DEFENDING WOMEN WHO KILL: ANALYSING 'PROVOCATION' IN THE CONTEXT OF INTIMATE- PARTNER HOMICIDE

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The Indian scholarship on female criminality, primarily based on research conducted in correctional homes, reveals that most of the crimes committed by women are due to stressful situations or past victimisation. However, given the rarity of women's involvement in brutal crimes, extensive studies on the judicial response towards female killers have not yet found a place in the feminist legal literature. This article will be a novel addition to the existing scholarship, as it examines the approach of the Indian Courts towards female killers, within the context of Intimate-Partner Homicide. The study aims to shed light on how the parallel use of provocation defence by men, who kill out of jealousy and anger, and women, who kill out of fear of violence, is problematic to the extent that they continue to perpetuate male aggression and violent subordination of women. Additionally, the study also includes arguments for the inclusion of women's experiences into the existing law, which will challenge the legal fiction of neutrality and universality.

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I. INTRODUCTION

"What a woman 'is' is what you have made women 'be'."[1]

Since Simone de Beauvoir's early analysis and critique of patriarchy as a system that reduces women to the *'Other'* in the social hierarchy,[2] feminist advocates have been wrestling with the demand of providing validation to women's lived experiences within the criminal justice system ('CJS').[3] Especially, in the recent years, scholars have been embroiled in an intense deliberation on the requirement of women being able to give their own account of themselves so that their criminal actions are recognised with a greater sense of instrumentality and intelligence which early criminologists have recognised only in the male offenders.[4] The scholarly attention afforded to female offenders in India has been from the sociological and criminological perspective, following the advent of the feminist movement around the late 1960s. Based on research conducted in prisons and correctional homes, the scholars have highlighted that most of the crimes committed by women are due to stressful situations like marital maladjustment, disharmonious and often a conflict-prone relationship with husband[5] or in scenarios where either her or her family's subsistence is at stake.[6] Given the rarity of women's involvement in brutal crimes, extensive empirical studies on the judicial response towards female offenders facing murder trial have not yet found their place in the existing feminist legal scholarship in India.

Nevertheless, few Indian scholars have been vocal about how the basic tenets of criminal law, which aim to penalise only those who deviate from accepted societal norms, often leave female killers defenceless or unable to provide their own accounts of differential circumstances and experiences.[7] The official

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1 Catherine Mackinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 59 (1987).

2 Simone De Beauvoir, THE SECOND SEX 159 (1953).

3 Roslyn Omodei, *The Mythinterpretation of Female Crime* in WOMEN AND CRIME 60 (Satyanshu K. Mukherjee & Jocelynne A Scutt eds., 2016).

4 Ngaire Naffine, FEMALE CRIME: THE CONSTRUCTION OF WOMEN IN CRIMINOLOGY 44 (2016).

5 *See* RAM AHUJA, FEMALE OFFENDERS IN INDIA (1969); Ram Ahuja, *Female Murderers in India: A Sociological Study*, VLII (20) JOURNAL IN SOCIAL WORK 1 (1970); V. Mohan & A. Singh, *Personality of Criminals in Relation to the Educational Attainment, Rural/Urban Background and the Nature of Crime Committed*, 8(2) INDIAN JOURNAL OF CRIMINOLOGY 41-44 (1980).

6 *See* Madhu Sharma, *Crime and Women: A Psychological Perspective*, 15(2) INDIAN JOURNAL OF CRIMINOLOGY 167-175 (1987); Leelamma Devasia & V.V. Devasia, FEMALE CRIMINALS AND FEMALE VICTIMS: AN INDIAN PERSPECTIVE (1989); ANJU BAJPAI & P.K. Bajpai, FEMALE CRIMINALITY IN INDIA (2000); Sesha Kethineni, *Female Homicide Offenders in India*, Vol. 25(1), INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE, 1-24 (2001).

7 *See* Ved Kumari, *Gender Analysis of Indian Penal Code* in ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 139-160 (Amita Dhanda & Archana Parashar eds., 1999); Shreyas Gupta, *Right to Kill: The Case of the Battered Women*, 3(2) NIRMA UNIVERSITY LAW JOURNAL 59 (2014); Keerthana Medarametla, *Battered Women: The Gendered Notion*

statistics relating to crimes in India show that females arrested on the charge of murder amount to only 7.4 % of the total number of alleged offenders.[8] Scholars contend that the persistent low-ratio of women committing violent crimes like homicide is one of the primary reasons behind the interpretation of criminal law from a male perspective, which takes into account the experiences of men to set a standard for theevaluation of all human behaviour.[9] No matter how gender-neutral criminal law appears theoretically, the actual application of the law is premised upon assumptions and sexist stereotypes about gender and therefore, discriminates against female killers.[10]

This 'gendered'[11] nature of criminal law has resulted in perceiving women either as cold-blooded killers or sympathetic victims, without taking into consideration interweaved complex issues of gender, equality and violence.[12] Given that even as victims of brutal crimes, women are often viewed in ways that make them seem guilty, it is not surprising for a woman, stripped of her traditional identity, ungoverned by convention and guilty of having killed someone, to be looked down upon as evil.[13] This shocking perversion of 'natural feminity'[14] becomes direct evidence against women who kill and in the long-run, justifies the heavy-handed treatment to which women are subjected, by the agents of the CJS.[15] Scholars have also observed that women who kill their abusive husbands or partners are often depicted in the Courts as engaging in cold-blooded and premeditated action even though such women themselves see their acts as self-pres-

of Defences Available, 13 SOCIO-LEGAL REVIEW 108 (2017); Aman Deep Borthakur, *The Case for Inclusion of Battered Woman Defence in Indian Law*, Vol. 11, NUJS L. REV., 1 (2018); Aishwarya Deb, *Rethinking Insanity Defence in the Light of Kumari Chandra versus State of Rajasthan: Are Female Murderers Abnormal?*, 61(3) JILI 350 (2019).

8 National Crime Records Bureau, *Crime in India 2019: Volume III (Table 19A.1:Age Group and Gender-wise Persons Arrested under IPC Crime)*, available at https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%203.pdf (Last visited on September 20, 2021); *See* Jean Dreze & Reetika Khera, *Crime, Gender, and Society in India: Insights from Homicide Data*, 26(2) POPULATION AND DEVELOPMENT 335 (2000); P.M.K. Mili et al, *Female Criminality in India: Prevalence, Causes and Preventive Measures*, Vol. 10(1), INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCES, 65 (2015); For more discussion on statistics which show that males consistently commit more violent crimes than females.

9 S. L. MALLICOAT & C.E. IRELAND, WOMEN AND CRIME: THE ESSENTIALS, 280 (2014).

10 Donald Nicolson, *Criminal Law and Feminism* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 17 (Donald Nicolson & Lois Bibbings eds., 2000).

11 The term 'gendered' is used here as a verb to signify the 'doing' or 'engaging' of criminal law in drawing on existing assumptions about masculinity and femininity. For a more detailed discussion on this statement, *see* Dana M. Britton, THE GENDER OF CRIME (2011).

12 Laurie Nalepa & Richard Pfefferman, THE MURDER MYSTIQUE: FEMALE KILLERS AND POPULAR CULTURE 1 (2013).

13 Lizzie Seal, WOMEN, MURDER AND FEMINITY 9 (2010).

14 Natural feminity, as defined in the feminist literature, includes the qualities of nurturance, gentleness and social conformity; *See* Ngaire Naffine, *Theorising about Female Crime* in WOMEN AND CRIME 70-91 (Satyanshu K. Mukherjee & Jocelynne A. Scutt eds., 2016); An in-depth discussion on the norms of feminity.

15 Anne Worrall, OFFENDING WOMEN: FEMALE LAWBREAKERS AND THE CRIMINAL JUSTICE SYSTEM 80 (2002); *See* Shampa Roy, GENDER AND CRIMINALITY IN BANGLA CRIME NARRATIVES: LATE NINETEENTH AND TWENTIETH CENTURY 142 (2017).

ervation.[16] Unlike in the case of male offenders whose actions are investigated in ways that suggest an urge to find 'provocation', similar acts by women are linked to perverse proclivities rather than material contexts that have shaped their lives and choices.[17]

Furthermore, owing to our social conditioning, whenever a woman kills someone with whom she shared a close or intimate relationship, we tend to dig deeper into the crime and end up asking 'Why did she kill?'. In a patriarchal society like ours, violence against women is viewed as 'doing masculinity' and considered appropriate if the situation calls for it, such as when a wife dares to protest against the wrongdoings of her spouse.[18] On the other hand, if a woman kills her abusive male partner or a family member, she is considered to have transgressed the gender norms by defending herself through the use of fatal violence.[19] When such women face trial, the Court is bound to ask whether she was justified in killing her assailant or not.[20] Instead of providing her account of subjectivity which might free her from the label of a 'murderer', defence lawyers seek to 'excuse' her act on the ground of 'provocation'. Such an excuse reduces the charge of murder to that of 'culpable homicide not amounting to murder' but imposes some amount of culpability on her,even though she might have merely acted to save her own life or that of her children.[21] Female killers are, therefore, routinely offered the opportunity to use provocation as a defence against their homicidal acts since it is a safer bet as compared to a plea of self-defence, whose failure might lead to incarceration for life or even death penalty.[22] However, the inherent problem with the tendency of defence lawyers to invoke provocation for women who react reasonably against persistent domestic violence shows the influence of socially construed picture of violent women as 'irrational' on judicial proceedings as well.[23]

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16 Worrall, *supra* note 15, 80; *See* Emerson Dobash & Russell Dobash, VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY 48-74 (1979).

17 *See* discussion *infra* Part III, IV; An analysis of the disparate treatment of male and female offenders, with respect to the use of 'provocation' defence, has been explicitly discussed in Part III and Part IV of this article.

18 *See* J. Messerschmidt, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALISATION OF THEORY 55-98 (1993).

19 Worrall, *supra* note 15, 5.

20 Id.

21 *See* discussion *infra* Parts III,IV.

22 Self-defence plea is a justificatory defence which, if proved in the Court of law, leads to an acquittal; *See* Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature,* 33 WAYNE LAW REVIEW 1155 (1987); Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L 387 (2005); For readers who are not completely aware of the distinction between justification and excuse defences.

23 Worrall, *supra* note 15, 20-24; *See* Christine Bell & Marie Fox, *Telling Stories of Women Who Kill*, Vol. 5(4), SOCIAL AND LEGAL STUDIES, 471-494 (1996); Caroline Keenan, *The Same Old Story: Examining Women's Involvement in the Initial Stages of the Criminal Justice System* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 29-48 (Donald Nicolson & Lois Bibbings eds., 2000); Karen Brennan, *Murderous Mothers & Gentle Judges: Paternalism, Patriarchy and Infanticide*, 30 YALE J. L. & FEMINISM 139 (2018); Various feminist scholars have traced how actors in the CJS work with a notion of 'natural feminity' and therefore women who commit crime

The problem is further enhanced with the Courts' reliance on the 'reasonable man' test that invokes an objective standard which eliminates interpersonal equations and is independent of the idiosyncrasies of the person whose conduct is in question.[24] For similar reasons, the provocation defence, which is often used to excuse crimes of passion and explain lethal actions of jealous and controlling husbands,[25] when used by women to explain the situations where they had no choice but to kill, the Courts are inclined to fall back on the yardstick of male experience for evaluating their conduct. Additionally, the contemporary understanding of provocation defence which relies upon the 'loss of self-control' theory is often detrimental to those female offenders who cannot justify their homicidal act that, according to them, was necessary to put an end to long-endured violence.[26] However, it will be pertinent to clarify that the purpose of this study is not to suggest that all women necessarily kill out of fear or desperation to end abusive relationships or the fact that all men are senselessly violent and always kill out of rage or anger. The argument advanced throughout this Article is that the law should recognise provocation triggered by emotions other than anger or rage to provide mitigation to accused persons.

This Article is designed to challenge the conventional wisdom behind the application of 'provocation' defence by examining the flaws embedded in the 'loss of self- control' theory and the objective standard of 'reasonable man'. Section II establishes the theoretical framework of the study by conceptualising provocation defence as reflected in scholarly writings. It elaborates on the pitfalls of the key elements of provocation and the underlying gender-based dichotomies associated with the same, which result in the defence being unfavourable for women who kill. To effectively consider the possibility of reformulating provocation defence, Section III pursues a comparative approach to examine how the defence has been modified in jurisdictions like the United Kingdom ('UK') and Queensland. Innovations on provocation law in these two jurisdictions have been specifically chosen to draw a contrast with the scenario in India owing to their diverse approaches in accommodating lived realities of female killers. In Section IV, I further develop the scholarship of this study by examining the judicial discourse in India vis-à-vis the disparate treatment of male and female killers in the context of Intimate Partner Homicide ('IPH'). The study aims to illuminate on how the parallel use of provocation defence by men, who kill out of jealousy and anger, and women, who kill out of fear of violence, is problematic to the extent that it continues to perpetuate male aggression and violent subordination of women. My criticism of this defence is also based on the understanding that the defence struggles

thus appear to be aberrant, irrational and the only explanation for their actions are that they are either mentally ill or had become excessively bad.

[24] Naffine, *supra* note 4, 33.

[25] *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter, Men Who Kill*, Vol. 2, S. CAL. REV. L. & WOMEN'S STUD., 71 (1992); Highlighting that killings by husbands to take revenge is marked by cool calculation unlike retaliatory killings.

[26] For a detailed discussion of this point, *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 530 (7th ed., 2016).

to respond favourably in cases of murderous women and reinforces the stereotypes attached to female offenders (as stated earlier). To provide a clear picture of how the defence continues to be used in Courts for defending female killers, I analyse the cases decided by the Hon'ble Supreme Court of India ('Apex Court') and the Hon'ble High Courts.[27] In doing so, I have necessarily drawn parallels between these cases and cases where the defence has been used by men to validate their 'out-of-jealousy' killings and challenge the underlying normativity which upholds the outdated notions of male honour, women as property and the legitimisation of violence against the 'Other'. Besides offering a critique of the case laws, this section also challenges the use of provocation defence by women who kill as a desperate measure to end violence and highlights the inherent limitations associated with such a plea. Based on the discussions in Section III and Section IV, Section V looks into the prospect of restructuring law of provocation in India. It also presents a set of concluding remarks to suggest particular ways to engage with the law, so that some constructive changes in its operation can be inflicted in order to be responsive towards women's unique experiences. Throughout this Article, I have heavily relied upon the existing western literature on female criminality since the discussion on the same is still at a very nascent stage in India. Therefore, this Article aims to add a different voice in highlighting the inherent incapacity of criminal law to engage with experiences of women who kill in the context of a claim of provocation defence, and also to contribute to the under-theorised area of judicial response to female crimes in India.

II. DECODING 'PROVOCATION' DEFENCE: A THEORETICAL CONSTRUCTION

The law governing homicide mainly revolves around the idea that the perpetrator was morally blameworthy and intended to kill the victim.[28] Since homicide is the gravest form of offence against a human body, the law attaches the highest level of culpability when a person acts with premeditation and deliberation and demands the concurring presence of an extreme act causing the death of a person along with requisite *mens rea*.[29] However, judgments made about the *mens rea* of a particular person are often influenced by culturally motivated factors which might prove adversarial for defendants who do not fit the stereotype of

[27] Before proceeding further, I would like to issue a necessary caveat about the data used in this Article. I have relied on the case laws sourced from SCC OnLine and Westlaw, and therefore the analysis will be limited to only those cases under Section 302 of Indian Penal Code, 1860 which are decided by the Appellate Courts and are subsequently reported. There is, of course, a limitation with regard to performing a wholesome critique of the usage of provocation defence by female killers, since the Trial court judgments are not reported in these online databases. As such, this research will confine its arguments only to the limited number of judgements available on these databases.

[28] Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, Vol. 55, AM. J. CRIM. L., 409 (2018).

