for battered women by considering their circumstance of prolonged abuse. The conventional model of rationality in law does not consider the particular history of the defendant or cultural factors due to the general requirement that the offender must intend to commit the act which constitutes a crime.²⁷ Since in most cases, a battered woman does possess the requisite intention to kill her batterer at the moment in question, it is assumed that she is a rational actor who committed such an act fully intending to do so.²⁸ The use of BWS helps a judge or juror look under the surface and appreciate the reasons for such retaliation and determine if the attendant circumstances mitigate the offence. Studies conducted with mock jurors have, in fact, proven that expert testimony tended to change the outlook of juries when they were unburdened from the requirement of a strict application of law.²⁹ Follingstad's experiment involving a fictitious problem concluded that expert testimony regarding self-defence pleas was an important factor leading to a verdict of acquittal.³⁰ In another study, jurors in a mock trial receiving subjective instructions were found be likelier to rule not guilty in the case of a battered woman accused of killing her spouse.³¹

B. RESPONDING TO A FEW POINTS OF CRITICISM

The theory of BWS has been criticised on multiple counts.³² Firstly, there is no consensus among psychologists and other medical professionals who

²⁵ *Id.*, 635.

²⁶ Ved Kumari, *Gender Analysis of the Indian Penal Code* in *Engendering Law: Essays in Honour of Lotika Sarkar* 15 (Amita Dhanda & Archana Parashar eds., 1999).

²⁷ Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 1 113 (1883).

²⁸ Barbara Hamilton & Elizabeth Sheehy, *Thrice Punished: Battered Women, Criminal Law and Disinheritance*, 8 *SOUTHERN CROSS UNIVERSITY LAW REVIEW*, 96-130, 114 (2004).

²⁹ R.A. Schuller & Sara Rzepa, *Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions*, 26 (6) *LAW AND HUMAN BEHAVIOUR*, 655-673 (2002).

³⁰ Diane R. Follingstad et al., *Factors predicting verdicts in cases where battered women kill their husbands*, 13(3) *LAW AND HUMAN BEHAVIOUR*, 253-269 (1989).

³¹ C.A. Terrance et al., *Effects of Judicial Instructions and Case Characteristics in a mock jury trial of Battered Women who kill*, 24(2) *LAW AND HUMAN BEHAVIOUR*, 207-229 (2000).

³² Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 (4) *ALBANY LAW REVIEW*, 973-1026, 978 (1995); Alafair S. Burke, *Rational Actors*,

deal with battered women as to whether BWS is so grave a psychological condition as to merit the mitigation of liability for committed offences.³³ Some researchers who have conducted similar studies have failed to find evidence for the existence of such a cycle.³⁴ For instance, Faigman has comprehensively critiqued the empirical basis for Walker's cycle theory on the ground that the three distinct phases of the cycle are not the experience of most women.³⁵

Without delving into an inquiry as to the reliability of Dr. Walker's methodology and her particular datasets, it would be useful to point to Dodge and Greene's follow-up survey among several others which have reached the same conclusions as those of Walker with a high degree of accuracy.³⁶

Regardless of these subsequent findings, the application of BWS does not stand merely on empirical ground. It also helps bring to light the material circumstances surrounding a battered woman which most juries have traditionally been blind to.³⁷ These include considerations such as fear of harm to children which, while not strictly part of Walker's Cycle, can be effectively fitted into a BWS analysis. Furthermore, BWS does not characterise only a specific set of reactions (such as Post Traumatic Stress Disorder) exhibited by battered women, but more broadly, a whole range of physical and psychological responses to battering, like depression or heightened threat perception.³⁸ To elucidate this point, it would be useful to reproduce an excerpt from the expert testimony in the Canadian case of *Lavallee v. R.*³⁹ - "I think she felt that, ... in the final tragic moment her life was on the line, that unless she defended herself, unless she reacted in a violent way, that she would die."⁴⁰

Secondly, there are concerns that if battered women were allowed to take such a defence, the offence would lose its ability to deter crimes committed by such women.⁴¹ This outcome would be unacceptable on two levels – firstly, it would give women the freedom to retaliate and kill their husbands at the slightest provocation by allowing them to get off easy and secondly, it

Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman, 81 NORTH CAROLINA LAW REVIEW, 211-316, 273 (2002-2003).

³³ David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 (3) VIRGINIA LAW REVIEW, 619-647, 639 (1986).

³⁴ Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony and the Distinction between Justification and Excuse*, 45 UNIVERSITY OF ILLINOIS LAW REVIEW, 53-64 (1994).

³⁵ Faigman, *supra* note 33.

³⁶ Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE AND VICTIMS, 271, 272 (1991).

³⁷ Anne M. Coughlin, *Excusing Women*, 82 (1) CALIFORNIA LAW REVIEW, 1-93 (1994).

³⁸ Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIMINAL LAW REVIEW 342-369, 364 (2007).

³⁹ 1990 SCC OnLine Can SC 39 : (1990) 1 SCR 852.

⁴⁰ R. A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 (3) LAW AND HUMAN BEHAVIOUR, 277 (1992).

⁴¹ Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 (4) INDIANA LAW JOURNAL, 1254-1282, 1269 (1987).

would impinge on the right of fair a trial to male homicide defendants and victims.⁴² Additionally, BWS has also been criticised for its application to cases of non-confrontational homicide, such as the killing of a sleeping or incapacitated spouse.⁴³

This line of argumentation is problematic on several grounds. Firstly, the case for BWS as a legal defence does not mean creating altogether new grounds for seeking exceptions.⁴⁴ It generally allows women's behaviour to fit the framework created for existing statutory defences by helping judges and jurors understand a battered woman's experience in a manner similar to social framework testimony or cultural defence.⁴⁵ The crux of the argument for a statutory recognition of BWS is that when the circumstance of battered women matches the underlying intent and object of that defence, the literal construction of the defence should not be a bar to availing it. Nevertheless, there may be a need to carve out a separate defence to ensure that this understanding of a battered woman's behaviour is consistently applicable in the appropriate cases irrespective of whether it fits another exception or not. However, even a separate BWS defence would lead to a discounting of intention in an exceptional situation – a principle already recognised in similarly exceptional cases such as provocation or a sudden fight.⁴⁶ Therefore, BWS, as a theory, does not create new legal grounds for exoneration.

Secondly, in most cases, BWS does not secure complete exoneration but only works as a partial defence. In other words, the use of a defence such as provocation or diminished responsibility in the case of battered women only shifts liability from a higher offence such as murder to the lower one of manslaughter.⁴⁷ The argument, thus, overestimates the negative impact on deterrence caused by mitigation to a still severe punishment.

