

● REDEFINING LEGAL PARADIGMS OF SUSTAINED PROVOCATION AS A DEFENCE IN CRIMINAL LAW FROM THE LENS OF PATRIARCHAL ASSUMPTIONS AND FEMINIST POSTMODERN JURISPRUDENCE



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Abstract

Modernism is an ensemble of a particular cultural norm and uniform practices in the Western civilization, in contrast, postmodernism announces the acknowledgment of a diversity of cultures and the chaotic sensation of accelerating change and uncertainty that permeates modern discourse. These conversations usually touch on the increasing feeling of turmoil and the social problem listed to comprehend the reasons for the rise of postmodernity. Over the last two decades, a growing number of perspectives from marginalized and vulnerable groups including women have impacted social issues in postmodern times. There are diverse understandings of the female dilemma under substantial law, however, almost every legal system in the history of civilizations accepts certain undisputed principles such as restraining gender injustice, female exploitation, oppression of the marginalised, etc. However, the use of violence has frequently been socially accepted and sometimes officially legalised in some jurisdictions as a legitimate kind of discipline for husbands against their wives if the husbands stayed within the set legal parameters and do not commit an offence. Despite several political upliftment through policies and legislation, there is enough evidence that men have been assaulting women constantly and hiding under the twisted words of the law. A man's "heat of passion" murder is one such illustration viewed as a reasonable or necessary response to an instance of adultery or infidelity that jeopardizes his perception of dignity or authority. Reversely, Suppose the provocation defence is utilized by the other gender. In that case, it implies that the woman lost control after being provoked, acted irrationally, and then killed her attacker, the defence of provocation hardly comes for her escape. The judiciary's task in arriving at an objective standard of justice and achieving reconciliation and synthesis of the needs for stability is by no means an easy feat, especially where a situation involves the intertwined relationship between law and psychology. The paper begins by describing some of the core ideas of post-modernism before examining how post-modernist conceptions of crime against women have been impacted. This paper investigates the feminist discourse which decides what counts as victimization of an abused battered woman and who defines its meaning and seriousness entailing the series of judicial pronouncements. The paper also evaluates the extent of the masculinist norms and patriarchal hegemony hovering over the Battered Wife Syndrome in India and emphasizing the need for expanding the definition of reasonableness and suddenness when it comes to responses to long-term abuse.

Key Words: *Postmodernism, feminist discourse, criminal justice system, provocation, sustained provocation.*

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I. Introduction

In the contemporary era, it has become a practice to talk about postmodernity, as no discourse is complete without referring to it. To a scholarly understanding, few can contemplate and comprehend the true meaning of postmodernism, and it can be stated that at its best postmodernism allows plurality and at its worst, it is nothing much more than nihilism. However, for an academic interpretation, postmodernism stands for differentiation, subjectivity, multiple points of view, intertextuality, and fragmentation. It entails construction and deconstruction, as postmodernists denied absolute truths and believed in fragmentation and separation of all the ideas with perspectives of no agreement and no absolute answer, the school of social constructionism works in tandem with postmodernism discourse and analysis narratives in both sociological and psychological literature, especially with the affirmative or reconstructive branches of postmodernism, like constitutive theory in criminology with its emphasis on "replacement discourse¹." To avoid closure and certainty, postmodernism is a process of dismantling other people's statements about the truth that tries to expose their presuppositions and arbitrariness². It undermines all assertions of superior or privileged knowledge-based power and authority. Deconstructive criticism tries to revive and celebrate oppressed voices that have been suppressed to show the existence of other realities, experiences, opinions, and domains as well as a variety of confrontations to the supremacy of other prerogatives to be truthful.

Modernism, on the other hand, laid down the basic groundwork for the recognition of the issues of women and advocated systematic changes, while post-modernism challenged some of the assumptions of modern feminism. The post-modernist feminist philosophy emphasises intersectionality and deconstruction of stringent categories that are built upon the advancements of modernism. Integrating postmodernist ideas into a legal system can be challenging as the system is structured around established rules and procedures and incorporating postmodernist critique may require significant modifications. Postmodernism thus with its focus on deconstruction and skepticism of grand narratives, can offer a critical perspective on legal concepts such as provocation. This could involve examining how the concept of provocation is constructed within legal discourse and how it may reflect underlying biases, specifically gender bias. Provocation has frequently been thought of as a mitigating circumstance. So, unless the offence is murder, it is superfluous to make specific regulations about this defence. Homicide committed in response to provocation requires skillful, self-motivated behaviour. The actor is held accountable for this submission and for not exhibiting a high level of independently motivated resistance. The defence of provocation typically excuses the masculine bursts of assault and violence. The jurisprudence behind this assumed behaviour ranges from acceptance of suppression of women in all public and domestic spheres and to some extent due to the historical baggage grounded in masculine conception and justification of male violence. These settled male-dominated norms have completely ignored an effective understanding of the unfortunate and traumatic experiences of women, their redressal, and protection in the country's criminal administration. The feminist philosophy of law demonstrates oppression and

¹STUART HENRY & DRAGON MILOVANOVIC, *CONSTITUTIVE CRIMINOLOGY: BEYOND POSTMODERNISM* (1st ed. Sage 1996).

²id.



masculinist values as having an overwhelming impact on legal systems and their consequences on the material conditions of women in the defence. It also considers gender-related issues arising between law, society, and developmental agencies.