[29] Seal, *supra* note 13, 27.

an 'aggressor'.[30] Since female offenders have been statistically fewer in number, criminallaw considers deviant behaviour on the part of women as a less significant social issue and an 'exceptional' act on their part, implying that their actions do not warrant any change in the existing punitive attitude towards women.[31] An overwhelming impression has been created by scholars who believe that gender stereotypes underlie the application of criminal defences which are based explicitly on male responses to violence.[32] However, the Indian Penal Code, 1860 ('IPC') is considered a progressive piece of legislation with respect to the codification of defences to criminal liability which aligns with human realities besides adequately reflecting the underlying core concepts.[33] The IPC categorically distinguishes between 'murder' and 'culpable homicide not amounting to murder' by giving statutory recognition to the requirement of a positively higher degree of guilty mind in case of the former. An offence of 'culpable homicide not amounting to murder' entails that the person engaged in killing lacks specific murderous intent and has merely the knowledge that there is a likelihood of causing death.[34] Such absence of specific intention is often proved by extenuating circumstances which find a place under the 'Exceptions' mentioned in Section 300 of IPC; 'grave and sudden provocation' being one of them.

Conventionally, provocation is considered an 'excusatory' defence as it requires acceptance on the part of the accused to have committed a homicidal act, and it places partial responsibility on the victim for triggering the action.[35] Provocation, as an excuse, acknowledges that when an individual merely reacts to the wrongful conduct of the victim or an impending danger rather than choosing to kill voluntarily, they cannot be held accountable for murder.[36] However,

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[30] The criminological literature views an 'aggressor' as a male, based on the idea that masculinity supplies the motive for majority of the crimes. Scholars have argued that crime is symbolically masculine as the sex-based division of labour accounts for greater rebelliousness of men. *See*, *e.g.*, Talcott Parsons, ESSAYS IN SOCIOLOGICAL THEORY (1954); Marie Bertrand, *Self Image and Delinquency: A Contribution to the Study of Female Criminality and Woman's Image*, Vol. 2(1), ACTA CRIMINOLOGICA, 71-144 (1969); Jody Miller, *Doing Crime as Doing Gender: Masculinities, Femininities and Crime* in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 19 (Rosemary Gartner & Bill McCarthy eds., 2014); See also *infra* Part III, for specific discussion and analysis of the cases which go to show that the Courts have often termed the homicidal acts done by female offenders as "outrageous" because they did not qualify as a typical "aggressor".

[31] Sandie Taylor, CRIME AND CRIMINALITY: A MULTIDISCIPLINARY APPROACH, 376 (2016).

[32] Nicolson, *supra* note 10; *See also* Aileen McColgan, *General Defences* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 137 (Donald Nicolson & Lois Bibbings eds., 2000).

[33] Stanley M.H. Yeo, *Lessons on Provocation from the Indian Penal Code*, 41 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 615 (1992).

[34] Champat Rai Jain, *The Law Relating to Homicide in the I.P.C.*, Vol., 25 ALLAHABAD LAW JOURNAL, 17 (1927).

[35] R.V. Kelkar, *Provocation as a Defence in Indian Penal Code*, 5 JILI 319 (1963).

[36] Joshua Dressler, *Why Keep the Provocation Defense: Some Reflections on a Difficult Subject*, 86 Minnesota Law Review 959 (2002); Andrew Von Hirsch & Nils Jareborg, *Provocation and Culpability*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 241 (Ferdinand Schoeman ed.,1987).

there exists a debate amongst scholars over the existence of a justificatory component in provocation premised on the ground that the victim's wrongful conduct makes it justifiable for the accused to use violence and his death, therefore, constitutes lesser social harm than that of an innocent person.[37] Almost invariably, the scholars who support the justificatory view argue that the retaliatory violence against the provocative conduct stems from a feeling of entitlement to punish the victim.[38] Nevertheless, the discussion in this Article will be based primarily on Joshua Dressler's account of provocation as an "excusatory defence, albeit partial, which may (but need not) have a justification like component."[39] To quote his words:

> "The defense is based on our common experience that when we become exceptionally angry- remembering that we are not blaming the person for his anger -our ability to conform our conduct to the dictates of the law is seriously undermined, hence making law-abiding behaviour far more difficult than in non-provocative circumstances."[40]

The provocation defence, as Dressler argues, thus plays a vital role in the homicide law by permitting the Courts to "tune levels of criminal responsibility based on differential culpability".[41]

The law of provocation as enunciated under IPC has its origin in the common law recognition of specific categories of provocative acts which served to reduce a murder conviction to manslaughter and drew a line between pre-meditated killings and hot-blooded killings.[42] The traditional understanding of the defence of provocation was based on the precedent set by *R.* v. *Mawgridge*[43] ('*Mawgridge*') where Sir John Holt, C.J. specifically categorised "grossly insulting assault, attacks on relative or friend, deprivation of a person's liberty and adultery"[44] as acts which would qualify as provocative conduct. With time, the Courts developed an objective standard of 'reasonable man' to assess the degree of provocation and the subsequent homicidal act.[45] Any killing that was not an outcome of the categorised

[37] For a comprehensive discussion on whether provocation is a partial excuse or partial justification, *see generally* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Mitchell N.Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, Vol. 52, WM. & MARY L. REV., 1027 (2011).

[38] *Id.*

[39] Dressler, *supra* note 36, 971.

[40] *Id.,* 974.

[41] *Id.,*1001; *See also* Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code,* 19 RUTGERS L. REV. 671 (1988).

[42] Michael J. Allen, *Provocation's Reasonable Man: A Plea for Self-Control*, Vol. 64, JOURNAL OF CRIMINAL LAW, 216 (2000).

[43] (1707) Kel 119.

[44] *Id.,* 130-137.

[45] *See* R. v. Kirkham, 1839 ER 273; R. v. Welsh (1869) 11 Cox CC 336; R. v. Alexander (1913) 109 LT 745; R. v. Lesbini, (1914) 3 KB 1116; For a detailed discussion on the development of the judge-made

wrongful conduct, which would cause an ordinary reasonable man to lose self-control, was presumed to be pre-meditated. Furthermore, a person was required to prove that his act of killing was a sudden reaction to the provocative conduct and that there was no lapse of time between such behaviour and his retaliatory action.[46] Thus, the traditional provocation law was primarily dependant on two elements, namely, the sudden 'loss of self-control' and objective standard of 'reasonable man'. However, the subsequent codification of penal codes across common law jurisdictions paved the way for an escape from the strait-jacket formula imposed by Mawgridge and other primitive decisions.

Similarly, provocation under IPC operates to mitigate murder charges into 'culpable homicide not amounting to murder' and provides the Court with discretion in sentencing the offender to a reduced period of imprisonment as compared to life imprisonment or the death penalty.[47] However, provocation is at best a 'partial' defence as it neither removes the culpability attached to an offender nor does it exonerate him or justify his actions. The defence of provocation can only be raised in a murder trial where the prosecution has discharged the burden by proving that the accused killed the victim with the requisite *mens rea* or where the accused himself concedes to such killing.[48] The burden subsequently falls on the accused to show that the killing was unpremeditated.[49] The doctrine of provocation has been codified under the Exception 1 to Section 300 ('Exception 1') of IPC as:

> "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."

A bare reading of the provision shows that a successful provocation plea must satisfy the subjective test of whether the accused was deprived of self-control while killing and the objective test of whether the conduct was severe enough to provoke an ordinary reasonable man. Furthermore, the 'suddenness'

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objective test, *see* Andrew Ashworth, *The Doctrine of Provocation*, Vol. 35, CRIMINAL LAW JOURNAL, 292 (1976); JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 24 (1992).

46 Allen, *supra* note 42, 218.

47 Indian Penal Code, 1860, §304: "Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death." (This provision is equivalent to the offence of Manslaughter in various common law jurisdictions like England and Wales, Australia and Canada.).

48 Kelkar, *supra* note 35, 319.

49 *Id*., 324.

requirement makes it imperative for the accused to prove that there was no 'cooling period' between the victim's provocative conduct and his act of killing. Surprisingly, the 'reasonable man' standard has not been explicitly spelt out under IPC but is still relied upon by the judges to ascertain whether the provocation was grave enough to incite rage or any intense emotion in the mind of an ordinary reasonable man.[50] The notion is ingrained in the use of male pronoun 'he' in IPC to signify that the pronoun's "derivatives are used for any person whether male or female".[51] Nevertheless, problems usually arise when 'provocation' is used to assess the culpability of women, especially those who kill to protect themselves or their dependants from further instances of violence and are confronted with criminal implications that are not designed to accommodate women's behaviour and responses.[52] Even though the 'reasonable man' does not have any specific gender, when such a standard is used in Courts to evaluate the social circumstances under which a woman resorted to violence, it inevitably relies upon a male understanding of the situation and results in reinforcing stereotypes about women who kill.[53] Feminist scholars have thoroughly criticised the traditional provocation doctrine as being sympathetic towards jealous men who engage in brutal domestic killings while the underlying factors disproportionately burden abused women who kill.[54] Scholars also believe that male killers have the option to access a variety of defences at trial, but the law fails to respond adequately by coercing women into pleading similar kind of defences irrespective of their diverse experiences to abuse.[55] The 'loss of self-control' and 'suddenness' requirements make it difficult for women to prove provocation, especially when they kill in non-confrontational scenarios.[56] Given the insurmountable difficulties that female killers might have to face in establishing provocation, this section examines the antiquated gender norms associated with the underlying elements of this defence.

A. THE REASONABLE MAN STANDARD

The objective standard of 'reasonable man' is a legal fiction based on an accepted standard of conduct applicable to every person, which technically

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[50] *Id*., 331; *See generally* KN Chandrasekharan Pillai, *Women and Criminal Procedure*, in ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 139-160 (Amita Dhanda and Archana Parashar eds., 1999); *See* discussion *infra* Part IV.A, IV.B.

[51] Indian Penal Code 1860, §8.

[52] *See* discussion *infra* Parts III, IV.

[53] Kumari, *supra* note 7, 155; McColgan, *supra* note 32, 144.

[54] *See* Brenda M. Baker, *Provocation as a Defence for Abused Women Who Kill*, 1 CAN. J. L. & JURIS. 193 (1998); Fiona Sampson, *Mandatory Minimum Sentences and Women with Disabilities*, 39 OSGOODE HALL L. J. 589, 594 (2001); Emily L Miller, *(Wo) manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L. J. 665, 667 (2001).

[55] Caroline Murphy, *Should the Defence of Provocation Be Available to Battered Women Who Kill*, 19 UCD L. REV. 71 (2019).

[56] R. Sanghvi & D. Nicolson, *Battered Women and Provocation: The Implications of R v. Ahluwalia*, CRIMINAL LAW REVIEW 728 (1993).

excludes all the non-universal personal characteristics of an accused.[57] In provocation cases, this objective test asks whether the provocation was such that "an ordinary reasonable man would be overwhelmed with emotions and lose self-control."[58] Initially, the rationale behind employing an objective standard was to ensure that all accused persons are measured against a universal standard of self-control, notwithstanding their unique characteristics.[59] However, the traditional understanding of provocation as a defence based on anger was further exacerbated once the courts started applying this standard to assess the gravity of provocation. As a possible outcome of such judicially endorsed excuse of killing someone in 'heat of passion', male violence came to be recognised as a 'reasonable act' if it resulted from failure to exercise control over anger that stemmed from possessiveness and sexual jealousy.[60] This idea of reasonableness somehow facilitated male killers' argument of "sexual infidelity, providing a moral warrant for murdering 'unfaithful' partners or their paramours."[61] As a result, over the centuries, the law's liberal treatment of a traditional impassioned man provoked to kill his 'unruly and adulterous' wife gave rise to a sense of entitlement amongst the male members of the society.[62] On the contrary, a share of blame was bestowed upon the female victims of such brutal killings for their negligence in causing men to get angry and act violently.[63] On account of such gendered nature of the objective test, scholars challenged the law's power to disqualify women's experiences of violence while favouring men's actions and rights.[64] Questions like "whether a 'reasonable man' means anyone irrespective of gender, class, race" or "whether a 'reasonable man' is someone who resembles the person on trial possessing all or some of his characteristics" or "whether a 'reasonable man' includes a 'reasonable woman'" became the primary focus of feminist legal inquiry.[65] Scholars argued that unique

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[57] Adrian Howe & Daniela Alaattinoğlu, *Introduction* in CONTESTING FEMICIDE: FEMINISM AND THE POWER OF LAW REVISITED 1-3 (Adrian Howe & Daniela Alaattinoğlu eds., 2019).

[58] Dressler, *supra* note 36, 971.

[59] Kumari, *supra* note 7, 153.

[60] Dressler, *supra* note 41, 701; G.R. Sullivan, *Anger and Excuse: Reassessing Provocation,* 13 OXF. J. LEG.STUD. 421, 422 (1993).

[61] Adrian Howe, *Red Mist Homicide: Sexual Infidelity And The English Law of Murder* (*Glossing Titus Andronicus)*, 33(3) LEGAL STUDIES 407 (2013); *See also* KATE FITZ-GIBBON, HOMICIDE LAW REFORM, GENDER AND THE PROVOCATION DEFENCE: A COMPARATIVE PERSPECTIVE 43-84 (2014).

[62] Nicole A.K. Matlock, *Reasonable Rage: The Problem with Stereotypes in Provocation Cases*, 6 WASH. U. JUR. REV. 371 (2014).

[63] *Id*., 389; *See* Anna Carline, *Honour and Shame in Domestic Homicide: A Critical Analysis of the Provocation Defence*, in HONOUR, VIOLENCE, WOMEN AND ISLAM80-95 (Mohammad Mazher Idriss & Tahir Abbas eds., 2010).

[64] *See e.g.*, Barry Godfrey, *A Historical Perspective on Criminal Justice Responses to Female and Male Offending* in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 158-171 (Rosemary Gartner & Bill McCarthy eds., 2014); Jeffrey W. Cohen, *Criminal Justice as a Male Enterprise* in WOMEN IN THE CRIMINAL JUSTICE SYSTEM: TRACKING THE JOURNEY OF FEMALES AND CRIME 31-46 (Tina L. Freiburger & Catherine D. Marcum eds., 2016).

[65] *See* Kevin Jon Heller, *Beyond the Reasonable Man - A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998); Caroline A. Forell & Donna M. Matthews, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 172 (2000); Caroline Forell, *Homicide*

characteristics play an essential role in how a person perceives and reacts to provocative conduct.[66] A closer look at such scholarships reveals that development of the judge-made 'reasonable man' standard was an outcome of the positivist approach followed by traditional Courts in recognising that there can be only one appropriate behaviour in a given situation.[67] However, the position changed with the landmark decision of the House of Lords in *Director of Public Prosecutions* v. *Camplin*[68] ('*Camplin*') wherein Lord Diplock defined 'reasonable man' as:

> "A person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects, sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him."[69]

This definition, therefore, distinguished the characteristics like sex and age which were relevant in assessing the power of self-control expected of a person and other features attributable to the accused, only if they went towards augmenting the particular provocation. Most of the western countries endorsed this redefined standard, albeit with slight modifications. Nevertheless, critics still view the very idea of a 'reasonable man' as a discourse which overlooks relevant differences between persons and contexts.[70] Robyn Martin argues that the attempt made by this objective standard to reduce individual characteristics of both men and women to elements which are attributed as 'masculine' leads to an assumption that a reasonable man includes a reasonable woman.[71] This conception essentially makes it obligatory for a woman to be 'masculinised' for being considered as 'reasonable' and results in failure to acknowledge the realities about women's experiences of anger, fear or impassiveness in violent situations.

Additionally, it has been argued that, while dealing with provocation cases the level of self-control to be expected should be attributable to a reasonable legal subject, irrespective of gender, by taking into account the sexually specific aspects affecting gravity of provocation to a particular woman or man, just like any other salient social differences.[72] This argument draws upon Katherine O' Donovan's assertion that a universal standard which relies upon an only male un-

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and the Unreasonable Man, 72 GEO. WASH. L. REV. 597, 598 (2004); Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273 (2015).

66 Julianne Parfett, *Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases*, 12 WINDSOR REV. LEGAL & SOC. ISSUES 55, 84 (2001).

67 *Id*.

68 1978 AC 705.

69 *Id*.,718.

70 Nicola Lacey, *General Principles of Criminal Law? A Feminist View* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 87, 92 (Donald Nicolson & Lois Bibbings eds., 2000).

71 Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 ANGLO-AM. L. REV. 334 (1994).