However, an interesting argument made against the formal inclusion of BWS as a defence and one that merits deeper engagement, is that

⁴² *Id.*

⁴³ Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO STATE JOURNAL OF CRIMINAL LAW, 464 (2005-2006).

⁴⁴ Mary Ann Dutton, *Critique of the 'Battered Woman Syndrome' Model*, 1 (Revised 1996), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.7128&rep=rep1&type=pdf> (Last visited on February 19, 2018).

⁴⁵ N. Vidmar & R.A. Schuller, *Juries and expert evidence: Social framework testimony*, LAW AND CONTEMPORARY PROBLEMS, 133-176, 135 (1989); Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 (2) UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 613-644, 635 (2000).

⁴⁶ Rebecca Bradfield, *Women Who Kill: Lack of Intent and Diminished Responsibility as the Other Defences to Spousal Homicide*, 13 CURRENT ISSUES IN CRIMINAL JUSTICE, 143-167, 151 (2001-2002).

⁴⁷ Juliette Casey, *Legal Defences for Battered Women who Kill: The Battered Woman Syndrome, Expert Testimony and Law Reform* (1999) (unpublished Ph. D. dissertation, University of Edinburgh, Edinburgh) (on file with author).

a guarantee of application based on being a battered woman would permit women to intentionally kill their husbands.⁴⁸ Therefore, it would be best if this defence was only availed on the basis of the circumstances of each individual case and not as a general exemption granted to all women who are battered by their partners. This strikes a reasonable balance when weighing the interests of both stakeholders and has been incorporated in the proposals that follow.

Thirdly, categorising the behaviour of women under a ‘syndrome’ on the word of an expert has the potential of dealing only with the symptom of domestic violence, the mentally ill victim, without engaging with the underlying systemic reasons for such a phenomenon.⁴⁹ The focus shifts to the psychological state of the battered woman and to understanding her apparently ‘irrational’ behaviour without analysing her individual decision making capacity.⁵⁰ Furthermore, it risks institutionalising battered women once they are declared mentally invalid. As Schneider argues, claiming BWS forces women to conform to a particular frame of behaviour instead of expanding our mores of reasonable behaviour to the defendant’s actions.⁵¹

While the concerns raised on this point are understandable, the comparison here must take into account the position of battered defendants in the absence of BWS. The argument is that BWS has, in fact, expanded the scope of reasonability of the behaviour of battered women by being able to rationalise their seemingly ‘irrational’ behaviour.⁵² Prior to the use of BWS, the only options left to them were to plead insanity or manslaughter in cases where they killed their batterers which would result in far stricter punishment.⁵³ The application of BWS has explored alternative ways of explaining their behaviour and enabled them to use other available defences such as necessity and self-defence.⁵⁴ Moreover, the concern of painting battered women as insane is not inherent to the use of BWS as a legal defence. The role of an expert is only to appraise the judge or jury of the defendant’s perception of threat which resulted in her actions and not to pronounce her insane or defend her actions on a uniform application of BWS as a mental condition.⁵⁵ The use of the word

⁴⁸ Elizabeth A. Sheehy, *Defending Battered Women on trial: Lessons from the transcripts* 67 (2013).

⁴⁹ Elizabeth M. Schneider & Clare Dalton, *Battered Women and the Law* 136 (2001).

⁵⁰ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 NORTH CAROLINA LAW REVIEW, 211-316, 273 (2002-2003).

⁵¹ Schneider, *supra* note 24.

⁵² Phyllis L. Crocker, *The Meaning of Equality for Battered Women who kill men In Self-Defence*, 8 HARV. WOMEN’S L. J. 121 (1985).

⁵³ Rocco C. Cipparone, *The Defense of Battered Women Who Kill*, 135 (2) UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 427-52 (1987).

⁵⁴ Patricia Easteal, *Battered Women who kill: A plea of self-defence* in *WOMEN AND LAW* 41 (ed. Patricia Weiser Easteal & Sandra McKillop, 1993), available at <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/16-easteal1.pdf> (Last visited on February 19, 2018).

⁵⁵ Rebecca A. Kultgen, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense--Smith v. State*, 47(4) MISSOURI LAW REVIEW, 835-848, 841 (1982).

'syndrome' need not be taken to be indicative that it is a disorder. Michael Dowd, in his seminal paper on the subject, defends the use of BWS by stating that BWS should be viewed as the responses and characteristics of a normal woman who finds herself in a dysfunctional relationship.⁵⁶ Therefore, the defects said to be associated with BWS should be placed on the relationship, the batterer and society.⁵⁷

Notwithstanding its criticisms, BWS remains a useful theory on which the defence of battered women should be based. In the next part of this article, I shall analyse how it has been applied as a defence in the courts of three major jurisdictions.

III. USE OF BWS AS A LEGAL DEFENCE: ANALYSING THE JURISPRUDENCE

BWS entered the criminal justice system as a legal defence when Dr. Walker began giving testimonies supporting the existence of such a psychological condition at criminal trials involving battered defendants.⁵⁸ It gained importance as a theory for explanation of the victim's actions since ordinarily it was not a matter of common understanding for juries.⁵⁹ The reason it was necessary to call expert witnesses to the stand was because the actions of battered women who killed their batterers did not satisfy the three ingredients for claiming self-defence under the law – namely, the use of proportionate force, immediate provocation and imminent danger.⁶⁰

Traditionally, these defences conjured up very different mental images. Provocation was seen as a man shooting his wife's lover after catching them in the act, or of self-defence, which gives the impression of a man fending off his attacker of roughly equal strength.⁶¹ The defence of provocation definitionally did not gauge the possibility that women could even lose their self-control and lash out at their batterer. Judges therefore only accepted the male reaction of rage and violent outburst as provocation.⁶² Women killing their husbands in fear and using these defences was not a scenario that was envisaged

⁵⁶ Michael Dowd, *Dispelling the Myths about the 'Battered Woman's Defence': Towards a New Understanding*, 19 (3) FORDHAM URBAN LAW JOURNAL, 578 (1991).

⁵⁷ *Id.*

⁵⁸ Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 (4) INDIANA LAW JOURNAL, 1254-1282, 1261 (1987).

⁵⁹ Roberta K. Thyfault, *Self-Defense: Battered Woman Syndrome on Trial Comments*, 20(3) CALIFORNIA WESTERN LAW REVIEW, 485-510, 499 (1984).

