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CONTENTS

EDITORIAL NOTE

The *Socio-Legal Review* was conceptualised over a decade ago to foster meaningful engagement on matters from a socio-legal perspective. Over the years, our aim has been to bring forth ideas from practitioners, academics, institutions and students alike. Our understanding of 'law and society' has always been expansive, including within it both the role played by law in social transformation, and the role played by social dynamics in the formulation and implementation of law. However, in recent years, we have made a parallel effort to dedicate an issue in each volume to focus on specific themes. These themes have extended to contemporary matters such as ecological justice, as well as evergreen issues such as legal education and practice.

This year's themed issue of the *Review* is committed to an examination of Crime and Society. The issue starts with an analysis of the expectation gap that exists at the prosecutorial level. While victims of a crime may frequently expect to be involved and represented in the trial, criminal jurisprudence almost entirely excludes them from the process. In *Public Prosecutors, Victims and the Expectation Gap: An Analysis of Indian Jurisdiction*, Anupama Sharma examines the problems that arise in the public prosecution system, and suggests some methods of addressing these concerns. Criminal jurisprudence in India is further examined by Keerthana Medarametla in *Battered Women: The Gendered Notion of Defences Available*. This article adopts a cross-jurisdictional comparison to analyse the defences available to those accused of culpable homicide amounting to murder, and examines potential avenues to make available such defences to battered women charged with the murder of their abusive husbands.

In *An Unclear Empiricism: A Review of the Death Penalty India Report*, Kunal Ambasta critiques the much-lauded report by NLU-Delhi scholars on the enforcement of the death penalty in India, while Manisha Sethi in *Tenuous Legality: Tensions Within Anti-Terrorism Law in India* critically analyses the manner in which successive anti-terror legislations have worn down on well-established and necessary principles of criminal justice in India. In *Reconceptualising Rape in Law Reform*, Shraddha Chaudhary similarly questions the changes brought about by the Criminal Law (Amendment) Act, 2013, and emphasises the need to reconceptualise rape to bring about true reform.

This collection is an attempt to critically examine some of the most fundamental tenets of criminal jurisprudence in India, to give a platform to voices questioning the well-accepted. It would not have been possible without the dedicated efforts of innumerable people – the rounds of review by our team of editors on the Editorial Board of 2016-17, the invaluable inputs from our ever-reliable board of peer reviewers, the guidance of our Faculty Advisor, Professor Sarasu Thomas, and the support of our Vice Chancellor Dr. Venkata Rao. We owe them our deepest thanks, and hope for their continued support and guidance.

Further, this year, in addition to the themed issue, it is our pleasure to introduce the *Socio-Legal Review Forum*, a sister-publication of the *Review* in a blog format, accessible from the website of the *Review.* While the *Review* has made its mark in the academic world and provided a platform for a number of incredible writers, the *Forum* is an initiative to go further in the fulfilment of our mandate, to provide a platform that allows for more immediate, informal responses to developments, and hence furthers engagement in real time and allows for the socio-legal lens to be applied to contemporary happenings. We look forward to hearing your responses to Volume 13 of the *Review*, and hope to host constructive debate on this matter and others on the *Forum*.

—Samhita Mehra and Shubham Jain,
Chief Editor and Deputy Chief Editor,
Socio-Legal Review,
Mumbai/ Zurich, February, 2018

PUBLIC PROSECUTORS, VICTIMS AND THE EXPECTATION GAP: AN ANALYSIS OF INDIAN JURISDICTION

—Anupama Sharma*

Public prosecutors hold a crucial position in the criminal justice system. They act neutrally to assist the court and produce the true picture of crime. Since victims are given a backseat by reducing their status from a 'party' to a 'prime witness', they rely heavily on the performance of the public prosecutor to win them justice. The paper analyses the standard of public prosecution office in India on the basis of three theoretical models provided by J. Fionda, i.e. operational efficiency, restorative and credibility models. Through this analysis, the paper highlights the deficiencies in the existing public prosecutor office and the resulting expectation gap, followed by suggestions to improve the deficiencies.

