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PROVOCATION AND BATTERED WOMEN: A QUANDARY?

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INTRODUCTION

The doctrine of provocation has a long history of evolution of common law and has gone through multiple changes brought by both judicial decisions and legislative actions. The doctrine's origin can be traced back to Hayward's case,² which was introduced in pursuance of the law's compassion for Human Infirmity. Initially, the principle focused only on assault and battery cases. However, it underwent significant changes over the years, incorporating concepts such as the "reasonable man" standard, etc.³ Further, with the passing of the Homicide Act of 1957,⁴ provocation resulting from spoken words was also included within its scope.

Despite these modifications, the doctrine still faces issues when dealing with Battered Women Syndrome Cases. This is because the defense can be availed only in situations where the accused's response to the provoked act is immediate and sudden. Thereby restricting the scope to "sudden and temporary loss of self-control" cases, requiring the answer to be impulsive and quick.⁵

DEFENSE OF PROVOCATION: CAN IT BE AVAILED BY THE BATTERED WOMEN?

The term "Battered women" refers to those women who suffer from continuous 'intimate partner violence'⁶, resulting in the development of a psychological phenomenon, namely 'Battered Women Syndrome'. The term 'Battered Women Syndrome' was coined by the

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² *R v Hayward*, (1908) 21 Cox CC 692.

³ *DPP v Camplin*, (1978) AC 705 (HL).

⁴ Homicide Act 1957.

⁵ *R v Duffy*, (1949) All ER 932.

⁶ Lenore Walker, 'The Battered Woman Syndrome.' (2016)4.

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psychologist Lenore E. Walker.⁷ The syndrome highlights that the continued subjection of women to violence at the hands of their batterers leads them to develop psychological reactions that prevent them from leaving the batterers. Further, it is marked by two significant features of 'cyclical violence' and 'learned helplessness', reinforcing the battered women to stay with the batterer and make them feel trapped in the relationship.⁸ This creates uncertainty about the responses of the battered women.

The cases relating to murder by battered women fall under the category of "Cooling off period"⁹ as there is a substantial time gap between the last provoked act and the woman's act which causes the batterer's death. Thereby making it outside the purview of the defense of provocation due to the absence of sudden and immediate reaction.

Further, the doctrine of provocation involves a subjective and an objective test.¹⁰ The personal test deals with the question of whether the accused lost self-control suddenly and temporarily. In contrast, the accurate test focuses on the question of whether the reasonable man would have responded to the provocation in the same manner as the accused did. It is to be noted that the "reasonable man standard" does not consider the experiences of battered women and portrays the male standard of behavior.¹¹ Moreover, the "sudden and immediate" response standard in subjective tests is male-oriented. This can be established through various studies that show that, unlike men who react instantly, women tend to respond after suffering a "slow burn" of fear and despair, which suddenly erupts, resulting in the killing of the batterer. This shows that the doctrine does not address the psychological makeup of women, who respond differently than men. Over the years, various judicial cases have reinforced this male-dominated idea of provocation. However, it was liberalized in the case of *R. v. Kiranjit Ahluwalia*. It relegated the time delay in the response from being a legal bar to provocation to simply evidence of whether the accused's self-control was lost. Further, the case provided for the inclusion of battered women syndrome as a relevant characteristic about the image of a reasonable man. Thereby providing for the reasonableness to be judged from the perspective

⁷ Donald Nicolson and Rohit Sanghvi, 'Battered Women and Provocation: the implications of *R. v. Ahluwalia*' (1993) *Criminal Law Review* 3.

⁸ Joshua Dressler, 'Battered Women, and Sleeping Abusers: Some Reflections' (2005-2006) 3 *Ohio State Journal of Criminal Law* 463.

⁹ David L. Faigman, 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72 *Virginia Law Review* 619-647.

¹⁰ Graham Virgo, 'Provocation Restrained' (2005) 64 *The Cambridge Law Journal* 532-535.

¹¹ Ved Kumari, 'Gender Analysis of the Indian Penal Code in Engendering Law: Essays in Honour of Lotika Sarkar' (1999) 15 Amita Dhanda & Archana Parashar eds.