⁶⁰ Cipparone, *supra* note 52.

⁶¹ Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER LAW REVIEW, 545-589, 565 (1988).

⁶² R. Holton & S. Shute, *Self-Control in the Modern Provocation Defence*, 27(1) OXFORD JOURNAL OF LEGAL STUDIES, 49 (2007).

as these defences began to be invoked in cases.⁶³ For this reason, there arose a need to go beyond the standard of a ‘reasonable man’ or even a ‘reasonable woman’ and evolve an entirely new standard for a ‘battered woman’. This section is an overview of cross-jurisdictional cases with the view to evolve a set of fundamental principles for inclusion of BWS in the Indian context.

A. UNITED STATES

The United States was one of the first jurisdictions to admit BWS testimony as evidence.⁶⁴ BWS was not used as a legal defence in and of itself. It began to be used through expert testimony as a justification for claims of self-defence.⁶⁵ In *Ibn-Tamas v. United States*,⁶⁶ the defence brought in Dr. Walker’s testimony to help fulfil the immediacy requirement of self-defence. Once the defendant’s behaviour matched that of a woman exhibiting BWS, it could be used to justify her feeling of imminent danger.⁶⁷ Thus, the court remanded the case back to the trial court to consider BWS testimony.⁶⁸

Similarly, in *State v. Leidholm*, the Court ruled that expert testimony was admissible and that the court should consider the prior history of abuse in determining the guilt of the accused.⁶⁹ This principle of law was further explained in *State v. Wanrow*,⁷⁰ where the court held that the reasonability of a person’s actions in self-defence needs to be judged by considering her own perception of the threat. It is to be evaluated in light of all circumstances around the defendant and then determined if the amount of force used was in reasonable and honest belief.⁷¹ In this case, the woman was on crutches and the man was large, intoxicated and standing right behind her.⁷² This ratio is particularly relevant to a self-defence case on the basis of BWS since it roots the subjective perception of threat in the mind of the battered woman and not on an objective determination of its physical nature. This allows expert testimony to rely on the theory of cyclical violence for the successful pleading of self-defence. However,

⁶³ Bronwyn F. Bartal, *Battered Wife Syndrome Evidence: The Australian Experience*, 1 The British Criminology Conference: Selected Proceedings, Loughborough University, 18-21 July 1995 (1998).

⁶⁴ Christina England, *The Battered Women’s Syndrome: A History and Interpretation of the Law of Self-Defense as it Pertains to Battered Women who Kill their Husbands*, 3(1) VANDERBILT UNDERGRADUATE RESEARCH JOURNAL, 1-12, 5 (2007).

⁶⁵ Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 (2) UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 379-486, 396 (1991).

⁶⁶ *Ibn-Tamas v. United States*, 407 A 2d 626, 634 (DC 1979).

⁶⁷ *Id.*

⁶⁸ *Id.*, 640.

⁶⁹ *State v. Leidholm*, 334 NW 2d 811, 818 (1983).

⁷⁰ 88 Wn 2d 221, 236 (1977).

⁷¹ *Id.*, 240.

⁷² *Id.*, 226.

judges have, on several occasions, been reluctant to entertain self-defence pleas to resist giving an impression of condoning crimes against batterers.⁷³

B. UNITED KINGDOM

The BWS jurisprudence took a different trajectory in the United Kingdom. The most intriguing development was the use of BWS to claim a partial defence of provocation. In fact, a Law Commission report identified that, between 1997 and 2001, 63.6% of women claiming provocation had been subjected to domestic abuse.⁷⁴ One of the first cases in the UK to admit BWS as reliable evidence was *R. v. Ahluwalia* ('Ahluwalia').⁷⁵ The facts of the case are as follows: the defendant sprinkled petrol on the bed of her sleeping husband and set him on fire. It was found that the wife, Kiranjit Ahluwalia, had been abused frequently and severely during their ten-year long marriage.⁷⁶ The Crown Court found her guilty of murder and sentenced her to life imprisonment.⁷⁷ The Court of Appeal accepted the ground of 'diminished responsibility' and ordered a retrial where the plea of manslaughter was accepted.⁷⁸ The Court in this case recognised sustained and long-term abuse and did away with the immediacy requirement of provocation.⁷⁹ It was held that evidence pertaining to the mental state of the accused could be taken into account to determine whether the defence of provocation would apply.⁸⁰

To appreciate the impact of Ahluwalia for the Battered Woman defence, it is necessary to understand the legal hurdles created by the pre-existing case law on provocation. The traditional position in English law was laid down in *R. v. Duffy* ('Duffy') by Lord Devlin, defining provocation as an act or a series of acts done or words spoken which would cause in any reasonable person and actually does cause to the accused, a sudden and temporary loss of self-control such that he does not remain, for the moment, the master of his mind.⁸¹

Based on the 'suddenness' requirement of loss of self-control, the Trial Court in *R. v. Thornton* convicted the defendant who had stabbed her long-time abusive husband.⁸² This standard was upheld in subsequent cases with the consequence that a cooling-off period after the provocation would be

⁷³ England, *supra* note 63.

⁷⁴ Law Commission of United Kingdom, *Partial Defences to Murder*, Report no. 290, 110 (August 6, 2004).

⁷⁵ *R. v. Ahluwalia*, (1993) 96 Cr App R 133, 143.

⁷⁶ *Id.*, 135.

⁷⁷ *Id.*, 134.

⁷⁸ *Id.*, 143.

⁷⁹ *R. v. Ahluwalia*, (1993) 96 Cr App R 133, 142.

⁸⁰ *Id.*, 141.

⁸¹ *R. v. Duffy*, (1949) 1 All ER 932, 935.

⁸² *R. v. Thornton*, (1993) 96 Cr App R 112.

indicative of premeditation on the part of the defendant.⁸³ However, as is evident from Ahluwalia, BWS testimony in English courts succeeded in reframing the construction of provocation from the requirement of loss of self-control at the time of provocation, to one recognising provocation even on a delayed response by the battered defendant.