72 Lacey, *supra* note 70, 91; *See also* Hilary Allen, *One law for all Reasonable Persons?*,16 INT. J. SOC. L. 419 (1988).

derstanding of social experiences fails to recognise women as properly accounted for equal citizens and legal subjects.[73] Under-recognition of women's experiences in the historical development of the 'reasonable man' can also be linked to the public-private dichotomy which exacerbates gender disparity by categorising 'public' as the male domain (demanding full protection of the law) and 'private' as the female domain (deemed as irrelevant to the process of law).[74] The elements such as personality, sexuality, reproductivity, relationships considered by law to be private are of utmost importance while defining the actions of a woman during a murder trial. However, the law overlooks the role played by each element and instead focuses on a universal standard of behaviour based on "the experiences, values and morality of men as a frame of reference for determining legal liability".[75] This universal standard emphasises the killing to be an immediate response to a 'provoking act'. It might be perfectly applicable in conflicts between males where the primary source of suchretaliation or provoking act is anger or rage, but it might not be useful in assessing conflicts between physically and socially unequal parties (especially when the conflicting parties include a man and a woman).[76] As a solution to this problem, it has been suggested that, "the reasonable man can be attributed with the characteristics or placed in those circumstances which would affect the gravity of the provocative act aimed at the accused."[77] Andrew Ashworth addresses this issue by stating that while assessing the gravity of provocation through the lens of an ordinary reasonable man, "it is imperative on the part of the Courts to consider the accused's characteristics barring those individual peculiarities that influences an accused's level of self-control."[78] On the other hand, Peter Westen suggests that the hypothetical reasonable man should not be individualised with the characteristics of the defendant; instead, the courts should begin their assessment with the traits of the actual defendant and then apply the appropriate moral standard to evaluate the provoked reaction.[79] Similarly, Donald Nicolson suggests that the proper approach would be to take into account what is reasonable to expect of a particular accused in the light of their history.[80]

These suggestions, mostly pointing towards 'individualising' or imposing the unique characteristics of the accused to a 'reasonable man', have given rise to the question of whether provocation should be assessed from a perspective internal to the defendant or an external one. For instance, a possessive man who

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[73] Katherine O' Donovan, SEXUAL DIVISIONS IN THE LAW 82 (1985); *See generally* Hilary Allen, JUSTICE UNBALANCED (1987).

[74] Martin, *supra* note 71, 353.

[75] *Id*., 342.

[76] Baker, *supra* note 54, 198.

[77] Yeo, *supra* note 33, 624.

[78] Ashworth, *supra* note 45, 299.

[79] Peter Westen, *Individualising the Reasonable Person in Criminal Law*, 2 CRIMINAL LAW AND PHILOSOPHY 137, 139 (2008); *See generally* Peter Westen, *Reflections on Joshua Dressler's Understanding Criminal Law*, 15(2) OHIO ST. J. CRIM. L. 311-336 (2018).

[80] Donald Nicolson, *What the Law Giveth, it also Taketh Away: Female-Specific Defences to Criminal Liability* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 159, 177 (Donald Nicolson & Lois Bibbings eds., 2000).

kills his wife when she attempts to leave him will expect the Court to view the reasonableness of the provocation from 'his perspective' which may or may not include beliefs shared by a larger community. Given the cultural understanding of proper gender roles, the wife-killer's perspective might be in tune with that of the Court's view (or the view of the society). But when a battered wife kills her abuser, 'her perspective' of reasonableness might be misinterpreted by those decision-makers who are socialised to see the world from a different perspective and the confines of social categories.[81] Few scholars have suggested the replacement of the reasonable man test by a 'reasonable person' on the ground that neutralisation of language will automatically result in the removal of bias.[82] However, post-modern feminists have challenged this androgynous formulation of reasonableness as being ineffective in addressing the concerns of female offenders.[83] The basis of their argument is that a 'reasonable person' will significantly be dressed in male clothing since most judges who interpret this standard are male.[84] To this end, it has also been argued that designing separate tests of 'reasonable man' and 'reasonable woman' might not be a correct approach since every person's experience concerning a particular situation is different.[85] It will also be inappropriate to say that male, and female killers should be assessed by male and female judges, respectively. The gender of a judge hardly affects their understanding of an abused woman's realities unless they can imagine what it is like to live under the constant shadow of abuse.[86] Similarly, irrespective of the gender of a judge, it might be easier for them to understand a scuffle initiated by a man or conflicts between men resulting out of anger, since that is what men do - men are socially expected to be violent.[87]

This conundrum surrounding the application of 'reasonable man' standard seems to have no plausible solution as it keeps manifesting itself in various types of unique homicide cases in heterogeneous societies. However, courts across jurisdictions have adopted a linear approach of taking into account the socio-cultural and religious background of the offender and invest the reasonable man with similar characteristics to determine whether such man would have reacted likewise.[88] Indian Courts, mostly, have gone further in subjectivising the objective test by attributing certain personal characteristics of the accused to the hypothetical reasonable man, which has been extensively discussed in Part IV.

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81 This argument has been comprehensively elaborated in Parts III and IV of this article.

82 Martin, *supra* note 71, 350.

83 Gruber, *supra* note 65; *See also* Toby Nisbet & Ann-Claire Larsen, *Normativity and the Ordinary Person Formula: Comparing Provocation and Duress in Australia*, 45 (2) UWA L. REV. 249-273 (2019).

84 McColgan, *supra* note 32, 142.

85 Baker, *supra* note 54, 191.

86 Anthony Hopkins, Anna Carline & Patricia Easteal, *Equal Consideration and Informed Imagining: Recognising and Responding to the Lived Experiences of Abused Women who Kill*, 41 MELB. U. L.REV.1201 (2018).

87 Lois Bibbings, *Boys will Be Boys: Masculinity and Offences Against the Person* in FEMINIST PERSPECTIVES ON CRIMINAL LAW 231 (Donald Nicolson & Lois Bibbings eds., 2000).

88 M. Sornarajah, *Commonwealth Innovations on the Law of Provocation*, 24 INT'L & COMP. L. Q. 184, 200 (1975).

Nevertheless, based on the preceding discussion, it is pertinent to observe that replacing the 'reasonable man' with an alternative 'gender-neutral' standard of behaviour cannot be a preferable approach. As such, it can be acknowledged that no single ideal or objective measure can be accommodative of the ideas of reasonableness of every person in the society.

B. GRAVE AND SUDDEN PROVOCATION VIS-À-VIS LOSS OF SELF-CONTROL

The provocation defence is based on the idea that persons who kill after losing self-control upon adequate provocation are less culpable than the ones who kill out of malice. This doctrine derives its authority from the notion that "self-control must be lost to such an extent, that the action of the accused person is motivated by passion rather than reason".[89] However, feminist critique views this loss of self-control theory as over-inclusive and merely descriptive since its application makes it easier for specific categories of defendants to get manslaughter conviction even in cases where mitigation is unwarranted.[90] It has also been argued that the traditional understanding of 'loss of self-control' allows possessive men and controlling husbands to receive manslaughter convictions in cases where they claimed to have been provoked by their partners' attempts to end the relationship.[91] The theory makes it impracticable for the judges (or jury) to differentiate between defendants who actually cannot control their violent reaction and the ones who simply fail to control their violent impulses.[92] The theory is also under-inclusive as it does not take into account the situations in which an accused might be provoked to kill as a result of fear and desperation.[93] Theoretically, a 'loss of self-control' claim will be accepted by the courts if the provocative conduct was of such a nature that it would induce rage or anger in the majority of the people in a society.[94]

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[89] George Mousourakis, *Reason, Passion and Self-Control: Understanding the Moral Basis of the Provocation Defence*, 38 REVUE DE DROIT DE L' UNIVERSITE DE SHERBROOKE 215 (2007); *See also* Reid Griffith Fontaine, *Adequate (Non) Provocation and Heat of Passion as Excuse not Justification*, 43 U. MICH. J. L. REFORM 27, 45- 47 (2009).

[90] Michal Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815 (2020); *See also* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340(1997); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self- Control*, 61 EMORY L. J. 501, 505 (2012); To understand the 'over-inclusiveness' of the loss of self-control theory, as envisaged by the feminist scholars, *see* Babu Lal v. State, 1959 SCC OnLine All 99, wherein the punishment imposed on the male accused was mitigated to a lesser offence even though he had killed the victim based on a simple "suspicion" of an illicit intimacy between his wife and the deceased. The Court's reasoning was primarily based upon the fact that mere knowledge about the unfaithfulness of his wife was sufficient to make him lose his self-control and act in a violent manner. This example resonates with the arguments advanced by the scholars with regard to the 'loss of self-control' theory warranting mitigation even when it does not deem fit.

[91] Buchhandler-Raphael, *supra* note 90, 1830; *See also* Jeremy Horder, *Reshaping the Subjective Element in the Provocation Defence*, 25 (1) OXF. J. LEG. STUD. 123, 124 (2005).

[92] Buchhandler-Raphael, *supra* note 90, 1843.

[93] *Id.,* 1840.

[94] Matlock, *supra* note 62, 382.

But when people are provoked by fear, rather than by anger, it becomes challenging to prove that they had lost self-control (as it is traditionally understood), since their conduct fails to manifest the type of reactions that is expected from people who are 'out of control'.[95] This passion-driven loss of self-control theory, therefore, fails to provide mitigation to abused women who kill their violent intimate partners out of fear, depression or sadness, and thereby gives validation to men's anger over women's fear.[96] To that end, it has been argued by scholars that the defence should not be made available to men who kill their partners because it sends a wrong message promoting male domination over women and also forces women to stay confined in unwanted relationships.[97] Instead, as suggested by Victoria Nourse, the defence should only be applicable if the accused reacts violently in response to some punishable unlawful act by the victim.[98] This would ensure that if the provocative incident is not a criminal or punishable act, the accused will be given a murder conviction instead of manslaughter, especially in cases where male intimate partners brutally kill women for attempting to end the relationship.[99]

Despite such criticisms made by scholars, courts continue to rely upon this theory to excuse defendants whose acts do not warrant mitigation from a normative perspective.[100] In addition to that, the 'adequacy' requirement further adds on to the problems stemming from the gender-based implications of a vague and over-inclusive view of the loss of self-control theory. Ideally, to qualify as an 'adequate' provocation, the victim's conduct must give rise to the accused's rage in such a manner that he cannot control it even after trying diligently to restrain himself.[101] However, if there is a lapse of time between the provoking event and the act of killing, for "the blood to cool down", the accused's plea of provocation will not succeed for being a pre-meditated act of violence.[102] This notion of 'cooling down period' is so intrinsically linked to the 'loss of self-control' element that it acts as a tool to bar the defence and consequent mitigation of murder charge.[103] Based on a similar principle, the IPC has specifically suffixed the phrase 'grave and sudden' as a qualifying term to 'loss of self-control' which means that there should not be any cooling time between the grave provocative conduct and the accused's subsequent homicidal act. The term "grave" is often used as a qualify-

95 Buchhandler-Raphael, *supra* note 90, 1837.

96 Baker, *supra* note 54, 194.

97 For a comprehensive summary of the scholarly critique, *see* Buchhandler-Raphael, *supra* note 90, 1830-1834.

98 Nourse, *supra* note 90, 1396; *See also* Victoria Nourse, *Reconceptualizing Criminal Law Defenses*, 151 (5) U. PA. L. REV. 1691, 1733 (2003).

99 *Id*.

100 The reliance placed upon the 'loss of self-control' theory by the courts has been thoroughly discussed in Part III and Part IV of this article. However, reference may be made to the example in footnote 90, to get a brief idea about how the Courts often mitigate the homicidal acts of defendants even though their acts do not seem to warrant mitigation from a normative perspective.

101 Witmer-Rich, *supra* note 28, 409.

102 Sornarajah, *supra* note 88, 185; *See also* Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1738 (2018).

103 Ariel Joanne Pinsky, *Heating up and Cooling Down: Modifying the Provocation Defense by Expanding Cooling Time*, 54 GEORGIA L. REV. 761 (2020).

ing element to gauge whether the provocation was sufficient to cause a reasonable man to lose control. However, courts do not follow a uniform standard in defining what exactly constitutes 'grave provocation'. Sometimes inciting words, gestures or provoking physical acts might all be encompassed within its purview while at other times, words alone might not be considered grave, since courts would prefer words to be accompanied by an act that can cause physical harm to the accused.[104] The idea behind such argument is that merely categorising inciting words as grave might make it easier for accused persons to avail the defence and consequently, even small verbal fights will have to be considered as provocative to excuse the killing.[105] Ironically, this argument does not hold good in front of the practical application of the defence whereby jealous men are leniently punished for brutally killing their partners over simple arguments.[106]

Similarly, the term 'cooling time' is mostly interpreted by courts based on particular facts of a case. This open-ended inquiry often leads to an ambiguity surrounding what constitutes sufficient cooling time.[107] While some might interpret a one day gap between the provocation and act of killing as sufficient cooling period to act as a bar, in some other cases, even a few minutes might be enough to have similar consequences.[108] A longer 'cooling time' suggests that the accused had sufficient time to contemplate his actions, and this might result in the court refusing to accept the defence of provocation.[109] Alternatively, sometimes any history of a long-standing grudge is presumed to be a characteristic of premeditation rather than a provocative impulse which ultimately attaches culpability to the accused.[110]

This vague and narrow understanding of 'cooling time' often fails to comprehend some homicides in domestic violence situations, especially cases where women, who may have been so angered or frightened by the abusive treatment, end up killing their abusers in non-conflictive scenarios.[111] Women who face violence for an extended period might react suddenly to some abusive action at the hands of their batterer that might not deserve such an extreme reaction.[112] Sometimes the killings take place while the abusive partner is asleep or engaged in some other activities, not related to any kind of violent behaviour.[113] To most women who kill in such circumstances, where their actions do not succeed the immediate provocative conduct, the requirement of suddenness acts as a hurdle in the application of the defence. For them, the decision to kill their abusers might

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104 *Id*., 768.
105 *Id*.
106 *See* discussion *infra* Part IV.
107 Buchhandler-Raphael, *supra* note 102, 1730.
108 Pinsky, *supra* note 103, 777.
109 Kahan, *supra* note 37, 318.
110 Pinsky, *supra* note 103, 778.
111 Buchhandler-Raphael, *supra* note 102, 1744.
112 Baker, *supra* note 54, 198.
113 Sanghvi & Nicolson, *supra* note 56.

seem like a reasonable choice to end violence.[114] According to popular culture, a provoked killer must appear angry to get the benefit of provocation defence, but persons, especially abused women, who visibly appear calm and composed owing to their emotions being triggered by fear or desperation, fail to receive similar kind of treatment from the decision-makers. Their passiveness is mistaken for them being 'in-control' and hence committing a pre-meditated act. Especially in scenarios where the victim and the accused have known each other since before the conflict preceding the killing, it is often seen that provoking behaviour patterns develop over a period which, in heightened instigative situations, might give rise to a moment of los of self-control.[115] To this end, scholars have argued for subjectivising the 'suddenness' requirement and expanding the meaning of 'cooling time' to focus on the unique qualities of the accused by taking into account contemporary understanding of the effects of trauma and reactions to various provoking acts.[116]

Additionally, scholars have argued for introducing the concept of 'rekindling' under the provocation doctrine as a means of evaluating the circumstances under which the accused committed the act.[117] Rekindling refers to a situation whereby an event which itself might not cause adequate provocation but reminds the accused of an earlier provocative event that would have been considered sufficient but for the cooling period.[118] This element can serve to explain cases of women who kill as a result of the 'slow-burn' reaction built up over time, concluding in a fatal act after reaching the breaking point. Although this concept has not yet been statutorily recognised in any jurisdiction, the courts have adopted the idea of 'rekindling' within the purview of cumulative provocation where the 'cooling time' is subjectively evaluated to avoid categorising homicidal acts by abused women who kill as acts of calculated revenge or pre-meditated killing.[119] Cumulative provocation is mostly present in the circumstances involving intimate-partner violence, especially in cases where battered women kill their abusers for self-preservation and their relationships have involved various tension-building scenarios and repeated provocative incidents.[120] While many common law jurisdictions overtly reject the idea of cumulative provocation, insisting on the immediacy requirement, gradual recognition of this notion by the Indian Courts demonstrates their willingness to interpret 'female offending' as a product of past

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[114] *Id.*

[115] Christine M. Belew, *Comment, Killing One's Abuser: Premeditation, Pathology, or Provocation?,* 59 EMORY L.J. 769, 793-96, 800 (2010); *See also* Kahan, *supra* note 37, 306; Richard Holton & Stenphen Shute, *Self- Control in the Modern Provocation Defence*, 27 (1) OXF. J. LEG.STUD. 49, 68 (2007); discussing how fear and depression, in so far as it is a relevant factor in a provocation defence, can be relevant in a way that is consistent with that defence.