* Anupama is an Assistant Professor at Jindal Global Law School, Sonipat, India.

INTRODUCTION

Today's victim is not just a victim of crime but can also be a victim of the apathy of the criminal justice system.

Under domestic as well as international law, the state has a responsibility to protect its citizens. Thus, every crime committed is considered a failure of the state (government) for not preventing its commission.[1] In order to comply with its role as protector of society, the state considers any crime committed to be against itself, and not against the victim alone. It professes to guarantee justice to the victim and society at large by punishing the offender and prosecuting the case under its own name.[2] By taking over the responsibility of the prosecution, the government seeks to maintain public confidence and faith in its criminal justice system. Public prosecutors represent the state in a criminal trial with a duty to assist the fair trial process and to prevent the misuse of the court process by not letting the citizens directly handle criminal cases for satisfaction of personal vengeance.[3] The UN Guidelines on the Role of Prosecutors describe the role of the public prosecutor in detail, stating that prosecutors must strive to use every legitimate means to obtain justice, without resorting to any improper methods which could result in a wrongful conviction.[4]

In this context, the role of the victim gets reduced to that of a prime witness rather than that of an active participant (party) in the trial. However, while placing that trust in the government and the criminal justice system, the victim harbours expectations that their case will be prosecuted with full efficiency and sincerity, the offender will be duly punished, and that he will be kept involved in the trial.

On the other hand, the state's expectation is best described by McDonald, that the crime is one against the state and as a result the damage caused to the victim is treated as incidental, without there being any responsibility of the criminal justice system to redress the victim's damage.[5] According to him the criminal justice system is not for the individual but for society and by taking over the prosecution, the state tries to protect the interests of society at large.

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1 DANIEL MOECKLI, SANGEETA SHAH AND SANDESH SIVAKUMARAN, INTERNATIONAL HUMAN RIGHTS LAW ch. 6 (2nd ed. 2014).

2 R.V. KELKAR AND DR. K.N.C. PILLAI, LECTURES ON CRIMINAL PROCEDURE ch. 2, 9 (4th ed. 2006).

3 Public Prosecution in India: An Argument for Autonomy, Aman Trust, 89 (Apr. 2005), http://www.amanpanchayat.org/Files/Reports/public-prosecution.pdf.

4 U.N. Secretariat, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at 188, A/CONF.144/28/Rev., Sales No. E.91.IV.2 (1991). *See* Articles 10-13 of the Guidelines on the Role of Prosecutors.

5 Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11(5) PEPP. L. REV. 121 (1984).

This leads to a gap between the expectations of the victim, the performance of public prosecution as it currently exists, and the appropriate balance between the expectation of the victim and the role of the public prosecutor as it should be. Because of limited involvement of the victim and ineffectiveness of the public prosecutors who act on behalf of the state, the declared protection of the victim by the state can become a mere pretence. The gap is created when the role of a public prosecutor is interpreted as that of a minister of justice and it is considered that his role is not to secure conviction but to assist the court in arriving at a true and clear picture of the case.[6]

This paper aims to analyse the role of the public prosecutor in India. The analysis is divided into 3 parts. In Part I, it explores how every criminal justice system faces certain challenges in creating a balance between the expectations of the victim and the role of the public prosecutor. The challenges vary - they could be the inefficiency in the public prosecutor's office as it gets tainted with corruption, ignorance, or callousness, or the ineffective accountability system. These challenges affect the expectation of the victim from the role of the public prosecutor. This paper seeks to explore the reasons for the same gap on the basis of three theoretical models. In Part II, the paper offers a few workable suggestions to bridge this expectation gap. It addresses the importance of 'victim representation' in a criminal justice system and explores the viability of private prosecution as a solution to the problem of lack of victim representation while discussing the response of the two jurisdictions to the mode of private prosecution. Part III of the paper concludes the paper with final analysis and suggestions for efficient prosecution.