Provocation never exonerates an accused under any given circumstances from complete criminal liability, but only lessens the punishment by changing the nature of an offence. The essential criterion for claiming the defence is stringent in reaction to the provocation as the deceased should not be attracted to provocative circumstances. The ordinary person is managed to be recognised and visualised as an "ordinary male person" who could lose his reason and be ruled by his passions. The ordinary reasonable man has been often described by the English courts in various pronouncements as a hypothetical rational average person, but it has expanded its definition by also including murderers steadfast in retort to the promiscuous and adulterous actions of a wife. This inclusion and acceptance of infidelity works as a qualified trigger for provocation highlighting the stereotype that females after marriage or physical commitment are the inalienable possessions of their male counterparts³. Also, the doctrine of coverture, one such doctrine that was prevalent in the common law jurisdiction wherein when a woman used to marry, her entire property and rights associated with it were given to her husband. Therefore, under coverture, all the property came under the husband's control, and while he could not sell or alienate the property without receiving the consent of the wife, he could meanwhile take all the profits and income earned over that property⁴. Under this doctrine, the wife could not enter a contract or make a will⁵. This doctrine in the past is a reminder of realisation about the level of oppression and subordination women had to face since the history of mankind.

The masculinist views and norms have led to stereotypes about how the two genders must react to the provocation offered to them. It has been presumed that owing to the patriarchal setup and dominance men's reactions might be viewed as more justifiable or understandable as compared to women's. Judges and juries influenced by these norms may interpret the emotional or psychological state of the defendant in a way that aligns with traditional masculine behaviours, potentially skewing justice. Therefore, the problem revolves around the modernist idea, which emphasized intellect, holism, universalism, and grand theory, which impacted the rulings of the English courts. The concepts of the relative cultural corpus, particularism, fragmentation, and more specifically tactile perception have not been considered by the courts when determining the seriousness of provocation especially in the case of battered women. This defence, which appears to be comprehensive ignores the slow-burning effect, which occurs when women retaliate after extended periods of abuse. Also, the essentials of sudden and immediate criteria are insufficient to safeguard the other gender.

³Alafair S Burke, Equality, Objectively, and Neutrality, 103 MICH. L. REV. 22(2003).

⁴Rosemary Auchmuty, Review of Married Women and the Law: Coverture in England and the Common Law World, Tim Stretton and Krista J. Kesselring eds. 85 UNIV. TOR. Q. 328-29 (2016).

⁵Id.

II. From universal truth to fragmented narratives: how modernism & postmodernism shaped feminist discourse

The woke contemporary era in the guise of globalisation is passing through various stages of dramatic changes. Traditions, cultures, myths, and belief gradually loosened their roots at the call of modernity. Religious practices and teachings received the flash brunt, followed by the end of monarchy and feudalism. The interaction between exploring the modern movements and the critique of modernist principles in post-modern theories has shaped the feminist discourse. Historically, urbanization and industrialisation initiated the entire process of modernization, and the world first experienced the Renaissance, then Enlightenment, and afterward modernity and postmodernity. Due to Renaissance, modernity is often identified with industrialisation that came in the 18th century in Europe⁶. Therefore, Europe is often attributed as the forerunner of modernity which took multiple stages and forms. Industrialisation changed into an agricultural-traditional society which further transformed into a modern-bureaucratic capitalist society. Modernity has had a long and complex historical evolution. It was thus a culmination of different forces such as political, economic, social, and, cultural, therefore no single process was sufficient to produce modernity. Feminist discourse has been deeply influenced by both modernism and postmodernism. Modernism emerged in the 19th century and supported the theory of universal truth and objectivity. This thought influenced early waves of feminism by pushing them to look forward to universal principles of gender equality, articulating women's identities and experiences challenging the settled stereotype norms. The waves of feminism uncovered the one prominent universal truth which is oppression of the women, and advocated women's rights. Postmodernism on the other hand contributed significantly to the development of intersectionality feminism, examining how various aspects of identity such as sexuality and gender influence individual experiences etc, Postmodernism which gained much prominence in the late 20th century, probed the notion of universal truths and grand narratives. This perpetrated shift started influencing the feminist discourse by encouraging fragmentation and diversity. Since the 1960s, the terms "feminism" and "postmodernism" have gained popularity, emerging concurrently and undoubtedly sharing a substantial amount of convergence. Postmodern feminists argued that there is no single, overarching narrative of women's experiences; instead, experiences are varied and context-dependent. It was stated that the feminist discourse must account for the multiplicity of identities and experiences, moving beyond a one-size-fits-all approach to understanding oppression⁷. Modernism's quest for universal truths gave way to postmodernism's embrace of plurality and diversity. Feminist discourse evolved from seeking a single, unified narrative of women's experiences to recognizing the complexity and variability of these experiences.

⁶ Krishna Kumar, *Modernization*, Encyclopedia Britannica (Aug. 29, 2024), <https://www.britannica.com/topic/modernization>.

⁷ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 (6) STAN. L. REV. 1241-1299 (1991).



i) The birth of Feminist Philosophy permeating Postmodernist Discourse

Western social and political thought has a major issue as per the feminists that it is inclined towards universalism of social happenings attached to men i.e. to represent experiences of men which is often prescribed as common to all human beings⁸. Western thought is men focus on themselves and dilute the marginalised women's appearance in every political thought⁹. The viewpoint regarding women was merely as partial helpmates. They were defined in terms of men's needs concerning pleasure and providing lineage through offspring. Such a viewpoint is specifically recorded in Judaeo-Christian theology and Greek philosophy¹⁰. The feminist philosophy has been influenced by postmodernism predominantly in the mid-20th century, during the feminism waves in the West. An academic work written by a prominent feminist philosopher is credited for the upheaval it created in the postmodern discourse by criticising the traditional viewpoint of the roles of women and the subordination faced by them for a long period¹¹. Feminist philosophy has challenged the male being the centric point of all the assumptions and narratives of the past and claimed that power and social structures since inception have been dominated by masculinist ideas. The stringent rigidity of male dominance and masculinist views were seen in antagonism with the postmodernist theme of gender fluidity, fragmentation, social constructionism, and deconstruction. The intertwined emerging relationship between feminist philosophy and postmodernism has resulted in an emerging field and theory of intersectionality, which illustrates and studies how various kinds of discrimination intersect with individuals and impact them.