[116] Pinsky, *supra* note 103, 778; Buchhandler-Raphael, *supra* note 102, 1732.

[117] *See* Sanford H. Kadish et al., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 476-93 (10th edn., 2017) (defining and contextualizing the concept of "rekindling"); *See also* Pinsky, *supra* note 103, 766.

[118] Kadish, *supra* note 117, 476.

[119] Pinsky, *supra* note 103, 785; For discussion on the Courts' reliance upon the concept of 'cooling time' and 'cumulative provocation', *see infra* Parts III and IV.

[120] McColgan, *supra* note 32, 146.

victimisation within the domestic sphere. This point is further elaborated on, in Section IV by examining the judicial response to women who kill their intimate partners. For now, it will be sufficient to acknowledge that the key elements of provocation defence, as evident from the principal contentions in the feminist legal landscape, regularly constrain the decision-makers to assess provocative conduct that normatively warrants mitigation.

III. EXAMINING BEST APPROACHES TO PROVOCATION FOR DEFENDING WOMEN WHO KILL

Given the predominant gendered nature of the defence of provocation, feminist critics have put forth various proposals to bring about radical changes in the law. Primarily there have been two schools of thought—abolitionist and retentionist. The abolitionist argument mooted by the scholars is based on the idea that the defence should be eliminated since deserving defendants like abuse survivors are unable to utilise the defence while the undeserving ones use it repeatedly.[121] On the other hand, those who are in favour of retention of the defence have either asserted that removal of the adultery or sexual infidelity categories would eliminate the discriminatory problems associated with provocation,[122] or mooted for adopting a requirement that men with a history of violence cannot take benefit of the defence plea.[123] As a result of this ongoing scholarly debate concerning the sexist nature of provocation doctrine and the struggle of feminist advocates to ensure that the defence operates more equitably, most of the common law countries found it necessary to amend the law. This section examines the changes brought about in the jurisdictions of the UK and Queensland in order to draw a contrast with the scenario in India. I have relied upon the law reform in the UK and Queensland for mainly two reasons. First, the law of provocation in India has developed in line with the one in the UK. This makes it imperative for us to study the replacement of UK's erstwhile provocation defence with the new partial defence that expressly excludes sexual infidelity as a trigger for loss of self-control. Second, the abolitionist approach followed by Queensland is quite different as compared to that of the UK's and therefore, it demands a review. It will be interesting to see whether such an approach can be followed in the Indian context as well.

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[121] Horder, *supra* note 45, 186-197; Adrian Howe, *More Folk Provoke their Own Demise (Homophobic Violence and Sexed Excuses Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)*, 19 SYDNEY L. REV. 336, 359 (1997); Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L. J. 197, 220-227 (2006).

[122] Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behaviour in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 650 (2003).

[123] Caroline Forell, *Domestic Homicides: The Continuing Search for Justice*, 25 AM. U. J. GENDER & SOC. POL'Y & L. 1 (2017).

A. THE UNITED KINGDOM AND STATUTORY MODIFICATION

With the advent of the "Battered Women's Movement"[124] ('BWM'), feminist advocates and scholars have continued to invest time in drawing the attention of common people and law enforcement agencies to the fact that women are most likely to experience violence at the hands of their partners than from any stranger.[125] Scholars have also focussed predominantly on the use of the English provocation law by male killers, whereby blaming women for provoking their own deaths has usually guaranteed an acquittal or maybe a conviction for manslaughter.[126] On the contrary, the same law when applied to women, who do not fit the typical narrative of a 'provoked' killer, does not accommodate the unique circumstances under which they kill, thereby leading to lopsided conceptions of rationality and reasonableness.[127] These issues surrounding women killing in exceptional circumstances,especially those with an overwhelming history of domestic violence, and the unequal treatment of men and women facing murder charges were the most persuasive reasons for replacing the law of provocation in England and Wales with the introduction of the Coroners and Justice Act, 2009 ('Act of 2009'). Before the enactment of the Act of 2009, the defence of provocation was given legislative footing under Section 3[128] of the Homicide Act, 1957 ('Act of 1957') which required the jury to consider "whether the provocation was

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[124] BWM emerged within the context of a larger Violence against Women's Movement ('VAWM') in the United States of America. In the 1960s, the VAWM, by putting forth the argument that 'the personal is political', created a framework and potential strategy for viewing violence as a political issue thereby leading to the BWM. The remarkable shift in the way domestic violence has come to be understood from a private relationship to an approach that configures domestic violence as a criminal offence can be attributed solely to BWM. For a detailed discussion on the same, *see* Claire Houstan, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217 (2014); Diane Mitsch Bush, *Women's Movements and State Policy Reform Aimed at Domestic Violence against Women: A Comparison of the Consequences of Movement Mobilisation in the U.S. and India*, 6(4) GENDER AND SOCIETY 587-608 (2014).

[125] Mackinnon, *supra* note 1, 44; Nicola Lacey, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 247-248 (1998); Patricia Easteal, Lorana Bartels & Sally Bradford, *Language, Gender and "Reality": Violence against Women*, 40 INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE 324 (2012); ANNA CARLINE & PATRICIA EASTEAL, SHADES OF GREY: DOMESTIC AND SEXUAL VIOLENCE AGAINST WOMEN 238-250 (2014).

[126] Adrian Howe, *Provocation by Sexual Infidelity – Diminishing Returns?* in CONTESTING FEMICIDE: FEMINISM AND THE POWER OF LAW REVISITED 11 (Adrian Howe & Daniela Alaattinoğlu eds., 2019); *See also* Amanda Clough, *Sexual Infidelity: The Exclusion that Never was?*, 76(5) JOURNAL OF CRIMINAL LAW 382–388 (2012).

[127] Adrian Howe, *Provoking Polemic Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition*, 10 FEM. LEG. STUD. 39, 64 (2002).

[128] The Homicide Act, 1957, §3; It reads: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

enough to make a reasonable man do as the defendant did".[129] Unlike the description of 'grave and sudden provocation' in IPC, the Act of 1957 did not stipulate the 'suddenness' requirement but gave recognition to the objective standard of 'reasonable man' based on which a provoked act was to be judged. The reasonableness standard was therefore limited to the confines of Section 3 and the elements stated therein. Following the decision in *R.* v. *Duffy*[130] ('Duffy'), the problematic nature of provocation vis-à-vis abused female killers garnered academic attention. In Duffy, a woman had killed her abusive husband while he was asleep. The Court, having regarded the behaviour of the woman as outrageous, denied to take into consideration the suffering caused to the offender or the blame attached to the dead man and prefixed the phrase 'loss of self-control' with the word 'sudden' in order to highlight the requirement of immediacy. The Court also went on to say that the history of abuse was inconsistent with provocation, and even in such cases, the defendant's loss of self-control must be sudden and temporary. The law came to be settled with Lord Devlin defining provocation as:

> "Some act, or series of acts done [or words spoken] ... 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 the master of his or her mind."[131]

The precedent set by this case subsequently led to an unfavourable judgement in the *R* v. *Thornton* case.[132] Sara Thornton, during her eighteen-month-old relationship with her alcoholic partner, was frequently abused and beaten up. One day when the abuser threatened to kill Sara in her sleep and taunted her with a knife, she stabbed her abusive husband in fear of her daughter's and her own life. However, Thornton was convicted for murder since she had left the scene of provocation and her actions had not been the result of any sudden loss of control.[133] It was only with the landmark case of *R* v. *Ahluwalia*[134] ('Ahluwalia') that Duffy's–no blame is attached to a dead man – line of reasoning was reversed, and the Court conceded that cumulative provocation and a long course of conduct was relevant in assessing an alleged act of killing.[135] As per the facts of the case, Kiranjit Ahluwalia was subjected to abuse at the hands of her husband, which she endured wordlessly to maintain the honour of the family. However, after ten years of suffering such mental and physical abuse, she obtained a court order to restrain

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

[130] R. v. Duffy, (1949) 1 All ER 932.

[131] *Id*.

[132] R. v. Thornton, (1992) 1 All ER 306.

[133] Justice for Women, *Sara Thornton*, available at https://www.justiceforwomen.org.uk/sara-thornton/ (Last visited on September 05, 2021).

[134] R v. Ahluwalia, (1992) 4 All ER 889.

[135] *Id*.

her husband from hitting her. Despitesuch legal intervention, he continued to be abusive. One evening, when he told her that their marriage was over and threatened to burn her with an iron, she decided to put an end to the cycle of violence by killing her husband while he was asleep. Kiranjit was then charged, tried and convicted of murdering her husband. Kiranjit's statement in 1989 – "Today, I have come out of my husband's jail and entered the jail of the law"[136] – echoed the plight of every woman who had faced violence at the hands of an abusive partner and had been incarcerated as a result of the subsequent killing of such abuser. Her case gathered enormous support from the Southall Black Sisters, who filed an appeal on her behalf. While considering the appeal, the Court was not willing to accept the ground of provocation. However, on finding fresh evidence of 'diminished responsibility',[137] a retrial was ordered where Kiranjit was found guilty of manslaughter instead of murder and was sentenced to a term of 40 months which she had already served.[138]

In this case, the question of cumulative provocation was addressed to remove the veil and to allow the law to look beyond the events, which immediately preceded the killing so that they can be viewed in the context of years of escalating violence and abuse and gradual erosion of self-control. Also, there was ample evidence at the trial to support that from the very outset of marriage the woman had been subjected to abuse at the hands of her husband. It was accepted that a small delay between the provocation and the resultant killing, often termed as 'cooling time', would not inevitably obliterate the defence. Subsequently, in the case of *R.* v. *Hobson*,[139] murder conviction of a woman who had admitted killing her abusive partner was quashed, and a retrial was ordered, following the ratio in Ahluwalia. In the case of *R.* v. *Humphreys*[140] where Emma Humphreys was treated like a prostitute, beaten routinely and subjected to humiliation and excessive taunting after attempting to commit suicide, she killed her abuser fearing that he would force her to have intercourse with him and others. The Court, following the decision in Ahluwalia, held that a history of violence suffered by the killer at the hands of the victim is relevant to show loss of self-control and it may indicate why the accused lost self-control in the face of what was not objectively particularly strong provocation.[141] Furthermore, following the decision in Ahluwalia, a retrial was

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[136] Southall Black Sisters, *Provoked: The Story of Kiranjit Ahluwalia*, available at https://southallblacksisters.org.uk/campaigns/domestic-violence/kiranjit-ahluwalia/ (Last visited on September 05, 2021).

[137] The Homicide Act, 1957, §2(1); It reads: "Where a person kills or is a party to the killing of Persons another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition diminished of arrested or retarded development of mind or any inherent causes responsibility, or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." (This section has been amended by The Coroners and Justice Act, 2009, §§ 52(1), 182(5)).

[138] R. v. Ahluwalia, (1992) 4 All ER 889, 142.

[139] R. v. Hobson, (1998) 1 Cr App R 31.

[140] R. v. Humphreys, (1995) 4 All ER 1008.

[141] R. v. Humphreys, (1995) 4 All ER 1008, 432-434.

also ordered for Sara Thornton, and thereafter, the Court took into account the previous history of abuse and reduced her offence to that of manslaughter.[142]

The legacy of injustice caused to these women was undoubtedly pivotal in the widening of the suddenness requirement and led courts in England to consider the probability that abused women can experience anger in the form of a slow burn. However, it was yet to concede to the fact that women's perception and reaction to provocation may be different from those previously recognised. The subsequent cases of *R* v. *Smith*[143] and *R* v.*L (Tracey Ann)*[144] where the defendants were initially convicted of murder, showed that the reason why women were not convicted initially of manslaughter stemmed from the inherent limitations in the provocation defence under Section 3 of the Act of 1957. In both the cases, these women were imposed with a manslaughter conviction after a retrial, in light of fresh evidence of violence faced by them which showed that they killed out of fear for their own lives. However, male killers continued to take advantage of Duffy's rationale to invoke provocation on grounds like sexual infidelity to avoid a murder conviction.[145] The criticism of Section 3, therefore, seems reasonable because it catered to only those situations arising from anger or passion and not from fear of harm, as a result of which abused women resorting to retaliatory violence out of fear and desperation, were susceptible to a murder conviction. In order to depart from a defence plea unsympathetic to the experiences of victims of domestic violence, Section 3 of Act of 1957 was repealed by Section 56(2)(a) of Act of 2009. A new defence was introduced under Section 54[146] solely based on loss of self-control as a result of 'qualifying trigger,'[147] thereby leaving behind the immediacy

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142 R. v. Thornton (No.2), (1996) 2 All ER 1023.

143 R. v. Smith, 2002 EWCA Crim 2671.

144 R. v. L., (2004) 1 Cr App R (S) 5.

145 R. v. Suratan, R. v. Humes and R. v. Wilkinson (Attorney General's Reference No. 74 of 2002, No. 95 of 2002 and No. 118 of 2002), [2002] EWCA Crim 2982, 285-286.

146 The Coroners and Justice Act, 2009, §54(1); It reads: "Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if— (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control, (b) the loss of self-control had a qualifying trigger, and (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D"; *See also* The Coroners and Justice Act, 2009, § 54(2); which reads: "For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden."

147 The Coroners and Justice Act, 2009, §55; reads: "… (2) A loss of self-control had a qualifying trigger if sub-section (3), (4) or (5) applies; (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person; (4) This subsection applies if D's loss of self- control was attributable to a thing or things done or said (or both) which—(a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged. (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in sub-sections (3) and (4); (6) In determining whether a loss of self-control had a qualifying trigger— (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence; (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence; (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded."

requirement of provocation. By virtue of Section 55, the element of 'fear of serious violence' as a trigger for a loss of self-control finally found a place and the same also expressly excluded sexual infidelity from being claimed as a precursor to a provoked act. The objective 'reasonable man' standard was replaced by a person of "normal tolerance and self-restraint"[148] thereby placing more reliance on a person's circumstances under which the killing took place rather than on his personal traits.

The legislative reform has been welcomed as a platform between the extremes of acquitting a woman for acting in a way that should be discouraged and validating her unique situation and circumstances by mitigating the conviction from murder to manslaughter.[149] Few believe that although the inclusion of 'fear' recognises the close connection between victimisation and retaliatory conduct of women, the defence might not prove beneficial for those people for whom it was designed.[150] A perfect example would be the first post-reform case, namely, *R* v. *Clinton, Parker and Evans*[151] where conjoined appeals were filed by three men convicted of murdering their wives who threatened to end their respective relationships. The Court went beyond the new statutory norms to unanimously assert that "infidelity – broadly construed to encompass relationship breakdown – may properly be taken into consideration for the purposes of the new partial defence of loss of control when such behaviour was 'integral to the facts as a whole'."[152] This reasoning somehow mirrors the pre-reform position of the usage of provocation plea and highlights how excluding only 'sexual infidelity' as a trigger has provided a way out for murderous men to excuse their acts of killing women on being abandoned by them.[153] Additionally, mere removal of the qualifying phrase 'sudden and temporary' is unlikely to have a significant impact on women since they are still required to prove 'loss of control' based on fear which might not be the same for every woman who kills.[154] There can be cases where enduring repeated cycles of violence might cause abused women to become passive, and she might not lose her self-control before killing her abuser.[155] The jury may interpret this stillness as an act of premeditation who obviously cannot gauge the seriousness of the fear experienced by such a woman before killing her abuser. Arguably, scholars and various other stakeholders have commented that the defence will continue to exclude women because "the loss self-control will be assessed as per the conventional

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

149 Amanda Clough, *Battered Women: Loss of Control and Lost Opportunities*, 3 J. INT'L & COMP. L. 279, 316 (2016).

150 B. Mitchell, *Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 39-50 (Alan Reed & Michael Bohlander eds., 2011).

151 R. v. Clinton, 2013 QB 1.

152 *Id*., 37.

153 Howe, *supra* note 126, 14.

154 Mitchell, *supra* note 150; Carrie-Ann Blockley, *The Coroners and Justice Act 2009: (A) 'Mending' the Law on Provocation*, 6 PLYMOUTH LAW & CRIMINAL JUSTICE REVIEW 127, 131 (2014).