I. BALANCING EXPECTATIONS OF THE VICTIM AND THE ROLE OF THE PUBLIC PROSECUTOR

A. The three models: A bridge to the 'expectation gap'

Fionda in her comparative study on prosecutorial discretion explores three theoretical models i.e., the operational efficiency model, the restorative model and the credibility model.[7] The paper uses these three models as a measure to test the effectiveness of the public prosecution as it exists today, in the two jurisdictions. Testing the systems against the models reveals the 'expectation gap'. The paper asserts that conformity with essential features of *all* the three models is indispensable for a criminal justice system to be free from the expectation gap.

The three models and their features have been elaborated below:-

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[6] Meredith Blake and Andrew Ashworth, *Some Ethical Issues In Prosecuting And Defending Criminal Cases*, Crim. L. Rev. 16 (1998).

[7] Julia Fionda, Public Prosecutor and Discretion: A Comparative Study 173 (Clarendon Press, 1995).

(a) The Operational Efficiency Model

As the name suggests, this model reflects the need for administrative efficiency.[8] In the present context, 'administrative efficiency' means that public prosecutors perform their role effectively. To ensure their effective performance, there are various factors which are essential, such as:-

Appropriate mode of appointment: The quality of human resource determines the efficiency of work. The mode of appointment forms an essential feature of an effective public prosecutor's office since if the appointment process is politicized or ineffective at ensuring the competence of new recruits, then it has a direct impact on the functioning of the criminal justice system. Hence, it is essential that the recruitment process is such that it assesses potential candidates not just on their knowledge and expertise, but also on their experience and calibre to conduct criminal trials.

Adequate resources and incentives: Once the prosecutors have been selected, it is equally important to provide them with sufficient resources to prepare for the trial without needing to make any compromise on quality and also to award them with incentives by providing recognition and encouragement where necessary. Low salaries and inadequate manual and material resources to assist the office of prosecutors lower the level of input and enthusiasm significantly. Moreover, as rightly observed by Court of Appeal in *R.* v. *Munaf Ahmed Zinga*,[9] the effect of paucity of resources for public prosecuting agency is detrimental to the 'public purse' since the exponential cost of private prosecution is borne by the victims.

Balance between workforce and workload: While recruiting public prosecutors, an estimate should be made of the number of prosecutors required as against the number of cases. An imbalance between the workforce and workload impacts the quality of the performance directly and affects the outcome of the criminal trial. Any sort of inefficiency can have a grave impact in a criminal trial, whether in the form of a wrongful conviction or the acquittal of a guilty person, so it is essential that public prosecutors can give sufficient time and attention to each case.

Updated code of conduct: There should be detailed guidelines for public prosecutors which must be regularly updated with information regarding the correct exercise of jurisdiction and procedure for trial. These may also be linked with performance assessment reports and may highlight areas where public prosecutors need to improve.

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[8] *Id.*, at 176.

[9] *R.* v. *Munaf Ahmed Zinga*, 2014 EWCA Crim 1823.

Performance Assessment: A mechanism for performance assessment serves the dual purpose of monitoring the functioning of public prosecutors and making them accountable. It also provides an overall idea of compliance with the code of conduct and the pattern of use of discretion by prosecutors, which can help in updating the guidelines mentioned above. The complete report of performance assessment over a period of time can reflect the level of effectiveness of the public prosecutor's office in a criminal justice system.

(b) The Credibility Model

This model has two aims. The first aim is to maintain public confidence in the criminal justice system. The public prosecution norm has imbibed in itself the tenets of the legitimate exercise of government power and pursuit of justice.[10] The very fact that criminal prosecutions are brought in the name of the state rather than of the individual parties poses the need for public confidence in the system and the state.[11]

The second aim of this model is to deter potential criminals. The accountability and efficient functioning of public prosecutors is essential to ensure this. If offenders develop an impression that the prosecution system is weak and inefficient, they will commit offences without much fear of conviction. Judicial review of the discretion used by public prosecutors is essential as both victims and the public at large have an interest in the proper enforcement of laws.[12] For instance, Tyler, while arguing for a self-regulatory approach towards law and criminal justice, weaves the two aims of the credibility model into one thread. He highlights the need for public confidence in the system to ensure its legitimacy, which in turn has a deterrent effect far greater than the risk of punishment.[13]

For the realization of its two aims, the credibility model is dependent on the 'operational efficiency' model. If a criminal justice system operates successfully and efficiently it helps in maintaining public confidence and deters further crime. In addition to the successful implementation of the operational efficiency model, however, this model also requires effective accountability standards.