ii) The biased nature of law in the quest for Equality

Enlightenment discourses have universalized the experience of white Western middle-class men, as feminists have demonstrated, and have consequently revealed the hidden dominance tactics clear in the concept of impartial knowledge. Both postmodernists and feminists have long acknowledged the necessity of new ethics adaptable to changes in technology and changes in the perception of relationships of strength and wisdom between the two genders¹². Therefore, liberal feminists contend that the law at times treats men and women differently. The law and specifically criminal law in any jurisdiction do not recognise material differences. The doctrines prevalent in the criminal justice system seem to ignore or sideline the special circumstances that differentiate between men and women. The criminal law in the past did not pay much attention to the women who were subjected to domestic violence and abuse as it was part and parcel of the marital set-up, as women were mostly uneducated and unaware of their human and legal rights. Also, women were married at an early age and were subjected to dominance and discipline by their elder spousal counterparts. The relevance of women's experiences was eliminated by the very objective nature of the

⁸CHRIS BEASLEY, WHAT IS FEMINISM ANYWAY UNDERSTANDING CONTEMPORARY FEMINIST THOUGHT 8 (Allen & Unwin, Leonards, NSW, Australia 1999).

⁹Id at 9.

¹⁰Supra at 8.

¹¹SIMON D. BEAUVOIR, THE SECOND SEX. (Vintage Classics 2015).

¹²PATRICIA WAUGH, FEMININE FICTIONS REVISITING THE POSTMODERN (1st ed. Routledge 1989).

defences available in the Criminal justice system, and the legal specifications. Consequently, an issue that came up again and again during the challenges was to speculate, "Why doesn't she end the relationship, if it is an abusive one?" The answer to that would be that leaving an abusive relationship after being subjected to abuse and torture is not a possibility, due to the total lack of any psychological and physical safety net for women in such circumstances. This unfortunate dissatisfaction on the part of women is often highlighted in the provocation defence where her closest ally becomes her batterer, and she falls into a state of constant despair.

The common law is what gave rise to provocation defence, because judges and lawyers tend to be mostly men, and that creative process has been male-oriented and dominated. As a result, the conventional standards for these defences are the outcome of legal arguments and considerations based on the experiences and perspectives of men. The fact that the courts nearly exclusively crafted the defence considering circumstances involving male defendants is another explanation for the bias in the law favouring men because men commit the great majority of violent crimes. However, when it is the woman defendant who could have sought the defence for mitigation of the offence, it is established through a series of judicial pronouncements of the common law jurisdictions where instead of claiming the defence provided, she has pleaded the degraded defence of diminished responsibility, admitting the evidence of their mental conditions and has been at the mercy of the courts¹³.

III. The overwhelming influence of masculinist norms in the criminal defence of provocation

It is generally known that the provocation defence is sexist. For many years, ardent feminists have argued that the theory condones harsh domestic murderers and reflects and encourages masculine standards of violence. The feminist criticism of provocation makes several assertions regarding the defence's problematically gendered nature, such as that it is rooted in patriarchal history, punishes responsible sexist murders too liberally, discriminates against women, and sends negative messages. Most articles that oppose provocation dwell on its ostensibly sexist roots. Critical observers assert that the voluntary manslaughter theory was developed by old English jurists to defend men who retaliated against insults to their honour, particularly the insult of marital adultery or infidelity. Thus, the idea is based on an outdated belief of the doctrine of coverture as to women being the private property of their husbands and which must be protected from "invasion" using death¹⁴. The formation of the idea of loss of control being centered on "human weakness" or "human frailty" became known through the writings about provocation at the beginning of the 19th century¹⁵. In the *R v. Mawgridge*¹⁶ ruling, where Holt CJ described envy as "the anger of a man," including the earliest indication of this transition. The concept created a legal exception for overpowering emotions to override an aggravated person's rational thinking, leading to unlawful killing. A man had to

¹³R v. Ahluwalia (1992) 4 All ER 889.

¹⁴TIM STRETTON AND KRISTA J. KESSELRING, MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD (McGill-Queen's University Press, 2013).

¹⁵EDWARD H. EAST, A TREATISE OF PLEAS OF THE CROWN 232 (Hawkins, 1803).

¹⁶[1707] KEL. 119.



retaliate to preserve his honour; he had to act violently and aggressively. The offended man's courage and "spirit" could only be shown through a strong and physical response.

i) The Challenges in the Defence of Provocation due to Patriarchal Hegemony

Going to the historical roots inherent in the broadening of the categories was the idea that the law of provocation had to reflect shared beliefs about what constituted acceptable human weakness. The opposite was also true such as disagreements over whether an illegal arrest, informational words, and injuries to third parties are sufficient bases for mitigation were evidence of community mores regarding what actions should not be used as an exception for losing control and in being provoked. Depending on the circumstances surrounding the offender's loss of self-control, the law of provocation as it existed in the middle of the eighteenth century reflected societal norms or value judgements regarding the relative degrees of moral culpability to be given to the offender. Therefore, the primary objective of the current defence is to accommodate a specific human flaw, the inclination to lose self-control when provoked. If this is extended to circumstances where self-control is lacking due to another factor, it unseals the access to extensive bounds of potential claims, especially for the gender which is presumed to be more aggressive, violent, and dominating¹⁷.