155 Murphy, *supra* note 55, 78.

terms,"[156] and "her fear will also not be understood within gender-normative understandings of the law."[157] It is not possible to conclude whether this defence will exclude all deserving abused women from availing the intended benefit as proposed by the legislators owing to the dearth of post-reform reported cases about female offenders. Nevertheless, the presence of the 'loss of self-control' element in the new defence needs to be remedied to offer a proper solution to the dilemma of women who kill in non- confrontational circumstances or as a result of 'slow-burn' or 'cumulative provocation.'[158] To this end, few scholars have proposed for the removal of 'loss of control' element from the current partial defence or formulating a new defence for domestic homicides, similar to that of Queensland's, as discussed in the next part.[159]

B. QUEENSLAND AND A SELF- PRESERVATION DEFENCE

Just like other countries, the substantial debate regarding introduction of specific defences for women who kill was reverberating in Queensland and questions were continuously being raised as to whether the traditional provocation doctrine helps women offenders involved in intimate partner killings to seek justice in Courts.[160] Scholars have vehemently pointed out how women facing murder trial for killing intimate partners have often resorted to self-defence plea instead of provocation because the latter unreasonably favours men and rewards male aggression by mitigating the punishment even when situations do not warrant the same.[161] However, a disconcerting difficulty arises when women kill in exceptional circumstances which do not fit within the statutory definition of 'self-defence', and they are only left with the option of pleading guilty or resorting to provocation.[162] Women have received manslaughter convictions even in cases where there has been sufficient history of violence since the Court considered

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156 Alan Norrie, *The Coroner's and Justice Act 2009 - Partial Defence to Murder (1) Loss of Control*, 4 CRIMINAL LAW REVIEW 275 (2010).

157 Susan Edwards, *Loss of Self-Control: When his Anger Is Worth More than her Fear* in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 79-96 (Alan Reed & Michael Bohlander eds., 2011); Susan Edwards, *Anger and Fear as Justifiable Preludes for Loss of Self- Control*, 74 JOURNAL OF CRIMINAL LAW 223 (2010).

158 Amanda Clough, *Loss of Self-Control as a Defence: The Key to Replacing Provocation*, 74(2) JOURNAL OF CRIMINAL LAW 118–126 (2010).

159 Clough, *supra* note 149, 316; Gibbon, *supra* note 61, 78.

160 *See e.g.*, Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1(1991); Elizabeth M. Schneider, BATTERED WOMEN & FEMINIST LAW-MAKING (2000); B. McSherry, *It's a Man's World': Claims of Provocation and Automatism in 'Intimate' Homicides*, 28 MELB. U.L. REV. 905- 929 (2005).

161 Graeme Coss, *Provocative Reforms: A Comparative Critique*, 30 CRIMINAL LAW JOURNAL 138, 150 (2006); Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER & SOC. POL'Y & L. 27, 31 (2006).

162 Geraldine Mackenzie & Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences*, available at https://cabinet.qld.gov.au/documents/2009/aug/criminal%20code%20amendment%20bill%2009/Attachments/Fi nal%20report.pdf (Last visited on August 30, 2021).

their acts as exceeding the right of self-defence.[163] As a result, the Queensland Domestic Violence Council ('QDVC') focused its attention on cases involving female killers and consequently proposed a new statutory defence to be available where there has been a history of domestic violence. According to their proposal, "a person is not criminally responsible for an offence which in fact involves the commission of an assault of such nature, duration and extent at the hands of the other as to make the assault in all of the circumstances justifiable; provided that the force used must not be disproportionate to the domestic violence."[164] However, the proposal was not acted upon until a very controversial case of IPH shook the conscience of the Queensland Law Reform Commission ('QLRC'). The usage of provocation defence in *R* v. *Sebo*[165] to excuse the murderous act of a man bashing his minor girlfriend to death, after being provoked by her continuous taunts of being involved with other men, threw light upon the leniency shown to men killing their partners only to assert supremacy over their so-called 'property.'[166] The public outrage following this judgment led the QLRC to undertake an extensive review of cases where provocation plea had been taken to reduce the charge of murder to that of manslaughter. It was found that men who kill their partners as a reaction to disharmony in a relationship[167] or threats of ending a relationship[168] or partners' adulterous relationships[169] avail provocation defence quite regularly as compared to women who kill to end the cycle of violence.[170] To that end, QLRC felt the need to alter the statutory terminology of 'provocation' to make it available only for deserving cases. The main argument was whether an intentional killing in retaliation for threats of infidelity or end of relationships deserves a conviction less than murder.[171] Consequently, the proposal made in QDVC was also taken into account, and QLRC decided to move beyond the traditional limits of common law provocation doctrine as defined in Mawgridge.[172]

A new partial defence of "killing for preservation in an abusive domestic relationship"[173] ('preservation defence') was eventually given statutory rec-

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[163] *See* R. v. Babsek, (1999) QCA 364; R v. Bob, 2003 QCA 129; R. v. Saltner (October 28 2004) (Queensland Supreme Court); R. v. Benstead, [2007] QCA 53.

[164] Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, *Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations*, 16 CRIMINAL LAW JOURNAL 369, 394 (1992).

[165] R. v. Sebo, [2007] QCA 426.

[166] Heather Douglas, *A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women*, 45 AUSTRALIA & NEW ZEALAND JOURNAL OF CRIMINOLOGY 367 (2012).

[167] *See* R v. Auberson, 1996 QCA 321; R. v. Dhother (May 22 2002).

[168] *See* R. v. Smith (November 23 1999).

[169] See R v. Schubring, (2005) 1 Qd R 515.

[170] Douglas, *supra* note 166, 372-374.

[171] Queensland Law Reform Commission, A Review of The Excuse of Accident and the Defence of Provocation, Report No. 84, September 2008, available at https://www.qlrc.qld.gov.au/_data/assets/pdf_file/0004/588244/qlrc-report-64-web-with-cover.pdf (Last visited on September 20, 2021).

[172] *Id*.

[173] Criminal Code Act, 1899, §304B (1) (Qld.); reads: "A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder,

ognition in 2011 and was designed in a manner to accommodate cases of abused women involved in IPH specifically. The preservation defence incorporated under the Criminal Code Act, 1899, was supposed to be gender-neutral to ensure that it would be viable for any person, having a history of an abusive relationship, to avail the benefit of a reduced charge of manslaughter and lower incarceration period. In furtherance of the same, an 'abusive domestic relationship' was defined as a "domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other."[174] The legislative intent behind inserting this provision was to provide an opportunity to raise the defence even if the killing took place in non-confrontational circumstances in response to an ongoing threat presented by the deceased rather than a specific attack.[175] The modified defence provides explicitly that the 'trigger' should not solely be based on words or the victims' decision about a relationship, in order to exclude those cases where usually male killers resort to their partners' decision to end the relationship as provocative conduct. Another unique element of this defence is that the focus is on what is reasonable to that defendant based upon the history of the abusive relationship and unlike the traditional self-defence or provocation doctrine, it does not rely on the imminent threat from the victim to gauge the defendants' reactions nor does it place any emphasis on 'cooling down' period.[176] The provision varies when compared to the provisions of the new English partial defence of loss of control contained in the Act of 2009. While the English defence still upholds the reasonable man standard, the Queensland's law is tailored closely to the predicament of abused women, without the need for what a reasonable man might do or even a reasonable woman might do.[177] The fundamental requirement is merely a woman acting in self- preservation.

As per Queensland's approach, the act is not justified but merely excused in part, which reduces the charge only from murder to manslaughter rather than an acquittal. This approach varies from the stance that an abuser who is sleeping has rights but not more than that of a woman whose rights he violated day and again, and this is the primary reason why few scholars believe that no triggering assault or immediate danger is deemed necessary while considering the case of

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is guilty of manslaughter only, if- (a) The deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and (b) The person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes death; and (c) The person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case." (This provision has been introduced by Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act, 2010, §3(Qld)).

174 Criminal Code Act, 1899, §304B (2) (Qld.).

175 *See* Criminal Code Act, 1899, §304B (3) (Qld.); which reads: "A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation."

176 Clough, *supra* note 149, 301.

177 *See* Celia Wells, *Battered Woman Syndrome and Defences to Homicide: Where Now*, 14 LEGAL STUDIES 266 (1994).

an abused woman who kills.[178] The fact that the new defence did not bring along with it any change in the evidence law suggests that the application of this defence might be minimal in cases of IPH and women may resort to other options to defend themselves in Court.[179] Some scholars assert that if there has been a history of extreme abuse, even a non-confrontational homicide should be justified based on her reasonably grounded belief, that she had no other option and such cases do not warrant even a reduced conviction of manslaughter.[180] Such reasoning is often followed by the Courts and is also one of the primary reasons behind the retention of Queensland's self-defence doctrine in its original unaltered form.[181] The post-reform decisions reveal that the preservation defence is pleaded along with self-defence to ensure a verdict in favour of women defendants. In *R.* v. *Susan Falls*,[182] (*'Falls'*) the jury was instructed on both self-defence and preservation defence, with Justice Applegarth advising the jury members to take into account the history of an abusive relationship. After hearing the evidence of domestic abuse, the jury was sympathetic to her circumstances and acquitted her on the grounds of self-defence, rather than convicting her of manslaughter, by reason of preservation in an abusive relationship, even though a considerable amount of premeditation was present. Following the strategy applied in Falls, a woman charged with the murder of her husband in *R.* v. *Ney*[183] pleaded self-defence along with the preservation defence. However, based on the evidence of the history of violence, she was convicted of manslaughter. Similarly, in *R.* v. *Irsliger*,[184] the case was primarily one of self-defence since she had killed her husband to prevent sexual abuse of her daughter, but during the trial, preservation defence was also raised as a back-up option. The Court ultimately acquitted her of murder charges on the ground of self-defence only. The preceding cases illuminate the restricted role of preservation defence as a fall-back option to ensure that if a self-defence claim fails, the defendant will at least have the chance of receiving a reduced sentence instead of mandatory life imprisonment for murder. Justice Applegarth's analysis of self-defence in Falls stressed on the fact that the long-standing abuse is sufficient to trigger self-defence and his assessment was based on Susan's personal experience of living in a violent relationship rather than that of a 'reasonable man'. This case has loosened the rigid self-defence rules in Queensland, thereby making the partial defence a 'second-best solution' for defending women who kill their abusers. This kind of trend in judicial decisions reflects a growing awareness amongst the judges and community of the prevalence and nature of domestic violence. It also

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[178] Elizabeth Sheehy et al., *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand*, 34 SYDNEY L. REV. 467, 468 (2012); *See also* Anthony Hopkins & Patricia Easteal, *Walking in her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland*, 35 ALTERNATIVE LAW JOURNAL 132 (2010).

[179] Rebecca Campbell, *Domestic Relationship Evidence in Queensland: An Analysis of a Misunderstood Provision*, 42 UNSW L. J. 430 (2019).

[180] Hopkins & Easteal, *supra* note 178.

[181] Clough, *supra* note 149, 302.

[182] R. v. Susan Falls (May 26 2010) (Queensland Supreme Court).

[183] R. v. Ney (March 8, 2011) (Queensland Supreme Court).

[184] R. v. Irsliger (February 24, 2012) (Queensland Supreme Court).

underscores the potential of looking at the possibility of enlarging self-defence in the context of IPH, rather than completely depending on the preservation defence.

The preceding analysis of provocation jurisprudence gives rise to certain conclusions concerning female killers. First, women often resort to committing homicide when no other option is available to them to save their own life or that of their children and in some cases, even after securing injunctions or protective orders. Second, despite modifications in the provocation doctrine, women have often resorted to other legal defences. Third, each country has a different approach towards resolving the inherent problems associated with defending women who kill. The English approach is reflective of the fact that a successful provocation defence that results in manslaughter and carries a shorter punishment is the best defence for women committing IPH. On the other hand, the approach followed by the Courts in Queensland shows that expanding the self-defence structure will not be equivalent to a license to kill; instead, it will address the dire situation in which women find themselves answerable to, in criminal law. This discussion, therefore, provides a suitable foundation for reviewing the Indian position in Part IV, followed by remarks on whether the Indian provocation doctrine should be reformed for eliminating disparity, under Part V.

IV. THE JUDICIAL DISCOURSE IN INDIA: APPLICATION OF PROVOCATION DEFENCE VIS-À-VIS INTIMATE PARTNER HOMICIDE

Traditionally, violence within the contours of intimate partner relationship was typically viewed as a male perpetrated act against a female victim. However, in recent years, the notion of intimate partner violence ('IPV') has expanded in both social and criminological research to illustrate the shift in the trend of domestic killings from a completely male- perpetrated act to that involving female perpetrators as well.[185] An extensive research conducted by the World Health Organisation based on data from sixty-six countries reveals that IPHs accounted for about forty percent of all killings of women, but only six percent of that of men[186] and this pattern of gender asymmetry is reproduced by most of the countries.[187] Scholars have argued that it is the culturally defined gender roles that encourage men to act violently and on the other hand, discourage women from engaging in violent behaviour and socialise them to suppress anger, even if it is at the cost of their own lives.[188] As a result, a man's involvement in an IPH is never

[185] Amy Reckdenwald & Karen F Parker, *Understanding the Change in Male and Female Intimate Partner Homicide over Time: A Policy- and Theory-Relevant Investigation*, 7 FEMINIST CRIMINOLOGY 167 (2012).

[186] Heidi Stöckl et al., *The Global Prevalence of Intimate Partner Homicide: A Systematic Review*, 282 THE LANCET 859–865 (2013).

[187] R. Emerson Dobash & Russell P. Dobash, *When Women are Murdered* in THE HANDBOOK OF HOMICIDE 135 (Fiona Brookman, Edward R Maguire & Mike Maguire eds., 2017).

[188] Martin Daly & Margo Wilson, HOMICIDE 147 (1988); Jeffrey S. Adler, *I Loved Joe, but I Had to Shoot Him: Homicide by Women in Turn-of-the-Century Chicago*, 92(3) J. CRIM. L. &

seen as a social problem especially when the killing is in the form of punishment to an adulterous wife or to a partner who wants to leave the relationship.[189] This kind of male aggression is considered natural since men are presumed to become violent when women question their authority or challenge the legitimacy of their behaviour.[190] However, with changing times and a shift in attitude towards IPV, women's involvement in domestic killings have seen a rise.[191] The fundamental reason behind this has been the law's primary concern about women's protection as the 'property' of men and not as autonomous individuals deserving of legal protection.[192] As such, women who are left unprotected against rampant abuse within the four walls of their household, end up using fatal violence against their abusers.[193] Quite contrary to the law's response to the heat of passion killings by men, a woman's desperate measure to end a troubled or violent relationship, is often seen as a socially-deviant behaviour and not a justified act of self-preservation. This disparate treatment is very much reflected in the usage of 'provocation' as a defence to the charge of murder.

Under the IPC, provocation in case of murder is much more than an extenuating circumstance as it takes away homicide out of the category of murder and there by, changes the very nature of the offence.[194] Despite such importance, the law regarding provocation is still in a state of 'bewildering uncertainty' with respect to its application in IPH cases. As evident from our discussion in Part II, the criticism of provocation stems from the continuous acceptance of the objective yardstick of 'reasonable man' by courts for assessing the seriousness of provocation and traditional application of the defence based on certain specific categories of victim behaviour. The defence, imbued with the requirement of objective reasonableness, often fails to accommodate the cases of women who may kill when driven by emotions like fear of violence or survival instincts.[195] This is primarily because the foundation of 'provocation' lies on the idea that homicide is a 'male act' which warrants male attributes to be infused with the objective standard of reasonableness. As such, the image of a provoked killer is that of a 'man', who after being wronged by someone, immediately loses his control in an emotionally charged scenario.[196] However, extensive research by feminist scholars shows that

CRIMINOLOGY 867-898 (2002).

189 Allen, *supra* note 42.

190 Bibbings, *supra* note 87, 235.

191 *See* Coramae Richey Mann, *Getting Even - Women Who Kill in Domestic Encounters*, 5 JUSTICE QUARTERLY 33 (1988); Greg T. Smith, *Long Term Trends in Female and Male Involvement in Crime* in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 139 (Rosemary Gartner & Bill McCarthy eds., 2014); Nicola Lacey, *Women, Crime and Character in Twentieth Century Law and Literature: In Search of the Modern Moll Flanders* (2017), available at http://eprints.lse.ac.uk/87574/1/Lacey_Moll%20Flanders_Author.pdf (Last visited on September 20, 2021).