Accountability Standards: Accountability standards keep a check on the functioning of the prosecutors, and also help secure the efficient functioning which consequently assists in maintaining the faith of the public in the criminal justice system. When the culture of non-accountability and minimal vigilance is allowed to prosper, it results in a gradual deepening of the roots of corruption within the

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[10] *R.* v. *Munaf Ahmed Zinga*, 2014 EWCA Crim 1823, para 435.

[11] Roger Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, U.C. Davis L. Rev. 43, 411 (2009).

[12] Chris Hilson, *Discretion to Prosecute and Judicial Review*, Crim. L. Rev. 739 (1993).

[13] Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 Ohio St. J. Crim. L. 307–359 (2009).

system. The office of the public prosecutor works with immense discretion, without a corresponding accountability mechanism, which creates an imbalance and increases the potential for abuse of power, misconduct and inefficiency.

Public Information: The office of public prosecutor is a public office, as the name itself suggests. He acts as the representative of the state and the public at large. It is important that the public is kept in confidence with respect to the functioning of the public prosecutor and transparency within the system is maintained. Details such as the code of conduct, mode of appointment, resources employed, incentives awarded, performance assessment report, victim complaint redressal mechanism, etc. must be easily accessible to the public so that they don't feel alienated or clueless about the functioning of the system.

(c) The Restorative Model

This model adopts a victim-oriented approach to restore the victim to the same state as before the crime. There are two aspects of such restoration i.e., punishment of the offender and effective victim representation and involvement. The paper focuses mainly on the latter aspect. This model highlights the injustice suffered by the victim. N. Christie emphasized that the relationship between the victim and the offender begins from the stage the offence has been committed, in the form of a conflict.[14] He describes this conflict as the 'property' of the victim and stresses that the denial of effective participation in solving the case is as much loss to the victim as the loss caused by the actual offence. In the ordinarily heavily offender-oriented process in the criminal justice system, restorative philosophy is essential to impart equal consideration to the victim.[15]

For the successful adoption of the restorative model, a criminal justice system should ensure a few essential features such as: -

Appropriate Victim Involvement: In any crime, it is the victim who is the prime witness and is the strongest source of reliable information about the crime. If the victim is not kept involved in the trial on a regular basis, it may not only impact the merits of the trial but also the faith the victim has in the criminal justice system. The victim should, at no point of time, feel alienated from the progress of his case.

Complaint mechanism for victims: The importance of accountability has already been discussed earlier. In addition to an effective internal accountability system, there is also a need for an external accountability mechanism, which in part can be achieved by a sound complaint mechanism for victims. The details about the complaint mechanism should be lucidly available on a public forum

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[14] Nils Christie, *Conflicts as Property*, 17(1) BRITISH J. CRIMINOLOGY 1-15 (1977).
[15] *Id.*

and should be layman friendly. It is equally important for timely redressal of the complaints for it to have the desired impact. This will not only keep the prosecutors accountable and vigilant about their performance but will also maintain the involvement and representation of the victims in the criminal justice system.

In this context, the paper will now analyse the features of the public prosecutor's office as it currently exists in India. With the analysis, the challenges that result in the 'expectation gap' will be identified. It is beyond the scope of the paper to discuss each and every challenge in detail. However, the analysis to measure the system against the models will reflect the wholesome picture of the existing challenges.

B. Public Prosecution and the existing challenges in India

In India, after commission of a crime, the police, which is the investigative authority, investigates the case and files the charge sheet, subsequent to which the public prosecutor prosecutes the case. Prior to the Code of Criminal Procedure, 1973 ('CrPC') public prosecutors were linked to the police and were accountable to the Deputy Superintendent of the Police ('DSP').[16] Since 1973, however, the assistant public prosecutors are not under the direct control of the DSP and are detached completely from the control of the police.[17] Instead, they are now answerable to the District Magistrate at the district level and to the Director of Prosecutions at the state level.