The "gendered" aspect of the doctrine has followed in stereotyping of the other gender as either sympathetic victims or cold and premeditated offenders, without taking into account the intertwined, complicated concerns of gender, equality, and abuse¹⁸. Given that women are frequently perceived in ways that make them appear guilty, even when they are the victims of heinous crimes, it is not astonishing that often women lose their original identity conforming to the universal truth of being submissive and subservient. This appalling misrepresentation of "natural femininity" serves as concrete evidence against murdering women and validates the harsh conduct that females endure in the current criminal set-up.

Other female critics emphasise the unequal tolerance imbibed in the defence of provocation bestowed on male perpetrators¹⁹. Many anti-provocation theories follow the civil rights paradigm, which states that laws and policies shouldn't discriminate based on gender, colour, or any other factor. As a result, many feminist experts spread the idea that applying the heat-of-passion concept favours men more than women. Provocation laws, according to feminist opponents, reflect and support a worldview wherein men have been regarded and considered as innate aggressors²⁰. According to this perspective, broad interpretations of the concept and even the philosophy itself convey the message that only men have the right to be homicidally enraged when their partners try to leave them or display interest in a different individual²¹. Women are thus

¹⁷Angelica Staniloiu & Hans Markowitsch, Gender differences in violence and aggression - a neurobiological perspective 33 *PROCEDIA SOC. BEHAV. SCI.* 1032 - 1036 (2012).

¹⁸R EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 48-74 (Free Press New York, 1979).

¹⁹James J. Sing, Note, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 *YALE L.J.* 1845, 1865 (1999).

²⁰SAMUEL H. PILSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (NYU Press 1998).

²¹Tracey L. Meares, Updating the Study of Punishment, 56 *STAN. L. REV.* 1171, 1203 (2004).

encouraged by the law to stay in unhealthy, even violent, relationships²². The philosophy at least indicates acceptance of or ambivalence over intimate male-on-female homicides²³.

The phenomenon of murders and assassination is often prescribed as a male phenomenon²⁴. Due to this presumption, the defences used as an exception to murders are often criticised to be unfairly favouring male defendants²⁵. Broad defences against violent crimes particularly exceptions are typically harmful to women as they often fall at the hands of the male aggressor than to be the actual aggressor in any given relationship. One can be in favour of giving female defendants a break without affecting the applicability of provocation to male defendants when only comparing the probability of success for male and female defendants. Critics of provocation claim that the theory prohibits the administration from effectively enforcing the law against male chauvinist murderers deserving to be punished for their crimes²⁶. The criticism contends that the concept does more than just let some flawed people get away with it; it also fosters the circumstances that allow many guilty individuals to escape fair and accurate punishment. Some opponents only presume that the defence partially exonerates this group of murderers in huge numbers because it has the potential to do so. Because of misconceptions, stereotyped thinking, or simple resentment, society generally accepts male-on-female intimate killing. Therefore, broad provocation rules enable state actors and juries to show chauvinistic sympathy for masculine murder suspects. As a result, many feminist experts spread the idea that applying the heat-of-passion concept favours reasonable men more than unreasonable women²⁷.

ii) Assessing the Reasonable Person Standard in the defence

The law made a difference between acts committed in sheer anger by a provoked man and acts done by an ordinary reasonable man in the same given set of circumstances. In a case²⁸, Tindal C.J. informed the jury members that the legal doctrine "compassion to human frailty" gave rise to the provocation defence. It was not later than in the 18th century when the reasonable person standard was synonymously used with the "Reasonable Man Standard". This emerged around the same time provocation began to change. During the 19th century, the focal point of the defence moved from the man of honour to the reasonable man. According to Keating J, anything which could plausibly lead an average and properly minded man, to surrender control and execute a violent

²²Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter / Men Who Kill, 2 S. CAL. REV. L.& WOMEN'S STUD. 91-94 (1992).

²³Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269(1996).

²⁴Laurie J. Taylor, Comment, Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence, 33 UCLA L. REV 1679 (1986).

²⁵Emily L. Miller, Comment, (Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code, 50 EMORY L.J. 667 (2001).

²⁶Caroline Forell, Homicide, and the Unreasonable Man, 72, GEO. WASH. L. REV. 597 (2004).

²⁷Aya Gruber, A Provocative Defence, 103 CAL. L. REV., 273 (2015).

²⁸R v. Hayward[1833] 6 C & P 157.



assertive behaviour would qualify as a provocation²⁹, and this standard should now serve as the basis for provocation. According to the law, there must be enough provocation for a reasonable man to be aroused by the circumstances and for the jury to conclude that the act was motivated by passion. However, the courts did not provide a description or a definition of the above-mentioned hypothetical "ordinary" or "reasonable" man, and it was assumed that juries would simply understand the phrase not attributing the reasonable man to be a pugnacious or irritable one. The reasonable man doctrine was adopted into homicide law in the famous English case and in the century that has gone since the Welsh³⁰ ruling, American courts have consistently applied the reasonable man threshold. An ordinary man with reasonable control is said to adhere to a set of specific concrete norms of conduct established by the court's application of an objective doctrine permeating through modernism.

With a few new but tight sorts, modern law maintains the same categories of things that offended the ordinary reasonable prudent man of history and still offend the modern and postmodern man. He is provoked into taking human life when he is physically abused when an illegal effort is made to arrest him, when he kills during a mutual fight, or when he witnesses his wife engaging in adultery and murdering her or the paramour³¹.

The existence and scope of the defence of provocation necessitate finding a middle ground between two opposing ideologies: first, the knowledge that different people respond to provocation in different ways and that the person who has provoked the accused to cause the death of any person should also be taken care by the law from any given scope of assault or harm or even life taking activity.