192 Mackinnon, *supra* note 1, 82.

193 Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 (1) J. CRIM. L. & CRIMINOLOGY 80, 149 (1994).

194 Kelkar, *supra* note 35, 328.

195 McColgan, *supra* note 32, 142.

196 Witmer-Rich, *supra* note 28.

the defence is mostly invoked by perpetrators of domestic homicides comprising of abusive or jealous husbands who kill over mere suspicion of the adulterous relationship of their wives and men who are threatened by their partners' attempts to leave a violent household.[197] Law's treatment of such perpetrators has been subjected to further criticism as it reinforces masculine norms of violence and accentuates leniency for men engaged in intimate-partner killings.[198] Thus, the primary concern of feminist scholars remains as to whether a defence plea that has been available to men since times immemorial should be equally accessible to homicidal women or not.[199] However, for the sake of clarity, it must be emphasised that the nature of equality suggested by feminist advocates means treating women based on their unique circumstances rather than women being treated like men.[200]

It has to be acknowledged that practically there is no parity between men and women in the eyes of the law since men are considered to be rational and autonomous legal subjects while women are denied full legal and civic subjecthood.[201] Therefore, we cannot expect the law to treat them equally without taking their social differences into account. Yet, it fails to draw upon the categorical distinction between them while assessing provocation as it simply imports male experiences to evaluate the deviant behaviour of a woman. When an act is committed by a man in the absence of malice, but due to loss of control owing to provocation, he is believed to be less culpable than someone who acted out of the wickedness of heart or with premeditation. But when women commit homicidal acts, they are believed to be 'dangerous' as they violate not only the law but also the socially defined role of a woman. This contention is a derivative of the preceding discussion in Part III, where we saw how courts have often disregarded the abuse inflicted on female defendants and labelled them asrevenge-seeking murderers. As such, *prima facie* it seems untenable to draw a parity between a person who kills out of jealousy or rage and another who acts in self-preservation and to attach the same amount of culpability to both of them. This leads us to a few pertinent issues linked to the equality question raised by feminist advocates but not fully elaborated by them. First, does an act of killing by a man on account of the 'loss of control' by acts of adulterous or unfaithful wife warrant mitigation to a

[197] Coker, *supra* note 25; Deborah E Milgate, *The Flame Flickers, But Burns On: Modem Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV.193, 201 (1998).

[198] Matlock, *supra* note 62.

[199] Gruber, *supra* note 65, 313; Forell, *supra* note 161; Kumari, *supra* note 7; Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 (6) U. PA. L. REV. 2151-2207 (1995); Victoria Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 364 (2004).

[200] Omodei, *supra* note 3; Kumari, *supra* note 7, 150.

[201] Nicolson, *supra* note 10, 17; discussing how denial of rational agency to women dangerously reinforces stereotypes of women being irrational and passive. For a better understanding of this argument, reference may be made to the decisions cited in Part IV.A. In most of the cases, the courts have acted on the assumption that the homicidal act was a rationally chosen behaviour on the part of the male accused. However, a contrast may be drawn by referring to the decisions cited in Part IV.B., wherein the courts, while dealing with female offenders have primarily focused on their internal motivations and in few cases, on the assumption that their criminality emanates from pathological state of mind.

lesser offence than murder? Second, does an act of killing by an abused woman to end the cycle of violence, or as a measure of self-preservation warrant any sort of culpability at all? Lastly, should there be a differential application of provocation defence for women who kill to end long-endured torture and those women who kill to exact revenge? With these questions in mind, I will proceed with the analysis of the case laws pertaining to the application of provocation. The critique will probably not be representative of the whole CJS in India since it includes only reported cases decided by the Appellate Courts. However, these cases are important as they portray how the antiquated gender-norms associated with the elements of provocation influence the judicial decision- making in homicide cases. In doing so, the critique will attempt to address the equality question and initiate an argument that anyone who kills in the circumstances arising out of an abusive environment deserves leniency as opposed to a person who kills out of anger where the victim posed no severe violence.

A. FAVOURITISM TOWARDS MALE KILLERS

As already stated in Part II, Indian Courts have engaged in judicial innovation while dealing with the cases of provocation and unlike other common law jurisdictions, have subjectivised the reasonableness standard and the traditional loss of self-control theory to a large extent. However, such innovation has primarily taken place to evaluate a male defendant's violent conduct arising out of jealousy or rage. Even before Lord Devlin characterised a 'reasonable man' in Camplin, Indian Courts had started deviating from the statutory statement of the law by attributing characteristics of the accused person to the hypothetical reasonable man while assessing provocation. Nonetheless, the test has been used by courts to recognise male anger as a mitigating factor in excusing violent killings by men against their wives or wives' lovers in cases of sexual infidelity or adultery. Traditionally, the person killed out of jealousy and rage was the male romantic partner of the killer's wife, and the defence was consequently applied to mitigate the offence of murder to that of culpable homicide not amounting to murder. As a result, the elements of 'loss of self-control' and objective reasonableness standard have evolved based on male experiences within the context of the heat of passion killings. The landmark case which settled the law of provocation in India is also, unfortunately, inextricably entwined with the antiquated social norm that women are men's property, to be defended from 'invasion' by other men. The Supreme Court in *K.M. Nanavati* v. *State of Maharashtra*[202] (*'Nanavati'*) opined that the test of 'grave and sudden provocation' is "whether a reasonable man belonging to the same class of the society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self- control."[203] The Supreme Court was also of the view that what a reasonable man would do in case of provocation depends upon "the custom, manners, way of life, traditional values etc. i.e., in short, the cultural, social and emotional background of the class

[202] K.M. Nanavati v. State of Maharashtra, AIR 1962 SC 605.
[203] *Id*.,¶ 85 (per K. Subba Rao, J.

of society to which an accused belongs".[204] In this case, the wife of the accused confessed to him that she had illicit intimacy with the deceased. On hearing this, he started thinking about asking an explanation from the deceased and after few hours, bought a revolver and then went up to the deceasedand shot him dead. Since three hours had elapsed between the time the accused heard the news and the murder took place, the Court held that the murder was deliberate and he could not claim the defence of provocation. Although it was the last jury trial conducted in India, the case is still subjected to criticism owing to the jury's exercise of chauvinistic empathy towards an impassioned jealous husband to hold him 'not guilty'. Scholars contend that the way in which the provocation law was applied in this particular case provided leverage to men to kill for want of love and affection and limited women's ability to leave abusive relationships.[205]

Following the rationale in *Nanavati,* the Supreme Court in *Budhi Singh* v. *State of H.P.*[206] observed that "an offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too in proximity to the time of provocation."[207] Subsequently, the Court went on to say that "the doctrine of grave and sudden provocation is incapable of rigid construction leading to any principle of universal application."[208] Also, in *Sukhlal Sarkar* v. *Union of India*,[209] the Supreme Court held that a person claiming the benefit of Exception 1 has to show that the provocation was grave and sudden so much so that he was deprived of the power of self-control and that he caused the death of the other person while he was still in that state of mind. The term 'grave' implies that the provocation should be of such nature to give cause for apprehension to the defendant and 'sudden' implies an action which must be instant and unexpected so far as to provoke the defendant.[210] This requirement demands that the accused reacts immediately after the provoking incident. An interval between the provocation and the response, therefore, is taken as a contradiction to the loss of self-control which forms the essence of the defence plea. However, courts have often arbitrarily deviated from this strict principle in cases of homicides taking place in domestic settings.

The trend of cases, both before and after Nanavati, reflect the line of reasoning employed in Mawgridge, which considered adultery and sexual infidelity as the 'highest invasion of property', and reinforce objectification and subordination of women, along with the primitive views that assess women based on their chastity. The chauvinistic evolution of this defence can be traced back to 1881– the case of *Boya Munigadu* v. *Queen*[211] – wherein the Madras High Court had allowed

[204] *Id*.,¶ 84 (per K. Subba Rao, J.).
[205] Sornarajah, *supra* note 88, 185.
[206] Budhi Singh v. State of H.P., (2012) 13 SCC 663.
[207] *Id*.
[208] *Id*.,¶18 (per S. Kumar, J.).
[209] Sukhlal Sarkar v. Union of India, (2012) 5 SCC 703.
[210] *Id*.,¶9- ¶10.
[211] Boya Munigadu v. Queen, 1881 SCC OnLine Mad 1.

the plea of provocation on the ground of adultery. The accused had witnessed the sexual intercourse between his wife and the deceased but killed him the next day when he saw her feeding him. The Court was of the opinion that even though there was a lapse of time between the adulterous act and subsequent killing, the mental picture of the adultery revived in the accused by the sight of his wife feeding the deceased would be considered as sufficient provocation to mitigate the offence. Similarly, in *Abalu Das* v. *Empress*,[212] the accused found a man entering his house at night at the invitation of his wife with whom he had sour relations and being enraged by such an act, he caught hold of the deceased and took him outside the house to some distance and assaulted him so severely that he subsequently died of the injuries received.[213] The Calcutta High Court held that the circumstances under which the deceased was found in the house of the accused on the night of crime were sufficient to cause 'grave and sudden provocation' to the accused.[214] The Court also held that the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period even after the deceased was caught in the house in the company of the wife of the accused.[215] Thus, while affording mitigation to the accused persons, in the past, the courts have dispensed with the requirement of suddenness to accommodate cases where the accused has either been subjected to provocative conduct for a considerable period or where the last act before the killing has had such a reference to earlier provocative conduct as to revive in the accused, memories of the earlier provocation. These cases show that the broad formulation of provocation perpetuates the patriarchal concept of honour whereby a man feels entitled to kill another person who invades his 'property' (meaning his wife or partner). The main problem lies with the fact that the defence overlooks the issues associated with a man's determination of whether his wife's disloyalty is worthy of his rage and his consequent violent act to assert his supremacy over her.

The liberal construction of the adequacy requirement is not just limited to cases where the victim is the male paramour. Courts have gone further in subjectivising the requirements especially in cases where the victim is the wife or intimate female partner and the trials have predominantly turned into trials of their character and the extent to which they accord with norms of chastity.[216] This problem can be very well portrayed by the Court's verdict in *Jan Muhammad* v. *Emperor*,[217] where the accused had killed his wife after a quarrel ensued between the two of them. The accused alleged that his wife led an immoral life, and since she did not pay heed to his repeated warnings, he dealt two blows on her head. While setting aside his conviction for murder, the Court observed that to deliber-

[212] Abalu Das v. Empress, 1901 SCC OnLine Cal 69.
[213] *Id*.,¶1.
[214] *Id*., ¶5.
[215] *Id*., ¶6.
[216] Nicolson, *supra* note 10, 16; *See generally* Marie Fox, *Legal Responses to Battered Women who Kill* in LAW AND BODY POLITICS: REGULATING THE FEMALE BODY 171- 200 (J. Bridgeman & S. Millns eds., 1995).
[217] Jan Muhammad v. Emperor, 1929 SCC OnLine Lah 303.

ate upon the issue of adequacy of provocation, one must not confine himself to the actual moment of the occurrence and must take into consideration the previous conduct of the woman. Apparently 'her evil ways' were known to every other person in the village which caused the accused extreme mental agony, shame and humiliation. Having pointed her previous 'misdeeds,' the Court opined that the wife's arguments during the quarrel constituted sufficient provocation which was equivalent to "the last straw which breaks the camel's back" and thereby, resulted in the husband's loss of self-control.[218] Subsequently, in *In Re, Murugian*,[219] the accused suspected intimacy between his wife and another man and ended up killing her. The Court accepted his plea of provocation and held that the circumstances in which the accused was placed when he lost his 'balance of mind' and resorted to the stabbing of his wife should be viewed liberally as constituting grave and sudden provocation. The Court's opinion was based on the premise that "the wife is a woman of whose person he desires to be in exclusive possession, and that is for the moment enough for him to lose self-control."[220] In *Babu Lal* v. *State*,[221] the appellant suspected that illicit intimacy existed between the deceased and his wife even though he had never seen them in a compromising position together. However, one day when he found the deceased at his home, he lost his self-control and killed him. The court observed that "where knowledge that his wife is unfaithful comes all of a sudden to the husband, it is considered likely that he may lose his self-control and act in a wild manner."[222] The Court held that an accused is entitled to get the benefit of this defence where:

> "the circumstances can be interpreted only in one way by any reasonable person, and the mental picture which will form in the mind of the husband by what he saw would be just as potent and powerful to disturb his mental balance and make him lose self-control as the ocular proof itself."[223]

Scholars have also argued that male killers often have a long history of violence against women and their homicidal act is less of an uncontrollable emotional outburst and more of a predictable manifestation of their disregard for female autonomy.[224] However, even in such cases where there is a prominent history of domestic violence between the parties, the courts have relied upon the broad formulation of provocation to excuse violent acts by men. For instance, in *Atura Ram* v. *State*,[225] the facts reveal that there was a prior history of violence between the accused and deceased wife, where the deceased was regularly beaten up by the accused. On the day of the incident, the deceased incited the accused

[218] *Id*., ¶¶6-7.
[219] Murugian, In re, 1957 SCC OnLine Mad 63.
[220] *Id*., 93.
[221] Babulal v. State, AIR 1960 All 223.
[222] *Id*.,¶ 14.
[223] *Id*.
[224] Coker, *supra* note 25.
[225] Atura Ram v. State, 1966 SCC OnLine P&H 302.

by alleging him of leading an immoral life and having an incestuous relationship with his sister. The High Court took a lenient view while allowing the defence plea and held that the innuendo contained in the wife's accusations would ordinarily infuriate any husband and her words would *per se* amount to grave and sudden provocation. Similarly, in *Paramlal* v. *State of M.P.*,[226] where there was a history of animosity between the husband and wife, the accused husband strangulated his wife when he saw her in a compromising position with another man. The Court observed that "the strata, society and state of mind of the accused do have an essential role to play in a case of this nature."[227] The Court accepted the plea of provocation on the ground that there was substantial evidence of altercation on the date of occurrence between the husband and wife, as he had noticed an extremely unbearable incident. Although the deceased escaped to her parental home, the accused followed her to that very place and killed her. The Court also observed that the *modus operandi* was reflective of the fact that there was no premeditation on the part of the accused since he was not in a position to garner self-control in the limited time. The court also relied upon the observations made in *Raghavan Achari* v. *State of Kerala*[228] and *State of U.P.* v. *Lakshmi*[229] wherein it was observed that if "wife is engaged in lascivious activities with another person, the husband is bound to be enraged."[230] This character vilification of female victims in IPH cases is a common occurrence by virtue of which the gravity of male aggression is subsided as against the constant victimisation of women. For example, in *Ram Kishore* v. *State of Rajasthan*,[231] the appellant found his wife having illicit intercourse with a stranger and stabbed her to death. The Court, while accepting the defence plea of the appellant, observed that the deceased wife was a "lady of easy virtue" which made her conduct provocative enough to incite rage in her husband.[232] Similarly, in *V. Dharmalingam* v. *State*[233] the accused and his deceased wife, had a strained relationship as he suspected her fidelity. As revealedfrom the facts of the case, the deceased continued with her illicit relationship despite several warnings given by her husband, and on the night of the incident, she threatened to leave him as a result of which the accused violently attacked her. The Court held that the accused was entitled to the benefit of the Exception 1 as her threat to leave the relationship amounted to adequate provocation.[234]

There are numerous cases to show that men more often raise the provocation defence in cases of IPH, but only a few have been discussed here to give an illustration of the Indian trend. From the above discussion, it is quite evident that the usage of rhetorical adjectives to describe a woman's past conduct

[226] Paramlal v. State of M.P., 2002 SCC OnLine MP 520.
[227] *Id*.,¶ 16 (per Dipak Misra, J.).
[228] Raghavan Achari v. State of Kerala, 1993 Supp (1) SCC 719.
[229] State of U.P. v. Lakhmi, (1998) 4 SCC 336.
[230] *Id*., ¶¶19- 21.
[231] Ram Kishore v. State of Rajasthan, 2007 SCC OnLine Raj 647.
[232] *Id.,* ¶¶1-4.
[233] V. Dharmalingam v. State, 2008 SCC OnLine Mad 359.
[234] *Id.,* ¶13.

while assessing the gravity of provocation expresses tolerance for masculinistic violence. Although domestic violence is a criminal offence in itself,[235] the courts ultimately offer leniency to sexist killers who would otherwise be legally condemned. Apart from that, attributing unchaste behaviour to dead female victims is incompatible with the CJS's rejection of constructs that attribute blame to victims.[236] These cases give a flavour of the apparent acceptability of being provoked by jealousy or anger whereby men have been able to exact unusual or fatal sanctions on their wives or their paramours. The trend of cases also reveals that where provocation is applied in cases of male- on-male violence, it is indivisibly bound up with the notions of honour. On the other hand, the same when applied to cases of male-on-female homicide, there is a constant denial by the perpetrator of having done anything wrong to the victim which ultimately resonates misogynist perceptions about male supremacy over women. On minimal occasions, the Courts have diverted from this liberal approach towards male killers. For instance, in *Vairana Pillai*, *In re*,[237] the accused was leading an unhappy life with his wife, and during one of their regular quarrels, he killed her. The Court rejected his plea that the verbal fight amounted to provocation in the light of the history of the prior relationship between the accused and the deceased. While doing so, the Court held that it would not be justified in taking into account "a certain course of living which is said to have constituted a continuing source of provocation adequate to attract the exception when the actual provocation was sudden but not grave."[238] Similarly, in the very recent case of *Ashwani Kumar* v. *State of Punjab*,[239] the Supreme Court rejected the defence plea of provocation. The appellant had killed his wife in the house, on finding her in a compromising position with another man. The accused, while deposing under Section 313[240] of the Code of Criminal Procedure, 1973 (' CrPC') said that he lost self-control on seeing his wife in another man's arms and pushed her in rage, as a result of which she succumbed to death. The prosecution proved beyond a reasonable doubt that the act did not fall under the purview of grave and sudden provocation and thereby the subsequent act of killing was a premeditated murder.