This shift has led to a few problems, which are an impediment to an effective functioning of the system and have lingered on till date. At the pre-trial stage, the files are at times sent to the assistant public prosecutors by the police for their opinion but since they are no longer answerable to the police authorities the opinions are often found to be perfunctory. Moreover, once the case reaches the court, the district police remain unaware about the status of the case. M.L. Sharma raises these concerns and stresses upon the need for proper coordination between the police and the prosecution.[18] He suggests that DSP should be given certain powers of review of the prosecutor's performance in the case. He also recommends that the DSP prepare a report of the performance of each assistant public prosecutor and send it to the district magistrate to keep a check on their performance and assist in the accountability mechanism.

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[16] Madan Lal Sharma, *Role and Function of Prosecution in Criminal Justice*, Resource Material Series No. 53, 107th International Training Course Participants' Papers, United Nations Asia and Far East Institute, 187 (1997), http://www.unafei.or.jp/english/pdf/RS_No53/No53_21PA_Sharma.pdf.

[17] *Id.*, at 196.

[18] *Id.*, at 197.

The role of the public prosecutor was defined by the Supreme Court in *Sheonandan Paswan* v. *State of Bihar*[19] as:

> a duty to represent the executive for trying the offender. While broadly his responsibility is to see that the trial results in conviction, but he need not be overenthusiastically concerned about the outcome of the case. He acts as the officer of the court and is duty bound to assist them and ensure that the accused is not unfairly treated. He may withdraw from a case for reasons like public interest, paucity of evidence and can never surrender this power to withdraw to anyone else.

As per the provisions of the CrPC, the public prosecutor's duty at the investigation stage involves getting the arrest/search warrants issued for the accused.[20] Once the investigation is complete, the police in consultation with the public prosecutors prepares the charge sheet and then sends the charge sheet to the court. However, in the 197th Law Commission Report, the view of the Supreme Court in *R. Sarala* v. *T.S. Velu*[21] was quoted to stress that the role of the public prosecutor should be limited to the post investigation stage as they are the officers of the court and their work is inside the court, which consequently removes their role or responsibility in the investigation stage.[22] The paper now discusses the challenges existing in the Indian criminal justice system.

C. Challenges in the Indian Criminal Justice system

(a) Mode of appointment

There are various categories of public prosecutors in India and the mode of appointment differs between categories. The ones who are responsible under the Director of Prosecutions deal with cases in the Magistrate Courts and are selected on the basis of a competitive exam held by the State Public Service Commission. In the Sessions court, cases are prosecuted by a different set of public prosecutors who are selected by the District magistrate in consultation with the Sessions judge and are subsequently appointed by the state government. Such direct appointment from the Bar with consultation of the Sessions judge has been justified by the logic that the advocates who have been working in the Sessions Court have better experience and knowledge of the functioning of such courts and the nature of the cases tried therein.[23] At the High court level, the state government appoints public prosecutors under section 24 of the CrPC in consultation with the High court. These rules are alterable by the respective states. However,

[19] *Sheonandan Paswan* v. *State of Bihar*, (1983) 1 SCC 438: AIR 1983 SC 194.
[20] CODE CRIM. PROC. §§ 67, 83 & 182.
[21] *R. Sarala* v. *T.S. Velu*, (2000) 4 SCC 459: AIR 2000 SC 1731.
[22] PUBLIC PROSECUTOR'S APPOINTMENTS, L. COMMISSION OF INDIA REP. NO. 197 (2006).
[23] *Id.*, at 26.

this might encourage politicization of the process since the government in each state undergoes fresh elections every five years and each political party has its wing of lawyers as supporters who might be favoured, to the prejudice of others. In order to gain political support, offering such benefits in the form of appointments to important positions is a very common phenomenon.[24] As was rightly stated by Sairam Sanath Kumar and Dr. V. Krishna Ananth, the appointment of public prosecutors seems to be determined, to a great extent, by political affiliations, than by merit.[25] To avoid the risk of political manipulations, there could be a separate entrance exam for public prosecutors in the Sessions Court and High Court with eligibility of fixed minimum tenure of experience as a lawyer in the respective courts as this will ensure transparency as well as practical exposure to the functioning of these courts.