C. AUSTRALIA

The position on Battered Woman defence in Australia has expanded its scope to recognise sustained provocation as a defence. In *My Chhay* case,⁸⁴ the defendant was a Vietnamese national who killed her husband with a meat cleaver. It was revealed that she had suffered long years of abuse at the hands of her husband.⁸⁵ The bench headed by Gleeson, C.J., ruled that the loss of self-control can occur in the case of a lengthy period of abuse even in the absence of a specific triggering incident.⁸⁶ The court also went on to consider cultural factors for determining the reasonability of the defendant's actions.⁸⁷

In other instances, the courts in Australia have also allowed BWS to be used to claim the defence of duress. For instance in *Runjanjic v. R.*,⁸⁸ two female convicts appealed their conviction for false imprisonment and causing grievous bodily harm. As per the evidence, a man named Hill had a history of dominating and inflicting severe hurt on the two women.⁸⁹ On the night the victim was killed, Hill had threatened that the three occupants of the house, including the convicts, would be dead once he woke up.⁹⁰ The issue of conviction depended on whether an objective or subjective test was required to be satisfied to claim duress. The court, on considering BWS testimony, accepted the latter and allowed duress as a defence.⁹¹ The learned judges analysed the woman's subjective perception of threat not simply on the basis of the immediacy of the threat, but on her anticipation of cyclical violence.⁹²

From the foregoing analysis of BWS jurisprudence in the three jurisdictions, a number of conclusions may be drawn. Firstly, in multiple cases, women were convicted in the court of first instance and subsequent to the admittance of BWS testimony, were often acquitted or had their sentence reduced. Secondly, the use of BWS in all three countries has been to the effect of altering the rigid standards applicable to existing exceptions. The tendency of

⁸³ *R. v. Ibrams*, (1982) 74 Cr App R 154, 160; *R. v. Davies*, 1975 QB 691, 702 : (1975) 2 WLR 586.

⁸⁴ *R. v. Chhay*, (1994) 72 A Crim R 1, 2.

⁸⁵ *Id.*, 2.

⁸⁶ *Id.*, 13.

⁸⁷ *Id.*, 13.

⁸⁸ *Runjanjic v. R.*, (1991) 56 SASR 114.

⁸⁹ *Id.*, 115.

⁹⁰ *Id.*, 115.

⁹¹ *Id.*, 124.

⁹² *Id.*, 119.

courts to convict battered women and the ways in which BWS testimony helps to fit women's behaviour within existing exceptions or under an altogether new one, have a bearing on how BWS is to be applied in India. In the next part, I shall look at the possibility of making available BWS in India in light of existing statutory defences and the decisions of the courts so far.

IV. BATTERED WOMAN SYNDROME IN INDIAN LAW

While framing BWS as a legal defence in the Indian scenario, it is important to understand the social context in which domestic abuse takes place in the country. The process of socialisation is instrumental in shaping an environment where girls are taught to be submissive and docile and not fight back against a male abuser, especially a close relative.⁹³ When judges attempt to examine the reasonability of a female defendant's actions, this sentiment typically creeps in and informs their decision.⁹⁴

Under the framework of IPC, there are two kinds of exceptions available as a defence for murder. The first kind in chapter IV includes general exceptions laid down in §76 to §106. The defences of necessity and private defence are covered under these. General exceptions act as a justification for the offence and result in complete exoneration of the defendant.⁹⁵ The second kind is the set of specific statutory exceptions provided for in §300 which defines murder. These exceptions, which include grave and sudden provocation, only mitigate culpability from the more stringent offence of murder to that of culpable homicide not amounting to murder, punishable under §304.⁹⁶

There is no explicit statutory recognition of BWS under Indian law. None of the exceptions under the framework of IPC, both as general or specific ones under §300 are *prima facie* applicable to the case of a battered offender. It is argued in this section that there is a need to apply BWS and amend the existing statutory framework to place the actions of battered women under defences such as the right of private defence, grave and sudden provocation or necessity. Alternatively, the practicality of carving out BWS as a separate exception under §300, is assessed.

A. GRAVE AND SUDDEN PROVOCATION

The first exception to §300 lays down the conditions for the application of the defence of grave and sudden provocation. To use this defence,

⁹³ Nigam, *supra* note 5.

⁹⁴ Schneider, *supra* note 24.

⁹⁵ DR. K.I. Vibhute, P.S.A. Pillai's Criminal Law, 379 (11th ed., 2012).

⁹⁶ *Id.*, 545.

the woman should have killed her batterer ‘whilst being deprived of the power of self-control by grave and sudden provocation.’ In this respect, the standard is one similar to the ‘sudden and temporary loss of self-control’ test laid down by Lord Devlin in *Duffy*.⁹⁷ The use of this exception is rendered contentious by the judicial construction of grave and sudden provocation.

Most cases have endorsed the objective test of provocation according to which the court must look into whether a reasonable man placed in the same circumstances as the accused, would have been provoked into killing the victim.⁹⁸ This fails to account for the subjective experiences of battered women who are provoked by their partners.⁹⁹ Furthermore, as the judgement in *K.M. Nanavati v. State of Maharashtra* (‘Nanavati’) makes clear,¹⁰⁰ any lag between the provocation and the loss of self-control would negate the causal link between the two. This would then be taken to mean that the accused regained self-control.

It is for this reason that it is necessary that BWS be applied to the exception of grave and sudden provocation. As the law stands today, to avail the exception, the provocation must be sudden and immediate.¹⁰¹ The loss of control which caused the defendant to kill must be the result of that provocation.¹⁰² If sufficient time passes between the provocation and the murder, this exception cannot be taken.¹⁰³ As Ved Kumari argues, the apparent initial tolerance by the victim and the failure to respond immediately is contrary to the ‘heat of the moment’ standard laid down by several judgements such as *Nanavati*.¹⁰⁴ The gap between trigger and action is taken to be a sign of premeditation.¹⁰⁵

The requirement of ‘sudden’ provocation is thus unfair to the situation of battered women since provocation works very differently in cases of battering. In most cases, the battering is continuous and long-term which means that it is not possible to point to a specific trigger for the loss of self-control. More importantly, due to the feeling of isolation caused by the prolonged

⁹⁷ *R v. Duffy*, (1949) 1 All ER 932, 935.

⁹⁸ *Ghulam Mustafa Gahno v. Emperor*, 1938 SCC OnLine Sind JC 74 : 1939 Cri LJ 778, 780; *Sukhdev Singh v. Delhi State (Govt. of NCT of Delhi)*, (2003) 7 SCC 441, 447; *Bholeswar Setha v. State*, (1993) 2 OLR 162, 165; *Mahmood v. State*, 1960 SCC OnLine All 180 : 1961 All LJ 209, 212.