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of a battered woman, taking into account her experiences that the doctrine lacked before.¹² This allowed battered women to claim the defense of provocation.

The Ahluwalia case created an opening that can be exploited to assist battered women. Further, it highlighted that the male “snapping” and killing by a battered woman is legally equivalent as “dominion over the mind” is not present in both situations. Thereby allowing for expanding the scope of provocation doctrine and not restricting it only to the immediate reactions of the accused. Thus, to provide battered women with some assistance, it is required that the scope of the doctrine should be widened.

PROVOCATION AND DIMINISHED RESPONSIBILITY: POSSIBILITY OF A MERGED PLEA?

The doctrine of diminished responsibility is another defense provided to battered women.¹³ It allows battered women to escape their responsibility for the killing of the batterer by taking the plea of mental incapacity to assess the consequences of their acts.

Scholars such as Mackay and Mitchell argue that the defenses of diminished responsibility and provocation are based on a similar principle of “disturbance of reasoning,” which serves as the basis for merging these two pleas rather than treating them as separate doctrines. As a result, it has been proposed by Mitchell and Mackay that the two pleas should be merged into a combined request of “extreme emotional disturbance,” whereby the question of what disturbed the accused is irrelevant. It does not matter whether the accused was provoked or not. The only consideration is that the accused did an act in an emotionally disturbed state of mind.

However, this notion of a merged plea needs to be more consistent as it fails to recognize the primary difference in the line of reasoning that lays the foundation for these two distinct defenses.¹⁴ It is to be noted that the defense of provocation acknowledges the responsibility of the accused but allows for a partial excuse as the act is committed under a deprived state of self-control. In contrast, the diminished responsibility defense is a partial denial of responsibility that does not recognize the guilt of the accused due to some mental

¹²Donald Nicolson and Rohit Sanghvi, ‘Battered Women and Provocation: the implications of R. v Ahluwalia’ (1993) Criminal Law Review 3.

¹³ James Chalmers, ‘Merging provocation and diminished responsibility: some reasons for skepticism’ (2004) Criminal Law Review.

¹⁴ Jeremy Horder, ‘Between Provocation and Diminished Responsibility’ (1999) 10 KCLJ 143.

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abnormality.¹⁵ Thereby highlighting the stark contrast between the reasoning that underlines the two defenses. Even if the reason for the defenses of provocation and diminished responsibility is similar and the pleas are merged, it still suffers from the problem of not recognizing the basic idea of provocation, that is, the accused must have committed an act due to sudden and grave provocation. Thereby establishing that the two pleas of provocation and diminished responsibility cannot be merged into one.

REINFORCEMENT OF STEREOTYPES: BATTERED WOMEN SYNDROME AND THE DEFENSES AVAILABLE

The battered women syndrome tends to reinforce the existing societal norms. This is because the Syndrome portrays “Battered Women,” survivors of domestic violence, as victims and sufferers of another woman’s condition.¹⁶ Further, it reinforces society’s image of femininity and the view that women must respond like men to avail the defense of provocation. Otherwise, they might end up with life imprisonment or may be declared mentally abnormal by taking the shield of diminished responsibility. Thereby ending up in a mental asylum, which is no less than a metaphorical prison.

The “Battered Women Syndrome” not only reinforces the stereotypes prevailing in society but also helps society to evade its responsibility for creating socio-economic and other situations that promote domestic violence and prevent women from leaving their batterers.¹⁷ The Syndrome puts the accused in the spotlight by focusing on the individual’s personality, suggesting that the solution to the problem of battered women killing can be found in the individual through the adoption of therapeutical methods rather than making the society realize their collective responsibility towards these battered women.¹⁸ This highlights that even though the Syndrome may help an individual partially justify or excuse their criminal liability, it does not help battered women. This is because the syndrome either associates them with a mental abnormality when seen from the lens of diminished responsibility or reinforces the societal norms about battered women.

¹⁵ R.D. Mackay, ‘Pleading Provocation and Diminished Responsibility’ (1988) Criminal Law Review.