Additionally, the quality of entrants in the prosecution agency is not impressive. Though the selection at the basic level is through an exam, the candidates appearing for it are not competent.[26] In *Elango* v. *State*,[27] the Madras High Court expressed the expectation of the judiciary from a public prosecutor to maintain the honour and dignity of being true to the court. The court stated that the prosecutor should not become a mouthpiece of police and must reflect allegiance to the higher cause. The court went further to discuss the Guidelines on the Role of Prosecutors laid down in a United Nations Congress meeting at Havana where the importance of appropriate qualifications for a prosecutor was highlighted, owing to the essential position they hold. Moreover, stress was laid on a method of recruitment that ensures quality and competence.

The 197th Law Commission Report on the appointment of the public prosecutors stressed that a mode of appointment which sacrifices on the quality of the prosecution or allows the state to appoint the prosecutor of their own choice without due consideration to their qualification, experience or integrity, will lead to arbitrariness.[28] The Report raised the concern that cases should only be dealt with by the police or the by the CBI prosecution since there is no accountability on the part of the state public prosecutors who are selected mostly on political recommendations. They further stressed that if public prosecutors are to be dealing with the case then they should be selected through Public Service Commission exams rather than political recommendations. While the suggestion of selection through exams is agreeable, the observation of the report that the cases should only be dealt by the police or the CBI doesn't seem to be the correct approach, as in India, even the police and CBI are facing similar challenges of political influ-

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[24] V. Radha Krishna Krupa Sagar, The Role of Public Prosecutor in Criminal Justice System 174-175 (2013).

[25] Sairam Sanath Kumar and V. Krishna Ananth, *The Prosecutorial System in our Criminal Justice Administration – A Close Look*, NUALS L.J. 2, 14 (2008).

[26] Sharma, *supra* note 16, 198.

[27] *Elango* v. *State*, (1998) 1 LW (Cri) 32.

[28] Public Prosecutor's Appointments, *supra* note 22, at 19.

ence and low accountability.[29] Instead, attempts should be made to strengthen the efficiency of the public prosecutor's office.

(b) Accountability mechanism

Practically, there is no accountability system in place. Public prosecutors at the district as well as sessions level are answerable to the District Magistrate, who is too burdened with cases to act as an effective check on prosecutors.[30] Further, in 2005, the Aman Trust Report revealed shocking facts about the lack of accountability and review mechanisms for the performance and conduct of public prosecutors. It discussed the *Rules/Guidelines for Constitution of Panels of Government Counsels for Conducting of Cases for and on behalf of Delhi Administration*[31] framed by the Delhi Government and how the guidelines fail to mandate review on a timely and regular basis. Instead they require the review of the performance by the Secretary as and when required, thus providing a lot of discretion to the Secretary. There is no systematic or well-developed mechanism for such review. Moreover, the interviews with the public prosecutors reflect that none of the public prosecutors in the High court have been subjected to any disciplinary enquiry.[32] In a very recent judgment, the Supreme Court of India mandated strict accountability on part of public prosecutors and ordered the Home Department of every State to examine the reasons for the failure of each prosecution case.[33] This was done in the light of the high number of cases where accused of heinous crimes were acquitted due to lack of evidence and improper investigation.

(c) Excessive workload, lack of resources and incentives

While the number of pending cases can be known, there is no data for the total number of public prosecutors and the number of cases per public prosecutor to assess the workload. However, the state of affairs certainly suggests that there is a major mismatch between the number of public prosecutors and the cases, thereby overburdening the public prosecutors.[34]

The quality of performance is not just dependent on the expertise and workload but also on the incentives that are provided to the public prosecutors. The pay scale and the resources for public prosecutors at the district level and the honorarium paid at the session level are both inadequate. The Aman Trust Report

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[29] R.K. Raghavan, *The Indian Police: Problems and Prospects*, 33(4) EMERGING FED. PROCESS IN INDIA 119-133 (Autumn, 2003).