Postmodernism encourages the deconstruction of legal narratives and assumptions. It questions the idea of objective standards and universal truths. In the context of provocation, this could lead to a critique of the idea that there is a universal standard for what constitutes sufficient provocation or a reasonable reaction. This perspective might argue that these standards are culturally and historically contingent rather than absolute. Postmodernism emphasizes the importance of individual perspectives and experiences supporting fragmented constructs. This might support a more nuanced view of provocation that considers the defendant's personal background, experiences, and psychological state, challenging the traditional objective standards³².

IV. THE CONUNDRUM OF SUDDENNESS IN THE LONG-TERM ABUSE CASES

At this juncture, it will be important to draw attention to the points made by Prof. Ved Kumari, who recognised the fundamental restrictions placed on criminal legal defence's³³. She has maintained that females or the other gender do not need a distinct criminal code or to be exclusively investigated or assessed by females, although

²⁹R v. Welsh (1869) 11 Cox C.C. 336, 339.

³⁰Id.

³¹R v. Mawgridge [1707] KEL. 119.

³²K. M. Nanavati v. State of Maharashtra, AIR 1962 SC 605.

³³VED KUMARI, GENDER ANALYSIS OF THE INDIAN PENAL CODE IN ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 15 (Eastern Book Company, 1999).

emphasising the inclusion of women's experiences and concerns in this very existing and sufficient system would be appreciated³⁴. Crime is attached to males and conformity is to females, therefore, women are not treated on par with men even if they have done any criminal activity. Ironically, men have had an easier way out of killing women over sexist charges or trivial disagreements as opposed to women's reprisal for offensive behaviour or ongoing abuse. Also, the criminal activities by women are mostly the outcome of difficult circumstances like a broken marriage, a chaotic home, and frequently a relationship that is prone to conflict with their counterpart or preceding victimisation faced by the women.

It is predicated on the notion that people who deprive the other person of their lives after losing self-control in response to a sufficient provocation are less guilty than those who kill intentionally as their passions are higher than their reason³⁵. In the defence of provocation, the oppressed gender's initial tolerance and reluctance at the first stance go against the "heat of the moment" norm established by other decisions, including *Nanavati*³⁶. It is believed that a delay between the trigger and the action indicates premeditation³⁷. In the battered woman case, it is difficult to identify and determine an isolated act that acted as a last straw on the camel's back. Thus, the provocation is maintained for a longer period³⁸.

i) The legal perspective on Suddenness and Immediate response intertwined with long-term provocation

Not only must the provocation be sudden, but it must also be grave³⁹. The essential elements of the defence of provocation involve graveness and suddenness since the inception of the law⁴⁰ which is now replaced by the *Bharatiya Nyaya Sanhita, 2023 w.e.f. 01.07.2024*⁴¹. Therefore, the provocation defence will qualify if it is both sudden and grave, and if any one of the elements lacks the involvement, the accused cannot claim the benefit envisaged under the Exception for mitigation of the punishment.

Also, the grave and sudden provocation must render a reasonable person (man) incapable of using his mental faculties. What constitutes grave provocation is a question of fact that has engaged the judicious minds of the Courts in this country as well as the English, American, and Australian courts. The word sudden involves two essential elements, the first being the unexpected provocation and the second being the interval or intermission between the provocation and the commission of crime. Therefore, for reduction of criminal liability, the act of causing death should have been done by the offender under the influence of some feeling depriving him of all self-control endangered

³⁴Id.

³⁵George Mousourakis, Reason, Passion, and Self-Control: Understanding the moral basis of the Provocation Defence, 38 R.D.U.S. 215 (2007).

³⁶1962 SCR SUPL. (1) 567 (India).

³⁷*K.M. Nanavati v. State of Maharashtra*, 1962 SCR SUPL. (1) 567 (India).

³⁸Katherine O Donovan, Defences for Battered Women Who Kill, 18(2) J.L. & SOC. 224 (1991).

³⁹*Rajvinder Singh v. State of Punjab*, 1982 Cr. L.J. 975 (P & H) (India).

⁴⁰The Indian Penal Code, 1860 (Act No. 45 of 1860).

⁴¹The *Bharatiya Nyaya Sanhita, 2023* (Act No. 45 of 2023).



by provocation which is both grave and sudden⁴². Therefore, to establish the suddenness criteria, judicial precedents of various jurisdictions become of utmost importance.

In *Hansa Singh v. State of Punjab*⁴³, the appellant lost his control and reasonable calmness after seeing the deceased performing the act of sodomy on his son. It was ruled in this case⁴⁴ that this entire scenario of watching one's offspring going through such a gruesome act was undeniably a grave and sudden provocation that compelled the father i.e. the accused to attempt to murder the deceased. In another landmark case⁴⁵ it was emphasised by the court that the word sudden fails to synonymously mean an immediate action or response the word sudden can be contemplated as to some action that can be expected or anticipated.

The question and dilemma of suddenness presents a practical difficulty as it is based on case-to-case circumstances and is a 'question of fact' as per the legislation. The judiciary plays a prominent role based on evidence of whether the person provoked (accused) acted impulsively in the heat of the moment while his passions were high on the deceased or there was a gap of time to calm down and his action of killing the deceased was thoughtful and deliberate. Therefore, provocation and the criminal justice system have a necessary but stormy relationship. Ancient law historically distinguished between crimes performed spontaneously and those committed with premeditation, with crimes committed spontaneously having a ground-lessening punishment. A person who knowingly murders someone in rage sparked by lawfully sufficient provocation is only guilty of unlawful death, not murder, according to the partial defence. Provocation's influence on the common law of homicide dates to the twelfth century, and practically all common law jurisdictions have some form of provocation defence in their legal system. However, despite a long history and widespread implementation, there is still no consensus regarding the doctrine's justification.

ii) The dilemma of Sustained Provocation

The definition of provocation did not account for the potential that victims of domestic violence can even lose control and lash out at their abuser who is the closest ally of the accused. Therefore, judges only recognised the male's wrath and violent outburst as a response to provocation⁴⁶. As these defences started to be used in cases, it was not anticipated that women would kill their husbands out of terror and use these defences. Because of this, it became necessary to create a brand-new criterion for a "battered woman" that went ahead of the definitions of a "reasonable man". Battered Women Syndrome (hereinafter referred to as BWS) was rarely used as a lawful defence in criminal cases involving battered defendants after Dr. Walker started testifying in favour of the existence of such a psychological disease⁴⁷.