⁹⁹ R.V. Kelkar, *Provocation as a defence in the Indian Penal Code*, THE INDIAN LAW INSTITUTE, 329, available at [http://14.139.60.114:8080/jspui/bitstream/123456789/15059/1/024_Provocation%20as%20a%20Defence%20in%20the%20Indian%20Penal%20Code%20\(319-355\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15059/1/024_Provocation%20as%20a%20Defence%20in%20the%20Indian%20Penal%20Code%20(319-355).pdf) (Last visited on July 2, 2017).

¹⁰⁰ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605 : 1962 Supp (1) SCR 567, 572.

¹⁰¹ *B.D. Khunte v. Union of India*, (2015) 1 SCC 286, 293.

¹⁰² *Halsbury’s Laws of England*, 11 619 (4th ed., 2006).

¹⁰³ *B.D. Khunte v. Union of India*, (2015) 1 SCC 286, 296.

¹⁰⁴ Ved Kumari, *Gender Analysis of the Indian Penal Code* in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR* 15 (ed. Amita Dhanda and Archana Parashar, January 1999).

¹⁰⁵ *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605 : 1962 Supp (1) SCR 567, 572; *B.D. Khunte v. Union of India*, (2015) 1 SCC 286, 295.

battering, a woman does not immediately lose self-control after being battered. The provocation is thus sustained over a considerable period of time.¹⁰⁶ This gradual and 'slow-burn' nature of provocation in battered women justifies the need to include 'sustained provocation' as a valid exception.

B. RIGHT OF PRIVATE DEFENCE

The application of BWS also assumes importance for battered women to be able to claim the general exception of private defence under §96 to §106 of the IPC. While §100 deals with certain situations in which the right of private defence can extend to the causing of death,¹⁰⁷ the circumstances in which women kill their batterers make the application of this section extremely difficult. This is due to the qualification laid down in the clauses under it according to which the right extends only as long as reasonable apprehension exists. As mentioned earlier, since most women kill their batterers when there is no physical apprehension of death, grievous injury, rape, wrongful confinement, etc., it is unlikely that such a defence would stand muster in court unless it were justified by the application of BWS.

The courts in India have relied on the common law conception of self-defence which treats it as a defensive right to be resorted to, only when there is no recourse to public authorities.¹⁰⁸ In *Yogendra Morarji* case,¹⁰⁹ it was held that self-defence could be used only when there was no safe or reasonable mode of escape by retreat for the person confronted with an impending peril to life or grave bodily harm except by inflicting death on the assailant. The right of private defence extends only so long as the reasonable apprehension of danger persists.¹¹⁰

From the preceding discussion, there are primarily two relevant ingredients which need to be satisfied when battered women avail this exception – reasonable apprehension of death or grievous hurt and proportionality of the response.

¹⁰⁶ Katherine O' Donovan, *Defences for Battered Women Who Kill*, 18 (2) JOURNAL OF LAW AND SOCIETY, 219-240, 224 (1991).

¹⁰⁷ Under §100 of the IPC, the right of private defence extends to the causing of death if the offence which occasioned the right be of any of the following descriptions: assault which reasonably causes the apprehension of death or grievous hurt; assault with the intention of committing rape, gratifying unnatural lust, kidnapping or abducting or wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

¹⁰⁸ *Parbhathi v. State of Punjab*, 1968 SCD 293, 296; *Gangavaram Sankaraiiah, In re*, 1968 SCC OnLine AP 175 : 1970 Cri LJ 1029, 1036; *Gurdatta Mal v. State of U.P.*, AIR 1965 SC 257, para 14; *Munney Khan v. State of M.P.*, (1970) 2 SCC 480, 484; *State of Orissa v. Rabindranath Dalai*, 1973 SCC OnLine Ori 212 : 1973 Cri LJ 1686, 1696; *Vadilal Pochabhai Thakkar v. State of Gujarat*, (1988) 29 (2) GLR 1101, 1103.

¹⁰⁹ *Yogendra Morarji v. State of Gujarat*, (1980) 2 SCC 218, 226.

¹¹⁰ *Vishwanath v. State of U.P.*, AIR 1960 SC 67 : (1960) 1 SCR 646, 649.

Reasonable apprehension of danger would require the battered woman to consider it likely that the batterer would immediately strike or hurt her. This requirement fails to consider the perpetual state of danger that the woman finds herself in. The battered woman continues to re-experience the trauma as if it were occurring again and again.¹¹¹ Furthermore, cyclic and intermittent phases of non-violent behaviour by the partner do not imply that the threat to the woman's life is over.¹¹² The defendant may kill her batterer based on an apprehension of violence based on past experience, such as particular times of the day at which the violence intensifies.¹¹³ However, this would not meet the standard of immediate danger required under law.¹¹⁴

Additionally, most women, due to the fear of renewed violence, attack their batterers either when they are in a vulnerable state or when there is a lull in the violence.¹¹⁵ For instance, in Ahluwalia's case, the offence took place when the husband was asleep, or in *Sara Thornton* case,¹¹⁶ when he was tied up. It is important to realise that the apprehension in such situations is just as severe even though it may not satisfy the legal test of 'reasonable apprehension'. A cyclical view of violence implies that the woman finds herself in perpetual fear of being beaten even in periods of relative calm.¹¹⁷ This makes her apprehension reasonable since the danger of violence is present as long as the batterer is around.¹¹⁸

The second ingredient of private defence fails to come to the aid of battered women since it examines the proportionality of a response based on factors which do not reveal the psychological state of a battered woman. Several battered defendants attack their partners viciously and violently with fatal weapons such as knives.¹¹⁹ In one Indian case, the accused dropped heavy stones on her sleeping partner.¹²⁰ However, it is important to take into account the mental state of the offender while considering the proportionality of the act. A woman, exposed to continuous battering in the home experiences a feeling of powerlessness in relation to the batterer. Most often, the woman will have endured brutal bouts of punching, kicking or choking.¹²¹ The use of such weapons is necessitated by her physical and mental incapacity to inflict only 'proportionate' damage on a batterer.

¹¹¹ WALKER, *supra* note 11, 323.

¹¹² *Id.*

¹¹³ Lenore Walker, *The Battered Woman Syndrome* 58 (4th ed., 2016).

¹¹⁴ *Id.*

¹¹⁵ *Malliga v. State*, Cri Appeal No. 42 of 1990 (Madras High Court), 2.

¹¹⁶ *R. v. Ahluwalia*, (1993) 96 Cr App R 133, 134; *R. v. Thornton*, (1993) 96 Cr App R 112.

¹¹⁷ Lenore Walker, *The Battered Woman Syndrome* 4 (4th ed., 2016).