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[235] Domestic Violence within the contour of marital relationship is an offence categorised as "Husband or relative of husband of a woman subjecting her to cruelty" and "Dowry Death", punishable under §§ 498-A and 304-B of the Indian Penal Code, 1860, respectively.

[236] *See* Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 397 (2005).

[237] Vairana Pillai, In re, 1963 SCC OnLine Mad 374.

[238] *Id*., ¶10 (per Anantanarayanan, J).

[239] Ashwani Kumar v. State of Punjab, (2019) 13 SCC 664.

[240] The Code of Criminal Procedure, 1973,§313; reads: "(1)In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court - (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary; (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under Cl. (b)…"

The strong line of cases, therefore, reveals that the 'reasonable man', as interpreted by the Indian Courts, is clothed in the garb of a jealous and possessive man who kills either to maintain his honour or to assert his supremacy. However, this generalised image, when applied to any other offender, will abstract an individual out of his/her social reality, thereby conferring on him/her formal equality. This illusory formal equality might ultimately lead to unjust consequences, especially for women, who do not kill out of rage. They might experience discrimination in subtle ways through male-centric power dominance which expects them to assimilate into this male standard rather than allowing them to maintain a separate position for themselves. Despite being considered as a genderless norm upon which all other forms of identity must rely, if this standard is applied in cases involving female offenders, it might create 'double injustice' by filtering out the social conditions which compelled them to retaliate.

B. IS PROVOCATION A SUBSTANTIVE DEFENCE FOR FEMALE KILLERS?

Unlike the BWM in the UK or Queensland, the feminist movement in India primarily focused on securing legal recognition of domestic violence (and subsequently IPV)[241] and did not involve much discussion on crimes committed by women as a result of victimisation. The primary reason behind negligent dialogue on female offenders is the common perception that women are supposed to be domesticated, passive, dependant and capable of being violated.[242] Any deviation from such standard is considered 'abnormal' or 'exceptional', thereby not deserving any place in the existing criminal jurisprudence. Unlike the feminist critique of provocation in the aforementioned countries, the Indian law has not been subjected to intense criticism owing to the lack of reported cases on female offending and empirical data to support the claim that female killers seldom invoke defence pleas in the Court. As evident from our discussion in the previous section, the defence is frequently used by men in cases where they have lost self-control and resultantly killed someone. However, female killers hardly draw attention to themselves in Courts as they are not even considered 'real' criminals.[243] The reason behind this is two-fold. Firstly, the common concern among the female killers is that they are often unable to communicate their own account or justify their actions to

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[241] *See generally* Indira Jaising, *Domestic Violence and the Law*, 1 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION 72 (2002); Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177 (2006); Anjali Dave, *Listening to Women's Voices: Domestic Violence and Women's Negotiations with Law and Public Institutions* in NEGOTIATING SPACES : LEGAL DOMAINS, GENDER CONCERNS AND COMMUNITY CONSTRUCTS 224 (Flavia Agnes & Shobha Venkatesh Ghosh eds., 2012).

[242] Worrall, *supra* note 15, 33.

[243] As already stated earlier, men are typically viewed as 'aggressors' and as such women do not fit in the definition of a 'real' criminal. For further discussion, *see* Pat Carlen & Anne Worrall, GENDER, CRIME AND JUSTICE (1987).

their lawyers (predominantly male), who ultimately represent them in the trial.[244] Secondly, the stereotypes associated with appropriate feminity, for instance, 'normal' women need protection, inhibits lawyers' ability to comprehend a woman's situation.[245] As such, women are usually advised by the defence lawyers to plead 'not guilty', instead of narrating their version of the story and depend upon the prosecution's failure to prove the case beyond reasonable doubt.[246]

The criminal jurisprudence in India places the burden of proving the intention of the accused person on the prosecution, and this burden never shifts.[247] If an offender is fortunate, and the prosecution's version raises even an iota of doubt in the mind of the judges, the chance of securing an order of acquittal is higher. However, if an accused pleads a defence, the burden of proving the existence of circumstances bringing the case within the said exception lies on him/her.[248] Although this burden is on the accused, "he is not required to prove the same beyond all reasonable doubt but merely satisfy the preponderance of probabilities."[249] Then again, invoking a defence also carries with it the risk of incarceration in case the plea does not succeed.

Given these limitations and the antiquated stereotypes associated with female offenders, it is quite common for women to avoid invoking any defence even if the circumstances warrant the same. There have been instances where women have not pleaded provocation defence even though the facts revealed the existence of elements of provoking incidents. In some cases, the female defendants were acquitted on benefit of doubt while others had to face murder conviction. For example, in *Emperor* v. *Sukhu Bewa*[250] the accused had allegedly murdered her husband. There was a history of prior violence as the deceased used to ill-treat her since the very beginning of the marriage. However, the Court acquitted her owing to lack of evidence and the prosecution's inability to prove the case beyond reasonable doubt. On the other hand, in *Durga* v. *State of Rajasthan*,[251] the accused had to face a murder conviction for killing her husband even though she was a minor when she committed the homicidal act. Her husband was continually pressurising her to give birth to a child, and one fine day, when she could not bear the torture,

244 Worrall, *supra* note 15, 77.

245 *Id*.

246 *Id*.; *See also* Gopal v. State, 2016 SCC OnLine Mad 10694, ¶¶15-19; The latter case discusses the general trend of pleading 'not guilty' in cases of homicide.

247 Bhikari v. State of U.P., AIR 1966 SC 1; *See* The Indian Evidence Act, 1872, §102; which reads: "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

248 Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563, ¶5 (per K. Subba Rao J.); The principle has been enshrined under The Indian Evidence Act, 1872, §105 which reads: "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

249 Surendra Mishra v. State of Jharkhand, (2011) 11 SCC 495, ¶13 (per C.K. Prasad, J.).

250 Emperor v. Sukhu Bewa, 1911 SCC OnLine Cal 251.

251 Durga Meena v. State of Rajasthan, 2019 SCC OnLine Raj 3839.

she stabbed him. On setting aside her conviction, the High Court observed that the accused-appellant had "every right to resist the pressure as she was not mature enough, mentally and physically, to bear a child."[252] The Court observed that the deceased was not killed in furtherance of any "pre-conceived design or a cold calculated manner".[253] Thus her act would at best be punishable under Section 304, Part II[254] of IPC which entitles her to get the benefit of probation instead of institutional incarceration. Similarly, women have also been wrongly prosecuted owing to the existing gender-stereotypes. For instance, in *Reena Hazarika* v. *State of Assam*,[255] the accused was convicted under Section 302 of IPC by the trial court for having murdered her husband, and the High Court upheld the verdict. The accused wife was not given a chance to record her defence as per Section 313 of CrPC; instead, her conviction was based upon the circumstantial evidence and the fact that she did not 'cry' after the death of her husband. Both the courts specifically termed her passive and silent behaviour as an 'unnatural conduct' which made her the prime suspect in that particular case. However, the Apex Court observed that she was not given a fair chance to establish her innocence and therefore acquitted her on finding that the prosecution's version did not prove the guilt beyond reasonable doubt.[256] These cases illustrate the inability or refusal of the CJS to entertain the female conditions of existence. The last two examples specifically portray how women are judged based on their demeanour and labelled as murderers, without providing any validation to the circumstances in which the crime must have occurred.

Nevertheless, with regard to the law of provocation, the Courts have been liberal in extending the benefit of the defence to women who kill in exceptional circumstances. Even before the recognition of 'cumulative provocation' in the UK, the concept was recognised under the terms of 'sustained provocation' in India. The Indian Courts have been receptive towards the fact that a continuous violent episode in a woman's life can reduce the culpability of a homicidal act. Especially if there have been instances of repeated physical or verbal abuse, women may be driven to become violent as a result of such cumulative effects. The Madras High Court has advanced this notion, in *Suyambukkani* v. *State of T.N.*[257] ('*Suyambukkani*'), wherein it had conceptualised 'sustained provocation' as a judicial creation envisaged by the architects of the IPC. The accused had been living,

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[252] *Id*., ¶17.

[253] *Id*., ¶30.

[254] *See* The Indian Penal Code, 1860, §304; The provision reads: "Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

[255] Reena Hazarika v. State of Assam, (2019) 13 SCC 289.

[256] *Id*., ¶¶20-22.

[257] Suyambukkani v. State of T.N., 1989 LW (Cri) 86.

since her marriage, in a situation of continuous adversity and also faced abuse by her insensitive husband. Once, when the situation became unbearable, she decided to commit suicide along with her children, but she survived. Despite explaining the reasons for her desperate course of action, the trial court found her guilty of murder and sentenced her to imprisonment for life. However, on appeal, her murder conviction was modified. The High Court observed that there is a cardinal difference between grave and sudden provocation and sustained provocation. The ingredient of the latter is a series of acts more or less grave spread over some time, the last of which "acting as the last straw breaking the camel's back may even be a very trifling one."[258] The Court also introduced the concept of 'Nallathangal's Syndrome' by referring to an old Tamil Literature named 'Nallathangal Ballad' which narrated the tribulations of a rich lady who was reduced to unbearable misery and committed suicide along with her children. The Court observed that the syndrome could be considered as one of the exceptions under Section 300 of IPC.[259] It was also observed that since on the day of the incident the accused woman was beaten and assaulted by her husband, she decided to take the Nallathangal way, and therefore, her act would not fall within the meaning of murder as contemplated by IPC.[260] A better explanation of 'sustained provocation' was provided by the same Court in *Poovammal* v *State*[261] ('Poovammal') where a grieving mother killed her own son out of frustration built up in her mind and also attempted suicide. It was observed that:

> "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."[262]

Thus, the concept of 'sustained provocation' provided a passage to excuse the homicidal conduct of abused women, in accordance with common moral standards. This rationale was further applied in a case of IPH where the accused had,on one occasion, killed her abusive husband after enduring violence for a very long time. In *Manju Lakra* v. *State of Assam*[263] ('Lakra') the question for consideration was whether the grave and sudden provocation should be immediately preceding the murder or the time lag can be stretched to a date long before

[258] *Id*., ¶21 (per David Annoussamy, J).
[259] *Id*., ¶7 (per David Annoussamy, J).
[260] *Id*., ¶24 (per David Annoussamy, J).
[261] Poovammal v. State, 2012 SCC OnLine Mad 489.
[262] *Id*., ¶30 (per P. Devadass, J.).
[263] Manju Lakra v. State of Assam, 2013 SCC OnLine Gau 207.

the date. In this case, the accused woman suffered unprovoked acts of domestic violence, but on one occasion, the violence boomeranged and devoured the abusive husband. The incident took place while the deceased was beating her, as a result of which she even sustained injuries in her head and eyes and on not being able to tolerate the violence any further, she snatched the *'lathi'* from his hand and hit him to death. However, the accused pleaded 'not guilty' during the trial and did not adduce any evidence on her behalf. On appeal, the Gauhati High Court relied on the decision in Ahluwalia, which highlighted the concept of 'cumulative provocation', and observed that:

> "Where the circumstances immediately preceding the fatal strike, may not be independent of the previous acts, treated so provocative as to make a man lose his power of self-control yet when the series of provocative circumstances preceding the fatal strike, were sufficient to deprive an ordinary man of his power of self-control, it may not be a proper appreciation of plea of provocation if the immediate provocative conduct preceding the cause of death, is taken into account excluding the previous series of acts, which were inextricably connected with the ultimate act of provocation leading to the cause of death."[264]

The Court also compared the immediacy requirement under Section 304B[265] of the IPC, which leads to the unnatural death of a woman, to the act committed by the accused in this case. The Court concluded that if circumstances potential enough to distinguish the suicide of a woman has been recognised, the same set of events should be equally recognised to be potential enough to turn such women into an aggressor so much so that she ends the life of her abuser.[266] In light of the same, the Court held that her case would fall well within the Exception 1 and therefore reduced her sentence. What follows from this decision is that the series of acts which together constitute 'grave' and 'sudden' provocation should be such which never really permitted the defendant to calm down and the act immediately preceding the killing of the abuser was the culmination of the previous provocative incidents. By recognising 'cumulative provocation', the Courts have undoubtedly widened the scope of 'cooling time' that usually acts as a bar to the application of the defence.

However, some interesting points must be highlighted. Unlike in Suyambukkani, the women in Poovammal and Lakra did not invoke any defence

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[264] *Id*., ¶87 (per IA Ansari, J).

[265] The Indian Penal Code 1860, §304B; reads: "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…"

[266] Manju Lakra v. State of Assam, 2013 SCC OnLine Gau 207, ¶109.

during the trial, but on appeal, their lawyers took the plea to dilute the rigour of the sentence. Such course of action affirms the initial argument that women usually do not plead provocation,and even if they do, the trial courts do not seem to take into consideration the unique circumstances under which they committed the act. It is only during an appeal proceeding that a question of mitigation of sentence comes before the Courts and they eventually take into account the provoking circumstances, if any, to mitigate the offence to culpable homicide not amounting to murder. Additionally, the concept of 'sustained' or 'cumulative' provocation has been implemented a tad differently in Suyambukkani and Poovammal, as compared to Lakra. The application of the doctrine of 'sustained provocation' in the former cases was primarily due to the absence of any immediate provoking incident resulting in loss of control of the accused. On the other hand, the Gauhati High Court in Lakra, while placing reliance upon 'cumulative provocation', took into consideration the previous acts of violence even though there was no 'cooling time' between the provocative conduct and the homicidal act. This expansive approach might turn out to be beneficial for defendants who lose self-control as a result of being subjected to continuous violence.