⁴²Guriya Bacha v. State of Gujarat (1958) Cr LJ 476 (India).

⁴³A.I.R. 1977 S.C. 1801 (India).

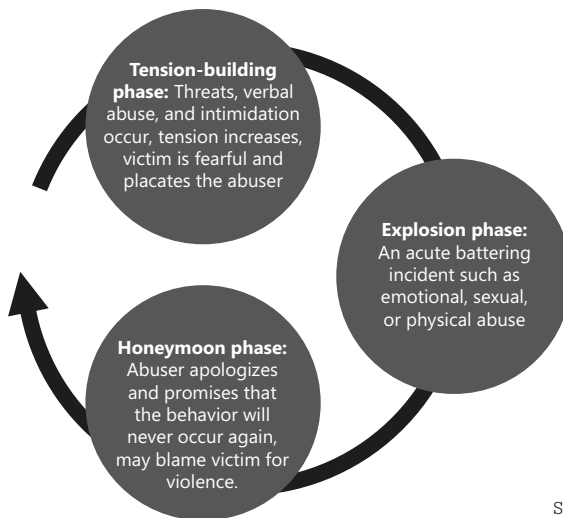
⁴⁴Hansa Singh v. State of Punjab, A.I.R. 1977 S.C. 1801 (India).

⁴⁵Balku v. Emperor, 1938 Cr. L. J. 956 (Allahabad) (India).

⁴⁶R. Holton & S. Shute, Self-Control in the Modern Provocation Defence, 27 (1) Oxford J. Leg. Stud. 49 (2007).

⁴⁷Mira Mihajlovich, Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defence, 62 (4) IND. L. J. 1254- 1282 (1987).

The primary stages/phases of a typical battering relationship are explained by the "Walker Cycle Theory."⁴⁸ The first is known as the "tension buildup phase," and it is when the men and the woman argue verbally⁴⁹. As a result, the batterer has an "acute battering incident," or the second phase, during which they become enraged and unable to control themselves. After these first two phases, there comes a third phase called "loving contrition," in which the abuser generously asks for forgiveness for his violent acts and expresses regret, vowing not to repeat them⁵⁰. As a result, the connection receives "positive reinforcement to continue" However, there is a constant cycle of aggression in this situation, which quickly enters the "tension-building phase."⁵¹ As a result of this vicious cycle of abuse, battered women have "learned helplessness," a mental state coined by psychologist Martin Seligman in which they feel helpless. They stay with their abusers because they believe they are in a helpless position over which they have no control⁵². The comprehension of the syndrome depends on two fundamental components: "cyclical violence" and "learned helplessness."⁵³ The cycle is a predictable pattern of repetitive and frequent domestic violence. However, every time the degree of violent actions increases by the abuser, the gap between the asking for forgiveness phase and the actual battering phase decreases. Unfortunately, many victims of domestic violence are not even close to chasing the "honeymoon" phase as there is constant abuse and battering by the abuser⁵⁴.



Source: Promising Futures

⁴⁸LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 91 (4th ed. Springer, 2017).

⁴⁹Id at 91.

⁵⁰Id at 92.

⁵¹Id at 93.

⁵²Id at 93.

⁵³Lenore Walker, Roberta K. Thyfault & Angela Browne, Beyond the Juror's Ken: Battered Women, 7(1) VT. L. REV. 1-14 (1982).

⁵⁴Promising Futures, The Cycle of Violence: Why It Is No Longer Widely Used to Understand Domestic Violence (Aug. 15, 2022) <https://promising.futureswithoutviolence.org/the-cycle-of-domestic-violence/>



As the female continues to face abuse despite her efforts to stop it, she loses the will to leave because she believes there is no way out. It gives the victim the impression that the batterer is unbeatable, which limits her options for responding⁵⁵. Because of this, the spectrum of reactions to the battering might be unforeseen, and some of these reactions can be violent. These reactions are now focused on maintaining her survival rather than helping her flee the assault. The woman becomes mentally and physically powerless to escape the coercive grip of her companion because of her psychological state of "learned" helplessness.

Walker asserts that battered women progressively grow passive and think it is impossible to escape, even when doing so is possible because they have little control over their abusive circumstances. The motivation and resolve to leave the circumstance or the relationship fade away. These women are stuck in this vicious cycle of violence because of socioeconomic conditions beyond their control. Furthermore, BWS makes battered women feel helpless because they think that their legal options will fail them. Because of their lack of hope and "learned helplessness," battered women may believe that the abuser's demise will end their cycle of violence once and for all.

iii) Provocation vs. Sustained Provocation

The primitive provocation beliefs, according to Horder⁵⁶, was based on partial justification. It was acceptable for a deeply offended man to react violently and furiously. An overwhelming response was only partially justifiable compared to a balanced answer. When viewed through the prism of honour, fury or outrage was a crucial part of the aggrieved man's (completely controlled) honourable response. Both the need for hot blood and the requirement for sufficient provocation had a foundation in partial justification. Importantly, loss of self-control was not mentioned at all at this formative stage of the provocation paradigm.