¹¹⁸ C.K. Gillespie, *Justifiable Homicide, Battered Women, Self-Defence and the Law* 68 (1989).

¹¹⁹ *R. v. Thornton*, (1993) 96 Cr App R 112; *R. v. Russell*, (2006) NSWSC 722, 723.

¹²⁰ *Malliga v. State*, Cri Appeal No. 42 of 1990 (Madras High Court), 4.

¹²¹ See *What is Domestic Violence?*, Abuse Counseling & Treatment, Inc., available at <http://www.actabuse.com/domestic-violence/what-is-domestic-violence/> (Last visited on October 22, 2017).

Charles Ewing adds a fascinating layer to this argument. According to him, private defence is justified since battered women do not kill in physical self-defence but do so to protect their battered psychological self.¹²² Such a need stems from the acute physical, emotional and verbal assault which leaves a battered woman psychologically vulnerable.¹²³ When the victimisation is so severe that the woman could lose the capacity to function as a psychologically integrated individual, physical existence loses its meaning. Ewing thus proposes a defence of deadly force in response to an extremely serious psychological injury.¹²⁴ The evident link between psychological and physical factors in his theory highlights the need to expand the notion of private defence beyond immediate physical threats of violence.

C. NECESSITY

The defence of necessity is provided in §81 of IPC which deals with acts likely to cause harm, but done without criminal intent and in order to prevent other harm to persons or property. The essence of this defence is choosing the lesser harm in good faith when faced with an impending choice in a situation of endangerment.¹²⁵ It recognises that the violation of a certain rule, such as not committing murder, is desirable in certain situations but this defence is circumscribed by the requirement that there exist a reasonable causal link between the act and the harm sought to be averted.¹²⁶

In *Reniger v. Fogosia*,¹²⁷ Pollard J. held that the law privileges acts done against the letter but not the spirit of the law, and thus, endorsed the maxim, '*quod necessitas non habet legem*' which means that necessity knows no law. The defence is however circumscribed by the condition that the accused must honestly believe on reasonable grounds that he was in a situation of imminent peril.¹²⁸ The test presently being employed looks at whether a reasonable man would consider an alternative to avoid peril.

This defence therefore presents problems with respect to defining the choices available to a battered woman in the relationship. It is often argued that necessity cannot be pleaded as a defence since the choice of not leaving

¹²² Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 (6) LAW AND HUMAN BEHAVIOUR, 579-594, 581 (1990).

¹²³ *Id.*

¹²⁴ *Id.*, 589.

¹²⁵ *Dendati Sannibabu v. Varadapureddi Sannibabu*, 1957 SCC OnLine AP 325 : AIR 1959 AP 102, 103; *Gopal Naidu v. Emperor*, ILR (1923) 46 Bom 605, 626; *R. v. Dudley*, (1884) 14 QBD 273, 282; *United States v. Ashton*, 24 F Cas 873, 874 (CCD Mass 1834).

¹²⁶ *United States v. Cassidy*, 616 F 2d 101, 102 (4th Cir 1979).

¹²⁷ *Reniger v. Fogosia*, (1552) 1 Plowd 1, 18.

¹²⁸ *R. v. Loughnan*, 1981 VR 443, 448.

was made by the victim herself.¹²⁹ In *State v. Allery*,¹³⁰ the battered wife had divorced her husband and left the home. One evening, when she returned home, she found her husband in her living room. As he threatened to kill her, the wife, Sherry, loaded a shotgun and killed him.¹³¹ The Appeals Court rejected the claim of self-defence, since she had a duty to retreat from the home.¹³² Such reasoning fails to consider the severity of the threat and the woman's situation where not killing her husband would perpetually keep her in fear.

Walker's data suggests that most women kill their husband only as a last resort to protect themselves from mental and physical harm.¹³³ It is an act done out of intense frustration and fear based on observed trends in the batterer's behaviour which very often veers towards an increasing level of violence.¹³⁴

It must also be remembered that while, ostensibly, the woman has the physical capacity to leave the home, she cannot, in fact, do so. There are primarily two reasons for the same. The first kind is due to the fear created by the threats of the batterer which involve harm being caused to the woman herself or her children.¹³⁵ The second is based on the logistical hurdles to taking such a step. A woman may not have any form of employment or support to be financially independent.¹³⁶ The problem is compounded in the Indian context by the social expectation of marriage from a woman which leads to ineffective community responses when a woman seeks intervention.¹³⁷ She is expected to bear the pain and remain married for the sake of the family.¹³⁸ These factors make it near to impossible for a woman to walk out of an abusive marriage. Faced with staying bound to her husband and the need for survival, she may have no choice but to kill her batterer. Moreover, as Sherry's case demonstrates, even leaving the home may not be enough to be free of the batterer but may end up inviting further violence.¹³⁹

¹²⁹ Don Dutton and Susan Lee Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: AN INTERNATIONAL JOURNAL, 139-155, 140 (1981).

¹³⁰ *State v. Allery*, 101 Wn 2d 591, 593 (1984).

¹³¹ *Id.*, 593.

¹³² *Id.*, 592.

¹³³ Lenore Walker, *The Battered Woman Syndrome* 304 (4th ed., 2016).

¹³⁴ *Encyclopedia of Domestic Violence* 90 (Nicky Ali Jackson (ed.), 2008).

¹³⁵ Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the impact of Domestic Violence on Family Dynamics* 95 (2002).

¹³⁶ Robert F. Bornstein, *The Complex Relationship between Dependency and Domestic Violence*, 61 (6) AMERICAN PSYCHOLOGIST, 595-606, 597 (2006).

¹³⁷ Nigam, *supra* note 5.

¹³⁸ Shruti Ravindran, *Halting the blow of domestic violence in India*, Al Jazeera (August 4, 2016).

¹³⁹ *State v. Allery*, 101 Wn 2d 591, 593 (1984).

D. COURTS IN INDIA

While the inclusion of BWS in the Indian statutory framework remains a distant goal, Indian courts have begun to consider BWS testimony and related psychological concepts when deciding cases of battered offenders.¹⁴⁰ Notably, the concept of 'sustained provocation' has been recognised not just in the case of battered women.¹⁴¹ For instance in *Suyambukkani case*,¹⁴² the Madras High Court conceptualised 'sustained provocation' as a judicial creation envisaged by the architects of IPC.

It would be pertinent to reproduce an extract from the judgement of the Madras High Court in *Poovammal v. State*,¹⁴³ where a grieving mother killed her own son.