[30] Sharma, *supra* note 16, at 199.

[31] *Rules/Guidelines for Constitution of Panels of Government Counsels for Conducting Cases for and on Behalf of Delhi Administration*, Government of Delhi, http://law.delhigovt.nic.in/rules.html.

[32] Aman Trust, *supra* note 3, at 37.

[33] *State of Gujarat* v. *Kishanbhai*, (2014) 5 SCC 108.

[34] *State of U.P.* v. *Ajay Kumar Sharma*, (2014) 3 SCC 568.

on the public prosecution in India highlights the lack of resources and low salary provided to the public prosecutors.[35] There is a serious dearth of assistant staff, stenographers, clerks and other infrastructure such as proper library, stationery, etc. The report cites the Bawa Committee report's analysis that such lack of facilities leads to low morale of the public prosecutors. It also affects their performance, as they have to compete against the defence lawyers who have adequate personal infrastructure to work with. The salary of the standing counsel is as low as ₹ 7000-10000 per month, whereas for the additional public prosecutors, the situation is worse, as there is no fixed monthly remuneration at all. Instead they are paid only when they are dealing with a case, at a rate of ₹ 450 per day with a maximum limit of ₹ 1200.[36] This disregard and apathy results from wage payment which is fixed on a daily basis and only for a limited tenure. This is also one of the major factors which dissuades efficient and competent lawyers from taking up public prosecution.

(d) Distracting part time private practice

The Indian criminal justice system allows part time private practice to a certain category of public prosecutors. In the High Court, only a part time prosecutor can prosecute criminal cases. Such prosecutors are paid only a consolidated quantum of fee and are not put on the regular pay scale. They are allowed to engage in their private practice simultaneously, but are not allowed to contest any case, civil or criminal, against the state for the duration of their tenure.[37] This means, however, that the public prosecutor's attention is, for the most part, engaged in establishing his usually more lucrative private practice, which consequently affects his role as a public prosecutor. This is further exacerbated by the fact that their salary and tenure is fixed, thus providing them no incentive to perform efficiently to secure their position or to gain a raise in the salary. Consequently, they tend to focus more on their private practice and remain in conflict between their public and private duties. Not only is he unable to give full focus and time to his role as a public prosecutor, but also he is expected to prosecute the case with his limited 'part' time experience as a public prosecutor as against a specialized defence lawyer. This affects the quality of case preparation and prosecution and hampers the interest of the victim and the society at large.[38]

(e) Victim representation

The Indian criminal justice system as a whole suffers from problems such as a large quantum of cases and poor quality of case preparation resulting in failed

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[35] Aman Trust, *supra* note 3, at 32.
[36] Aman Trust, *supra* note 3, at 40.
[37] Krupa Sagar, *supra* note 24, at 165.
[38] Krupa Sagar, *supra* note 24, at 183-184.

prosecutions and delays.[39] In the current Indian legal system, the space for victims is quite limited and they have the status of a mere prosecution witness. There is a need for a victim and witness service which besides maintaining the integrity and autonomy of the public prosecutor, will also provide a platform to the victims to connect with their case and play an essential role.[40]

In *Anil Kumar Tiwary* v. *State of Jharkhand*,[41] the victim expressed dissatisfaction with the public prosecutor as he didn't produce all the relevant evidence in the court which were essential for the judgment. The court in the case stated that the prosecutor cannot be biased towards any party and has to act as a sincere agent of the court. His service should not be to cause intentional detriment to the accused and neither should he do injustice to the victim. In another case, *Laxman Rupchand Meghwani* v. *State of Gujarat*[42] where a complaint was raised against the public prosecutor for deficiency of work, the court highlighted that it seemed as if the public prosecutor behaved like a defence counsel, instead his duty is to be fair and neutral. There should not be any thirst to either convict the accused or acquit him, and the prosecutor should be true to the court and act like an agent.