Over the years, there has been a heap of debate regarding almost every aspect of the partial justification of provocation. Difficulty areas include determining when to refer a case to the jury and the defence's applicability to mistreated women who commit murder. Here, the "reasonable" or "average man" and the qualities ascribed to him considering the accused's character will be the subject of discussion. The idea of provocation started to take on a shape that is recognisable to modern researchers around the Seventeenth Century through the jury and the judgements⁵⁷.

In India, the provocation defence views the legitimate actions and responses of the females as the outcome of the ranting or unreasonable reaction that women are often tagged to in society. Contrary to that, a man's "heat of passion" murder is seen as an appropriate or necessary response to adultery, infidelity, and promiscuous relationship that exposes his perception of respect, honour, and status in the male-dominated society. It would be implied if the provocation defence were used that the woman became out of control after being provoked, behaved irrationally, and then killed her

⁵⁵Lenore Walker, Battered Woman syndrome and Self-Defence, 6 Notre Dame J.L. ETHICS & PUB. POL'Y 321 (1992).

⁵⁶JEREMY HORDER, PROVOCATION AND RESPONSIBILITY (Clarendon Press, Oxford, 1992).

⁵⁷R v. Mawgridge [1707] KEL. 119.

attacker. Females' inability to decide for themselves what to pursue when faced with a provocative circumstance is further promoted by the application of objective reasonable standards based on the experiences of males following a modernist course. Even though it is still way down on the country's legislative agenda, Indian courts are beginning to use BWS testimony and related psychiatric theories when rendering judgments in cases involving traumatised offenders⁵⁸. Notably, instances outside of those involving battered women have recognised the concept of continued provocation⁵⁹.

In a case⁶⁰, the High Court of Madras, for instance, intellectualized "sustained provocation" as a construction by the judiciary envisioned by the designers of the Criminal law. In the Madras High Court's decision,⁶¹ the term "sustained provocation" was identified as a legal creation intended by the drafters of the criminal legislation. In *Poovammal v. State*⁶², the court stated that there might be instances or situations where the offender doesn't immediately become irrational and act out in public. But it might be there for a while, tormenting him nonstop, and then suddenly erupting, causing him to lose control and allow his mind to wander; in other words, it might not be under his control or command and leading to the offence. The accused's mental state of constant provocation and frustration reached a breaking point, leading to the accused's murder of the deceased⁶³.

In *Manju Lakra v. State of Assam*⁶⁴, it was debated whether the grave and unexpected provocation should have occurred right before the murder or whether the time gap may have been extended to a much earlier period. Domestic violence was committed against the accused woman in this case without provocation, but on one occasion the violent husband was consumed. She was being beaten by him at the time of the occurrence, and as a result, she also suffered head and eye injuries. Unable to take the brutality any longer, she stole "lathi" from the hands of the deceased and killed him. The accused ended up entering a "not guilty" plea throughout the trial and no evidence on her behalf was put forth. While hearing the appeal the High Court of Guwahati cited the Ahluwalia⁶⁵ ruling coming from the English law jurisdiction, which emphasised the idea of "cumulative provocation," and said that if the instantaneous and prompt behaviour is taken into consideration without giving due regard to preceding actions or series of actions that were intertwined with the last provocative action that lead to the killing of the deceased, then it may not be sufficient to be a proper application of the defence of provocation. The Court further related the activities carried out by the accused in this instance to the urgency requirement under Section 304B⁶⁶, which talks about the unnatural death of a woman. The court concluded that if a set of circumstances was identified as having the

⁵⁸Manju Lakra v. State of Assam, (2013) 6 Gau LR 222, 251 (India).

⁵⁹Lakhwinder Kaur v. State of Punjab Appeal (Cri) no. 385 DB of 2004 (India).

⁶⁰Suyambukkani v. State of Tamil Nadu (1989) LW (Cr) 86 (para 21) (India).

⁶¹Id.

⁶²(2012) 2 MWN (Cri) 276, 278 (India).

⁶³Poovammal v. State of Tamil Nadu (2012) 2 MWN (Cri) 276, 278 (India).

⁶⁴(2013) 6 Gau. LR 222, 251 (India).

⁶⁵[1992] 4 All ER 889.

⁶⁶The Indian Penal Code, 1860, s 304 B.



ability to lead to a woman's suicide, it should also be identified as having the same potential to make that woman become an aggressor who kills her abuser. Due to these factors, the Court determined that her case would be a good fit for Exception 1 and thereby decreased her sentence.

This ruling means that a series of actions that combined establish "grave" and "sudden" provocation should be such that the defendant was never truly able to cool down, and the action that was taken right before the abuser was killed was the result of the earlier provocative recurring episodes. The Courts have broadened the definition of "cooling time," which typically prevents the use of the defence, by recognising "cumulative provocation."

But there are a few noteworthy elements that should be emphasised. The unfortunate and unaware female defendants in *Poovammal*⁶⁷ and *Lakra*⁶⁸, unlike *Suyambukkani*⁶⁹, did not raise any defences during the trial; but, on appeal, their advocates argued that the sentence's severity should be reduced. Such actions support the initial claim that women rarely argued the defence of provocation. The courts only consider a sentence-mitigation issue during an appeal case, and they then, if applicable, consider the instigating circumstances to reduce the offence to a culpable homicide that does not constitute murder. The notion that the mental state caused by the deceased's preceding act could be taken into consideration for the evaluation of whether there was an acceptable reason for provocation is applied in the court's recognition of "sustained" provocation⁷⁰. By extending the period between the conduct and the provocation, the court went beyond this English common law concept⁷¹. This justification is drawn from another Madras High Court case,⁷² in this case, it was stated that because the provocation that sets off the loss of self-control, cannot be separated from the actions and circumstances that preceded it, the court allowed the sustained provocation defence. Thus, even though the deceased batterer's most recent actions may not have been particularly provocative when considered in the context of the earlier violence, they may have been enough to make the battered woman lose control. This demonstrates that there is preliminary legal precedence for the incorporation of BWS into Indian law. However, given the current system's dependence on judge discretion, it is possible to convict abused women, as has happened in numerous cases in lower courts and other jurisdictions. The above case laws highlight the need for the BWS to be expressly included in the *Bharatiya Nyaya Sanhita* to make it gender-just legislation for courts to assist battered women without violating the Code's statutory framework of fulfilling criteria of suddenness and relying heavily on the courts to act in their favour.