“There may be incidents/occurrences, which are such that they may not make the offender suddenly make his outburst by his overt act. However, it may be lingering in his mind for quite some time, torment continuously and at one point of time erupt, make him lose his self-control, make his mind to go astray, the mind may not be under his control/ command and results in the offender committing the offence. The sustained provocation/frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.”

The court's recognition of 'sustained' provocation is an application of the principle that the mental state induced by the prior act of the deceased could be taken into consideration for the determination of whether there was an adequate ground for provocation.¹⁴⁴ The court went beyond this principle, borrowed from the English common law, by extending the time interval between the acts and the provocation.¹⁴⁵

However, like most other courts in the United States and the United Kingdom, such judgements fail to offer a principled justification for the addition of sustained provocation to the statutory list of exceptions. This reasoning emerges from another case of the Madras High Court, i.e., *Rajendran*

¹⁴⁰ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207 : (2013) 6 Gau LR 222, 251; *State v. Hari Prashad*, 2016 SCC OnLine Del 751.

¹⁴¹ *Vanarani v. State*, 2000 SCC OnLine Mad 828 : (2001) 1 CTC 656, 661; *Lakhwinder Kaur v. State of Punjab*, Cri Appeal No. 385-DB of 2004, decided on 3-7-2006 (P&H), 5.

¹⁴² *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86, para 21.

¹⁴³ *Poovammal v. State*, 2012 SCC OnLine Mad 489 : (2012) 2 MWN (Cri) 276, 278.

¹⁴⁴ *Boya Munigadu v. R.*, ILR (1881) 3 Mad 33, 34; *Chervirala Narayan, In re*, 1957 SCC OnLine AP 242 : AIR 1958 AP 235, 238.

¹⁴⁵ *Id.*

v. *State of T.N.*¹⁴⁶ In this case, the Court allowed the defence of sustained provocation due to the fact that the trigger for a provocation and consequent loss of self-control cannot be viewed in isolation from other acts and circumstances that have led up to it.¹⁴⁷ Thus, the most recent behaviour of the deceased batterer may have been non-provocative, but if viewed along with the history of abuse that preceded it, it may have been sufficient to cause a loss of self-control in the battered woman.¹⁴⁸

In extraordinary situations, accused women have also been able to claim the exception of exceeding the right of private defence. In one case, an abusive husband attempted to force his wife into prostitution.¹⁴⁹ The accused woman, fearing for her life, killed her sleeping husband.¹⁵⁰ The court held that her act came within the scope of the second exception to §300 since there was a reasonable apprehension that her husband would cause grievous hurt to her if she did not comply with his demands.¹⁵¹

These judgements, dealing with what is often termed the Nallathangal's syndrome, provide a legal basis for allowing BWS testimony in Indian courts. The landmark judgment of *Manju Lakra v. State of Assam* delivered in 2013 is the first Indian case to have dealt extensively with BWS and has paved the way for its inclusion in defence cases for battered women.¹⁵² In this particular instance, the defendant wife fatally attacked her drunk and abusive husband when he was beating her one night.¹⁵³ The court analysed the literature on the BWS and allowed the history of abuse endured by the victim to be considered for bringing her act within the exception of provocation under §300.¹⁵⁴

Another recent development has been the application of BWS to cases of women accused, not of harming their batterers, but themselves or some other person. For instance in the 2016 case of *State v. Hari Prashad*,¹⁵⁵ a wife committed suicide by setting herself on fire after her husband cruelly beat her one night for dowry. The court observed that it was the husband's continuous battering which drove the woman to suicide and convicted him for the crime of abetment under §306 of IPC.¹⁵⁶

¹⁴⁶ *Rajendran v. State of T.N.*, 1997 SCC OnLine Mad 191 : (1997) 2 MWN (Cri) 237, 246.

¹⁴⁷ *Id.*, 246.

¹⁴⁸ *Id.*, 246.

¹⁴⁹ *Malliga v. State*, Cri Appeal No. 42 of 1990 (Madras High Court), 1.

¹⁵⁰ *Id.*, 1.

¹⁵¹ *Id.*, 6.

¹⁵² *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207 : (2013) 6 Gau LR 222, 251.

¹⁵³ *Id.*, 225.

¹⁵⁴ *Id.*, 253.

¹⁵⁵ *State v. Hari Prashad*, 2016 SCC OnLine Del 751, 2.

¹⁵⁶ *Id.*, 10.

In the above mentioned case of *Suyambukkani v. State of T.N.*,¹⁵⁷ the long-abused defendant was convicted by a trial court for the murder of her two children caused by drowning in a well. The High Court set aside her conviction for murder by applying Nallathangal's syndrome to the framework of exceptions under §300.¹⁵⁸ It reasoned that this was *ejusdem generis* with the other exceptions – ill-will and premeditation being absent from all five of them.¹⁵⁹

While the court's application of BWS in the above case is certainly welcome, its rationale for setting aside the conviction is ill-considered for two reasons. Firstly, none of the §300 exceptions are applicable, as they are, to the case of the accused. This is because, for an act not done by mistake or accident, the exceptions of provocation and private defence apply only to the murder of the assailant or the person who gave the provocation; in this case, the husband.¹⁶⁰ Secondly, in spite of stating that the exceptions must be understood strictly, the Nallathangal's Syndrome was *per se* construed as an exception in the clear absence of any statutory backing in IPC itself.¹⁶¹

This case demonstrates the need for the express inclusion of BWS in IPC, for courts to be able to come to the aid of battered women without offending its statutory scheme. A general BWS exception, as proposed in the subsequent section, would solve this problem in two ways. It would be available *vis-à-vis* third parties, unlike provocation and self-defence which apply only with respect to the batterer (for acts done intentionally). This would mitigate the criminal liability of battered women who either attempt suicide or harm their children or any other persons. Furthermore, an express statutory provision would eliminate the need for courts to read BWS itself into §300 as an *ejusdem generis* exception.

As this section makes evident, there exists preliminary judicial precedent for the inclusion of BWS within the Indian statutory framework. However, its current reliance on judicial discretion creates the possibility for the conviction of battered women, as has been seen in several cases in the lower

¹⁵⁷ *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86, para 4.

¹⁵⁸ *Id.*, para 22.

¹⁵⁹ *Id.*, para 22.

¹⁶⁰ Exception 1 to Section 300, Indian Penal Code, 1860: "*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.*"; Pravinbhai Bababhai Chauhan v. State of Gujarat, 2010 SCC OnLine Guj 10301, 18.