¹⁶ Donald Nicolson and Rohit Sanghvi, ‘Battered Women and Provocation: the implications of R. v Ahluwalia’ (1993) Criminal Law Review 3.

¹⁷ Charles Patrick Ewing, ‘Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill’ (1990) 14 Law and Human Behaviour 579-594.

¹⁸ Donald Nicolson and Rohit Sanghvi, ‘Battered Women and Provocation: the implications of R. v Ahluwalia’ (1993) Criminal Law Review 3.

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INCLUSION OF BATTERED WOMEN SYNDROME IN INDIAN LAW

Even though the Indian courts have acknowledged the Battered Women Syndrome (BWS) cases and have made attempts to protect battered women through the adoption of doctrines such as ‘sustained provocation’ and Nallathangal Syndrome (BWS)¹⁹, the Indian Law does not have any specific provision for providing defense to “Battered Women.”

This reflects the need to bring amendments in the existing statutory framework of grave and sudden provocation, right of private defense, etc., or by carving out Battered Women Syndrome as a separate exception to murder (§300) to provide a reason to battered women.

1. Grave and Sudden Provocation – The requirements of grave and sudden provocation suggest that the motivation must result in the loss of self-control and the reaction to it must be immediate, which is not the case in the Battered Women Syndrome (BWS) scenario, where women respond after some time has passed. However, it is pertinent to note that in BWS cases, the battering occurs over time and is continuous, making it challenging to identify the specific provocative act that leads the woman to lose her self-control. Thus establishing that the provocation is sustained over some time.²⁰

This problem can be resolved through the inclusion of judicial construction of ‘sustained provocation’ as an exception to s.300 in the Indian Penal Code, providing that the provocation can be sustained over some time.

2. Right of Private Defense – The right to private defense protects people from reasonable apprehension of danger. The two requirements that battered women need to satisfy to avail of this defense are:

a. Reasonable Apprehension of Death and Grievous Hurt – This requirement concerns immediate apprehension of danger. It does not take into consideration the perpetual state of risk that the battered woman experiences at intervals over some time. This creates a perpetual reasonable apprehension of danger in the woman's mind.²¹ Thus, the requirement should also take into consideration the perpetual presence of credible threats to provide a defense to battered women. Further, the standard of

¹⁹*Suyambukkani v State of T.N.*, 1989 LW (Cri) 86, para 21.

²⁰ Katherine O’ Donovan, ‘Defences for Battered Women Who Kill’ (1991) 18 *Journal of Law and Society* 219-240, 224.

²¹ Lenore Walker, ‘The Battered Woman Syndrome.’ (2016) 4.

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reasonable apprehension should be viewed from the perspective of battered women to account for their experiences.

- b. ***Proportionality of Response*** – The accused's response should be proportional to the apprehensible danger present. This requirement does not consider the psychological state of battered women, which is essential in Battered woman killing cases. Further, the continuous exposure of women to domestic violence leaves them psychologically vulnerable,²² leading them to take measures to inflict 'proportionate' damage on the batterers, which is substantiated by their necessity to protect their psychological self. Thus, the Right of Private defense needs to be amended to recognize the psychological aspect of women.

CONCLUSION

Despite going through changes, the doctrine of provocation still faces a challenge in the form of Battered Women Syndrome. The doctrine's scope is restricted only to immediate response cases. Thereby not protecting battered women. Further, the diminished responsibility doctrine, another defense provided to battered women, leads the battered women to take the course of a medical plea, resulting in the accused being declared mentally incapable.

The paper also highlights that these defenses lead to the reinforcement of social stereotypes regarding the role of women. Thereby contributing to the development of narratives in society while simultaneously hiding the part of society in the creation of conditions that contribute to the promotion of domestic violence.

The paper also suggests an amendment to the existing provisions or the creation of "Battered Women Syndrome" as an exception in the Indian Penal Code (1860), which can help protect battered women.

²²Charles P. Ewing, 'Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill' (1990) 14 Law and Human Behaviour 579-594, 581.

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