Additionally, *Suyambukkani*⁷³ and *Poovammal*⁷⁴ have handled the idea of "sustained" or

⁶⁷(2012) 2 MWN (Cri) 276, 278 (India).

⁶⁸(2013) 6 Gau LR 222, 251 (India).

⁶⁹(1989) LW (Cr) 86 (India).

⁷⁰*Boya Munigadu v. The Queen*, ILR 3 MAD 33,34.

⁷¹*Id.*

⁷²*Rajendran v. Tamil Nadu* (1997) 2 MWN (Cri) 237, 246 (India).

⁷³(1989) LW (Cr) 86 (India).

⁷⁴(2012) 2 MWN (Cri) 276, 278 (India).

"cumulative" provocation a little differently from Lakra. The idea of "sustained provocation" was applied in the earlier trials primarily because there was no instantaneous occurrence that caused the accused to lose control. However, the Guwahati High Court in Lakra⁷⁵ considered the prior acts of violence while relying on "cumulative provocation". Not to mention that any law sinking in the system should also not become unfavourable to the justice dispensation mechanism and ethos. Therefore, the murder conviction of a lady who had slain her husband was modified by the Apex Court in *Nawaz v. State*⁷⁶ wherein the court gave the benefit of Exception 1 because the occurrence occurred in a split second and the accused was devoid of self-control because of her spouse calling her names⁷⁷. The accused use their right to free will in situations where they are under coercion. The label "prostitute" applied to his wife and daughter may, at most, be taken into consideration for the wife's sentencing mitigation because she had a valid reason for her involvement in the murder; however, this does not qualify for a reduction in the charge itself. This woman's plight has become a mockery of justice.

Regarding the need to accept the exemption under the IPC, the Allahabad High Court, in addition to the Madras High Court, has just recently argued in favour of its recognition and provided excellent justifications for it, wherein it was stated that the idea of "sustained provocation" has also increasingly seeped into Indian criminal law over time. The needs of the times and their problems must be met with adaptability. Under no circumstances can justice be the slave to rigid rules. Legal jurisprudence aims to provide justice in all contexts⁷⁸.

Ironically, men have had an easier way out of killing women over sexist charges or trivial disagreements as opposed to women's reprisal for offensive behaviour or ongoing abuse, even though violence seems to dominate the factual matrix of both male and female killer cases. The behaviours of the batterer are provocative, especially for women who kill their abusive partners, and they cause a variety of feelings in the victim's head, including dread, despair, and the urge to survive in addition to rage.

V. Conclusion & Suggestions

In addressing the defence of provocation through the lens of feminist discourse permeating modernism and postmodernism, the article highlights the predominant impact of patriarchal theoretical frameworks and societal constructions over the defence of provocations and the male chauvinism involved and deeply rooted in the history of this defence. By deconstructing dominant narratives and questioning the universality of legal norms, feminist postmodern approaches reveal the limitations and exclusions inherent in traditional legal concepts. Reforming the legal paradigms for incorporating an analysis based on gendered violence and the psychological and emotional dimensions of the defence can be crucial for reaffirming the elimination of bias from the defence. The defence of sustained provocation which contemplates long-term abuse necessitates a transformation in the jurisprudence of the system that is

⁷⁵2013) 6 Gau LR 222, 251 (India).

⁷⁶(2019) 3 SCC 517 (India).

⁷⁷Id.

⁷⁸Jag Prasad v. State of U.P., MANU/UP/1293/2018:2018 (104) ACC 186 (India).



primarily recognising male-oriented offences and punishments. The deep-rooted masculinist system can be reformed if the legal practitioners and judicial officers are aware of the consequences of long-term abuse and sustained provocation. The practical implementation of sustained provocation in the defence of provocation can be established through the addition of an Explanation into the existing legislation providing a clear and precise application of law and for a more equitable and just legal system. There is no doubt that even men face violence and even they are responsible for activities that are specifically termed to be women-centric. However, the neutrality that these social groups mention is beyond the social realities of the patriarchal social environment. Men often occupy powerful positions in social strata, employment opportunities, and unfortunately even while claiming a defence in the criminal justice system. The present status of defence of provocation unravels that the female's acts are the result of a psychological reaction to having been abused by her perpetrator, rather than a deliberate act on her own. Since, the modernist idea, which emphasised intellect, holism, universalism, and grand theory, has had an impact on the rulings of the English courts, the concept of the relative cultural corpus, particularism, fragmentation, and more specifically tactile perception have not been considered by the courts when determining the seriousness of provocation. It is crucial to note at this point that the objective standards used in criminal law have historically been very consistent. If we desire to maintain the standards of provocation, we must be more explicit about them. I believe that the current trend toward personalising the concept of reasonableness conflicts with the fundamental legal requirements of a varied community. Integrating postmodernist ideas into the concept of provocation in criminal law offers a critical lens through which to examine and potentially reform traditional legal practices. While it presents challenges related to consistency and practical application, it also provides opportunities for a more nuanced understanding of the factors influencing provocation and self-control.