¹⁶¹ *Suyambukkani v. State of T.N.*, 1989 LW (Cri) 86, para 22.

courts and in other jurisdictions.¹⁶² In Malliga case,¹⁶³ for instance, the Trial Court rejected a claim for self-defence reasoning that the accused should have approached a village Panchayat first, before killing her husband.¹⁶⁴ The use of BWS can be instrumental in preventing murder convictions in the Trial Courts and expanding the scope of available exceptions beyond extraordinary cases. Therefore, its formal inclusion within IPC is more likely to be effective in allowing battered women to claim it as a legal defence.

E. CHANGING THE LAW

While considering legislative changes, it would be instructive to analyse the UK Coroners and Justice Act, 2009, which incorporates certain elements related to a BWS exception. Under §55 of this Act, “qualifying triggers” include things said or done which constituted circumstances of an extremely grave character and cause the defendant a justifiable sense of being seriously wronged.¹⁶⁵ The trigger of ‘fear of violence’ was included on the recommendations of the Law Commission in England.¹⁶⁶ This trigger recognises the cyclical nature of battering violence which also accounts for the perception of the threat of violence by a woman.¹⁶⁷ Other provisions have been a step forward in reducing the male-centric nature of provocation,¹⁶⁸ such as deleting suddenness and sexual-infidelity triggers. Indian lawmakers would do well to keep these path-breaking amendments in mind.

To that end, I propose the following broad outline for amendments to the relevant provisions of IPC.

1. §300

Exception 1 to §300 of IPC which deals with grave and sudden provocation can be amended to add the following explanation: “*For the purpose of this exception, when the accused is shown to have suffered from repeated long-term physical and psychological abuse, the entire period of abuse may constitute a period of provocation.*” This would enshrine the ‘sustained

¹⁶² B. Sathiyaveni v. State, 2016 SCC OnLine Mad 20935, 2; Gitaben Maganbhai Rathwa v. State of Gujarat, 2012 SCC OnLine Guj 4009, 2; Manju Lakra v. State of Assam, 2013 SCC OnLine Gau 207 : (2013) 6 Gau LR 222, 226; State v. Koss, 49 Ohio St 3d 213, 215 (1990); People v. Barbara Sheehan, 997 NE 2d 151 (NY 2013), 152.

¹⁶³ Malliga v. State, Cri Appeal No. 42 of 1990 (Madras High Court), 4.

¹⁶⁴ *Id.*, 4.

¹⁶⁵ Joshua Rozenberg, *Battered women who kill to be main beneficiaries as homicide law changes*, GUARDIAN, September 30, 2010.

¹⁶⁶ Law Commission of United Kingdom, *A new homicide act for England and Wales*, Report no. 177, ¶¶4.9-4.10 (2005).

¹⁶⁷ The Coroners and Justice Act, 2009, §54 (1).

¹⁶⁸ See The Coroners and Justice Act, 2009, §55(6)(c): “*the fact that a thing done or said constituted sexual infidelity is to be disregarded.*”

provocation' principle that courts have applied so far. Its statement in general terms ensures that it remains applicable to persons other than battered women.

2. §100

§100 of IPC which provides for situations where the right of private defence of the body, extends to the causing of death, can be amended to add the following two explanations for all six clauses: "(1) *An apprehension of danger may be reasonable even when based on acts of assault that are recurrent in nature.* (2) *The alleged act must be proportional to the apprehended act in the view of the accused.*" This makes the test for determining the proportionality of a response a subjective one which is more suited to a battered woman's mental state. The two explanations essentially allow immediacy and proportionality to be determined from the perspective of the person exercising this right.

Both the above determinations shall be made on the basis of the BWS testimony given by an expert. This would be permissible under §45 of the Evidence Act, 1872, as opinion on a point of science (psychology) to prove the relevant fact of the mental state of the accused.

Furthermore, it may also be possible to frame a new category of defences specifically for battered women who do not exhibit the particular psychological symptoms expected of a BWS affected woman. These can be inserted both as a mitigatory exception generally applicable to offences against the body or as a sixth exception under §300 applicable specifically to murder. This defence can apply in the event that a battered woman is unable to meet the already lowered standard suggested for private defence and provocation.

The appropriate standard should then be one which requires proving firstly, that there was a history of repeated physical or mental abuse, and secondly, that the woman felt herself or persons close to her such as her children or relatives in danger of severe harm. However, the proof of the latter should not be the one left to be determined by expert evidence (which would rule out BWS) but by the facts around which each battered woman behaved. If it is proved that the woman felt such an apprehension, and the evidence adduced justifies it based on her history of abuse and the circumstances of the offence committed, the law should allow the mitigation of the offence.

V. CONCLUSION

The purpose of this paper was to make a case for mitigating the liability unjustly imposed by IPC on battered defendants, who kill their husbands. The basis for the mitigation stems from the fact that when the existing

framework of penal law fully comprehends the psychological state of battered women, their circumstances fit within the situations for which statutory defences have been contemplated. The theory of BWS, as expressed through expert testimony, is an explanatory tool to understand the reasons for why women who have suffered continuous abuse for a long time kill their batterers. The application of BWS in courts reveals a state of mind to judges and jurors which brings the conduct of battered women within mitigatory circumstances. In other words, it prevents the literal construction of the statute from becoming an obstacle to its rightful application.

Nevertheless, courts in the past have been reluctant to entertain such defences and have imposed heavy sentences on battered defendants, especially in the lower courts. The inertia of the courts in considering BWS testimony, as sufficient to reduce a charge of murder to manslaughter or culpable homicide, is explained by the policy consideration of maintaining a level of deterrence for such violent crimes. The failure to consider BWS testimony in deserving situations necessitates the amendment of statutory exceptions to explicitly provide for consideration of BWS testimony and the conclusions derived from it as facts relevant for deciding the liability of a battered defendant.

The larger object of this paper, however, has been to contribute to a more gender-just discourse on criminal law. The case of battered women fits into this paradigm by virtue of the subjectivities of the experiences of battered women which are ignored when the law is conceptualised from an androcentric perspective. Crucially, such subjectivity is inherent in the very framework of the law. For instance, the determination of what qualifies as 'offensive' under the now invalid §66 A of the IT Act or 'reasonable' under several criminal legislations including the IPC is often informed by an extremely situated male bias. This predilection guides the expectations of judges when it comes to dealing with gendered crimes such as rapes or homicides committed by battered women. The use of BWS is meant to be a first step in addressing this issue and allowing women's experiences to be brought to the fore.