Notwithstanding such broad interpretation, the defence has also been extended to women who lost self-control as per the requirement under Exception 1. In the case of *Gnanagunaseeli* v. *State*,[267] the accused was subjected to repeated insults and abuse by her deceased husband. On seeing him having an illicit relationship with another lady in her matrimonial abode, she killed him. The Madras High Court accepted her plea of grave and sudden provocation and scaled-down her offence to culpable homicide not amounting to murder. Similarly, in *Lakhwinder Kaur* v. *State of Punjab*,[268] the accused and the deceased were wife and husband. During one of the quarrel sessions, the accused attacked the deceased, and he succumbed to death. Even though the accused did not raise any defence plea, the High Court examined from the circumstances of the case that the accused had been sufficiently provoked and had acted in the heat of passion after quarrelling with her husband. As a result, her conviction under Sec. 302 was modified to one under Sec. 304 Part I. Also, in *Eliamma* v. *State of Karnataka*,[269] the accused had killed her partner when he tried to outrage her modesty. The deceased was an alcoholic and used to assault her frequently. The Court observed that the case fell within the scope of Exception 1 and modified her conviction to one under Section 304, Part II. Furthermore, the Apex Court in *Nawaz* v. *State*[270] modified the murder conviction of a woman who had killed her husband. The facts of the case reveal that the deceased suspected that the accused and their daughter had illicit intimacy with another man and on the day of the incident, the deceased hurled abuses at them and called his wife and daughter 'prostitutes'. On hearing this, the accused killed her husband along with the help of the other man, with whom she was allegedly in an

[267] Gnanagunaseeli v. State, 1995 SCC OnLine Mad 291.
[268] Lakhwinder Kaur v. State of Punjab, 2008 SCC OnLine P&H 246.
[269] Eliamma v. State of Karnataka, (2009) 11 SCC 42.
[270] Nawaz v. State, (2019) 3 SCC 517.

intimate relationship. The Court observed that the deceased provoked the accused by uttering the word 'prostitute' as no woman would like to hear such scathing remarks from her husband, especially if such a name is used against her daughter.[271] The Court also held that as the incident happened within a fraction of a minute when the accused was deprived of self-control owing to the name-calling by her husband, she would be entitled to get the benefit of Exception 1.[272]

It is clear from the preceding discussion that the Courts have taken into account abusive words along with other instigating gestures to constitute adequate provocation, quite similar to that of the Courts' acceptance of small and petty arguments resulting into loss of self-control in cases of male offenders. Ironically, even though the history of violence seems to dominate the factual matrix of the cases of both male and female killers, men have had a more comfortable way out for killing women over misogynist claims or petty arguments as compared to women's retaliation against outraging behaviour or constant abuse. However, the increasing rate of female killers does not represent the masculinisation of women but is indicative of the fact that women are no longer bearing torture silently. By choosing to invoke provocation defence, these women have claimed their legal right to resist habitually violent partners.

The foregoing analysis of the cases, *prima facie* gives an impression that 'grave and sudden' provocation under Exception 1 might be a substantive defence for women who kill as they most certainly satisfy the traditional requirements of the defence and there is usually the presence of physical assault or threats by the deceased. The provocative conduct to which women react violently are examples of serious provocation when compared to those that lead men to kill their intimate partners. Especially, for women who kill abusive partners, the actions of the batterer are genuinely provocative and give rise to various kinds of emotions in the mind of a woman – emotions not limited to anger, but also extending to fear, despair, and survival instinct. If we consider logically, these emotions might naturally motivate retaliatory violence on the part of an abused woman as compared to a man who caught his wife cheating on him. Thus, women who are seen as irrational, considered intellectually inferior to men, and classified as the 'Other' in the society, are more likely to make use of lethal violence mostly in situations where they are compelled to do so or with much rational motives when compared to male offenders who have "greater disposition towards seemingly senseless violent criminal behaviour".[273] It will be wrong to say that women are always driven by fear or despair when they kill, as the analysis reveals that women also kill out of rage or anger. However, in the case of female killers, the dominant emotion is mostly self-preservation which warrants an explanation as to why the woman committed such homicidal act. As indicated at the outset, my concern with the usage of provocation defence was its portrayal of women as 'irrational' beings, incapable of choosing

[271] *Id.*, ¶12.
[272] *Id.,* ¶11.
[273] Gruber, *supra* note 65, 310.

any lawful conduct. From the case laws, it is quite evident that women who kill to save themselves from further accounts of violence, act more rationally than men who kill over small arguments. Why can't a woman's choice to kill her abuser be a rational one? Invoking the provocation defence would necessarily mean that on losing self-control, the woman failed to act rationally and ended up killing her assailant. The defence interprets the woman's behaviour as the product of some pathological reaction on being ill-treated by her abuser, rather than a responsible choice on her part. On the other hand, 'heat of passion' killing by a man is seen as a necessary or justified reaction to an act of infidelity or adultery, which targets his sense of honour or power.

Additionally, the use of the objective reasonable standard based on male experiences reinforces women's incapacity to choose for themselves a particular course of action when confronted with some provoking incident. For instance, it is reasonable for a man to kill his wife if she threatens to end the relationship, although the law allows a person to walk out of a relationship and such an act does not warrant any retaliation. On the contrary, the same reasonableness standard is applied to assess the act of a woman who kills out of necessity. This argument exposes the assumption that men are vested with the authority to govern both themselves and their partners. As a result, a responsible actor, as contemplated by the law, is always garbed in male clothing, thereby placing the female defendants outside the realm of responsibility or rationality. By reaffirming women's incapacity for rational self- control, the provocation doctrine mutualises the violence between the parties and disqualifies women's narratives about the seriousness of violence. The way in which the law of provocation has evolved in India, it provides male defendants with the benefit of their offence being mitigated even if it is a result of jealousy or anger but denies women defendants a better disposition. As such, the parallel use of provocation forthe heat of passion killings and killings out of violence faced at the hands of an abuser is unfair. After all, different reasons for killing should merit different legal responses. To this end, I would like to assert that women who kill in response to long-endured domestic violence should not face incarceration at all. I am not claiming that abused women who kill are innocent in the eyes of the law, but I will agree with the UK Court's observation in Ahluwalia. These women deserve leniency, not because the gravity of their offence was less as compared to what it would have been if committed by a man, rather their culpability should be decided based upon their past sufferings. I agree that this will result in the bifurcation of female killers into two categories with respect to sentencing and culpability, but this argument seems morally and ethically correct. Why should a person be held guilty for saving her own life?

Nevertheless, it might be argued that women who kill their intimate partners out of jealously also deserve harsh treatment just like their male counterparts. After all, sexist men who kill their intimate partners in situations where they do not pose a severe threat to them, should not be treated leniently, and they do not deserve anything less than a murder conviction. As an answer to the equality

question raised by the feminist advocates, it will be pertinent to say that provocation defence should not be made equally available to men and women since it is difficult to conceive of a legal standard of reasonable behaviour applicable for both the gender. Weighing the acts of male killers and female killers on a similar scale will be against the concept of substantive equality. Such treatment will facilitate subjectivity without contextualisation for men and contextualisation without subjectivity for women. However, the defence should be made equally available to all those defendants who are similarly situated, irrespective of their gender.

Taking a cue from the critique of the cases, it can be said that the Indian Courts have subjectivised the hypothetical reasonable man standard to a considerable extent and instead of objectively evaluating the reasonableness of the act, they have taken into account the lived realities of women. However, the cases that have been discussed in this part do not represent similar factual circumstances as compared to the ones in Ahluwalia, Thornton, Falls and the like, where women have faced trouble in invoking provocation defence owing to the killings taking place in entirely non-confrontational scenarios. The recognition of 'cumulative' or 'sustained' provocation in India is limited to particular kind of scenarios and therefore, it gives rise to a possibility that the defence in its current form might not be available to defendants who might kill someone while they are asleep or engaged in some other non-provocative activities. The approach of the Indian Courts to accommodate the cases of abused women who kill might not save those who do not fit into the stereotypical image of a female killer as created by our Courts. Some provocative conduct might not meet the threshold, as a result of which the homicidal act might be viewed as something unexpected rather than occurring against the victim's violent pattern of behaviour. It ought to be acknowledged that abused women might kill in myriad ways, and it is impossible to comprehend the necessity or reasonableness of their violent actions without full consideration of their lived experiences. The Courts have indeed recognised 'cumulative provocation' to accommodate homicides even in non-confrontational scenarios, but relying on such judicial innovation without any appropriate legislative framework might lead to a miscarriage of justice. As such, given the fact that the expansion of provocation defence is a matter of judicial discretion, female killers will continue to face the risk of being convicted on the charge of murder.

Moreover, the application of provocation defence in homicide cases does not constitute a modification of the norm and cannot generate precedents that other people may rely on in the future. Provocation being an excusatory defence is applied via a case-to-case approach for acknowledging that the accused was merely reacting to a provocative act rather than choosing to do something wrong. For instance, if a court accepts a woman who had "no choice" but to kill her abusive husband to save the life of her daughter, can a woman rely on this order of the Court in contemplating her course of action while facing abuse at the hands of her partner? The answer is not affirmative because the Court's earlier judgement was based on the acknowledgement of the accused's conduct in a particular situation

which might be different from that of the present defendant. Nevertheless, in the absence of any other suitable defence, provocation seems to be the best option available to women defendants, as a successful plea might at least lead to mitigation of sentence - if not an acquittal.

V. DIRECTIONS FOR THE FUTURE

The contemporary feminist dialogue has emphasised the need for bringing about a radical change in the law of provocation to make it readily available for women and to remove the discriminatory issues associated with its usage. While some have mooted for its complete abolition, others have suggested minor changes in the terminology of the defence.[274] Nonetheless, it has been hardly acknowledged that complete abolition of the defence or a broad formulation might prove to be problematic for defendants who do not commit IPH. A law cannot essentially be abolished based on only a specific group of sexist intimate killers since there is no statistical data in India to show whether intimate killings comprise a significant part of all homicides. Also, the abolitionist argument cannot be supported if we were to rely on the findings of this study. It has already been acknowledged that victims of male killers who invoke provocation more often include other men, as compared to women and the provocation defence is also raised in many cases that do not involve IPV. The abolitionist argument also cannot be supported for want of answers to a few critical questions that can be derived only after a thorough empirical study. Firstly, whether men mostly raise the provocation defence in IPH cases. Secondly, whether such defence pleas are always successful in the Court.

The analysis in Part IV shows that as compared to women, the defence is more often used by men. However, this solely cannot be the reason for abolishing a defence like provocation. To abolish the defence would mean denying a vast majority of defendants the ability to secure a lesser sentence in the Court of law. It does not mean we should not bring about a law reform to make the defence more accessible to women. It will be pertinent to highlight Victoria Nourse's suggestion concerning provocation claims in IPH cases. She asserts that to be "entitled to mitigation, the provoked party would have to point to a criminal law, and not a shared norm, that would justify punishing the decedent for the provocative action."[275] In simple words, it means that provocation will be limited to criminal acts only. For example, a person cannot invoke provocation defence if he observes his/her partner committing adultery since adultery is no more a punishable offence under the IPC. If we were to follow this suggestion and restructure our provocation defence accordingly, the defence might work perfectly in cases involving domestic violence but not in other cases. What if my husband frequently uses casteist slurs to insult and abuse me? Should I be disallowed to invoke the defence in case I retaliate against such abuse? The suggestion does not seem to take

[274] *See* Horder, *supra* note 45, 186-197; Howe, *supra* note 121; Rozelle, *supra* note 121.
[275] Nourse, *supra* note 90, 1395.

into consideration the fact that provocation defence is not limited to usage in IPH cases only. Additionally, the suggestion does not talk about the underlying issues associated with the elements of loss of self-control and reasonableness standard. Even if a provocative act is criminal in nature, the defendant will still be assessed based on the objective standard and will have to fulfil the criteria of grave and sudden provocation. These concerns again bring us back to the primary questions raised at the very beginning of this Article.

At this point, it will be relevant to highlight the arguments put forth by Prof. Ved Kumari, who was the first Indian scholar to recognise the inherent limitations associated with the criminal legal defences. Ved Kumari, while emphasising on the integration of women's experiences and concerns in the CJS, has argued that women do not require a separate criminal code nor do they require to be solely investigated or judged by females.[276] Such feminisation of proceedings might eventually lead to another kind of exclusion from the legal system and as such, it is necessary to change the existing criminal procedure to bring about democratisation of its subjects.[277] While there are disparities in the western feminist legal scholarship pertaining to whether female killers are treated more leniently or more severely than their male counterparts, the Indian scenario is quite different. The discussion in Section IV gives an overview of the fact that Courts have been applying a similar approach while sentencing male and female killers. However, if we scrutinise it from a feminist perspective, women who kill their abusive intimate partners receive severe penalties than their male counterparts who kill their wives or paramours based on jealousy or rage. Since the primary concern of this study has been the parallel use of provocation by both male and female killers which propagates male chauvinist views against women, it becomes pertinent to see whether the defence can be restructured to make it more accessible for women.

As already discussed in Part III, the jurisdictions of the UK and Queensland provide befitting examples of how law reform can be effectuated to get rid of the antiquated norms that are oppressive to women. Nevertheless, owing to the limitations associated with each approach and the societal structure in our country, it is not advisable to export their legal reforms directly into the Indian context. For instance, the UK has retained a partial 'loss of self-control' defence by changing the terminology of the erstwhile provocation defence and has struck down sexual infidelity as a trigger for any provocative act. Despite such innovation, men have used the defence to get their homicidal acts excused by stating some other ground entrenched in deep misogynist values. Furthermore, the defence being partial does not guarantee an acquittal for women who kill out of fear of violence and the problem remains the same as they still have to prove that their act was a result of 'loss of control'. On the contrary, the Queensland approach seems to be mostly benefitting women who kill their abusive partners, and as such, the preservation defence might be a better option as compared to the UK's partial

[276] Kumari, *supra* note 7, 159.
[277] *Id*., 158.

defence. However, the preservation defence has been used as a fall back option to a self-defence plea.

To a certain extent, I agree with the view of the Queensland Courts' to extend the self-defence plea to women who kill their assailants, instead of resorting to the preservation defence which only mitigates the offence to a lesser one. Although the self- defence doctrine has its limitations, it does not reinforce women's lack of rationality and instead, justifies the act of killing as a reasonable choice made by a woman. An abused female killer may take the self-defence plea, and if it succeeds, she will be acquitted. If she kills in non-confrontational circumstances, she will fail to prove the imminent threat requirement and her defence will fail. However, if the self-defence claim is expanded, in the manner provided by the Queensland Courts, the homicidal act will stand justified, and no amount of culpability will be attached to the woman. The self-defence doctrine will not be applicable in cases where women kill intimates out of heat of passion and without any justifiable cause, and in such scenarios, the only option will be to rely on provocation defence.

No innovation can be effectively implanted in our country without measuring it against the cultural milieu within which the provocation law operates. Our culture is non- responsive towards jealous and controlling husbands and forgives them easily even if they kill their partners or any man intending to take away their partners. However, women's homicidal acts are scrutinised as something 'evil' irrespective of the fact that their use of violence might have been a result of continuous victimisation. Although it cannot be ignored that male defendants can also be victims of abuse and other social frailties, the official statistics of crimes in India shows that women are more susceptible to violent crimes against them.[278] Given these factors, it will be pertinent to state that the law of provocation does not deserve complete elimination, but it surely does demand specific changes in its terminology. I believe that the main criticism against provocation law can be removed if the defence is not used to excuse the acts of sexist abusers, irrespective of gender, where there is compelling evidence of violence. However, as stated earlier, the provocation defence itself carries with it the women-protecting bias that is deeply tied to the idea that women are irrational. Therefore, no matter what changes are brought about in the terminology, the underlying problem is here to stay. The reasonableness of the act will be ultimately judged by the decision-makers. It is quite obvious that those assessing the gravity of provocation will weigh the women's actions as against their own experiences, which might not accord with those of the woman. In order to address the existing prejudices and discrimination, the judges (or jury) will have to consider the 'why' and 'how' question – "Why did the defendant behave in that manner? How will I feel in that situation?" Once the answers to these questions are understood, it will be easier for them to comprehend the lived realities of women who kill. However, if the

[278] National Crime Records Bureau, *Crime in India 2019 - Volume I*, available at https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf (Last visited on September 20, 2021).

decision-makers are not conscious of the realities of IPV and its effects on the defendant's capacity to tell her own story, it is unlikely that they will acknowledge her reason behind the use of such lethal violence.

VI. CONCLUSION

This study was designed to challenge the conventional wisdom behind the application of provocation defence in IPH cases. Throughout this Article, I have argued that the provocation defence should not be only applicable to cases where defendants commit homicidal acts out of anger but also in cases where other emotions are involved. This study has also been able to show that the parallel use of this defence by both male and female killers is unfair to the extent that it reinforces objectification of women and perpetuates violence. My objections to the parallel use of the defence are directly linked with the question of equality as to whether the defence should be equally available to both men and women defendants. The objections suggest that we need to consider a revision of criminal law's understanding of responsibility and rationality if we have to figure out a way to make the defence more accessible to similarly situated defendants, irrespective of their gender. I ultimately conclude that we must retain the provocation defence but find a way to revise the same. These suggestions leave an opportunity for future research work in this area. Nevertheless, this Article also illuminates the need for conducting a wholesome empirical study to understand whether the provocation law demands a complete change to be in conformity with the public policy considerations. I believe that this discussion will set the foundation for conducting any future empirical study on this subject.