The Malimath Committee report expressed that India should take inspiration from the steps taken in England with respect to rights of the victims such as Victim's Code of Practice, Victim's Commissioner, Victim's Personal statement, right of the victim to be informed about the progress of the case, etc.[43] The committee also recommended the implementation of the right of the victim to be represented by a lawyer of his own choice, provided that the state bears cost of the lawyer in cases where the victim cannot afford one; right to participate in the proceedings which includes right to advance arguments after the prosecutor, right to know about the progress of the investigation and right to move to the court to ask for further investigation, *inter alia*.[44]

An increased role of the complainant has been emphasized at various intervals, including in the Malimath Committee Report. The other option available to the victims when they are dissatisfied with a public prosecutor is to resort to private prosecution. But the 'option' of private prosecution in India is misleading. This is because the function of a public prosecutor takes upon itself a judicial nature.[45] While the CrPC allows for private prosecution, a private prosecutor is

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[39] DR. SYED MOHAMMAD AFZAL QADRI, CRIMINOLOGY AND PENOLOGY ch. 17, 596 (Eastern Book Company, 6th ed. 2009).

[40] Bikram Jeet Batra, *Public prosecution- in need of reform*, INDIA TOGETHER (July 5, 2005), http://indiatogether.org/prosecute-government.

[41] *Anil Kumar Tiwary* v. *State of Jharkhand*, (2013) 3 JLJR 195.

[42] *Laxman Rupchand Meghwani* v. *State of Gujarat*, (2016) 2 GLR 1671.

[43] JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REP., ¶ 6.9.7, 84 (2003).

[44] *Id*., at 270-271. *See* recommendation 6.

[45] *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831.

permitted to work only under the direction of the public prosecutor.[46] Section 302 of the CrPC permits private prosecution with the permission of the Magistrate and this has been considered satisfactory to address the issue of victim participation.[47] However, it is questionable whether this is enough in an adversarial system where the accused is presumed to be innocent and the burden of proof is on the prosecution, with the standard of proof being that of 'beyond reasonable doubt'. In such a situation, if the prosecution suffers from inefficiency then it affects the victim as well as society's interest at large.[48]

It can be concluded that the challenges lay a direct impact on the victims' interest and expectations. Moreover, there has not been much research in the Indian literature that would address the concern of victim representation and the expectation gap due to the prevailing challenges.[49] The analysis with respect to the three models reflects how alarming the expectation gap in India is.

II. VICTIM REPRESENTATION, JUSTICE AND PRIVATE PROSECUTION

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 recognized the rights of victims of crime and asked states to make laws and schemes which fulfil the aim of the declaration. However, the question is the extent to which the jurisdictions have been successful in fulfilling the aim of the declaration. One aspect is to frame such laws and rights which satisfy the requirement of recognizing the victims' rights and the other aspect is how far these rights are actually able to materialize themselves in effect.

When a crime is committed it leads to violation of the victim's rights, thereby creating an imbalance between the victim and the offender.[50] As a result, victims should have a central position and the aim of the criminal prosecution should be to rectify the violation caused to the victim's rights by the defendant.[51] N. Christie points out that in any crime the victim is the biggest loser- not only does he suffer mentally, physically and materialistically but also loses participation in his own case.[52] On similar lines, Fionda pointed that the victim plays a very essential role in the effectiveness of a criminal justice system.[53] Every legal

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46 K.N. Chandrasekharan Pillai, *Public Prosecution in India*, Article 2 (December 24, 2008), http://alrc.asia/article2/2008/12/public-prosecution-in-india/.

47 The Code of Criminal Procedure, 1973, L. Commission of India Rep. No. 154 (1996).

48 Justice V.S. Malimath, *supra* note 43, at ¶2.3, 24.

49 Krupa Sagar, *supra* note 24, at 2.

50 Gittler, *supra* note 5, at 138.

51 Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y, 389 (1986).

52 Christie, *supra* note 14, at 7.

53 Fionda, *supra* note 7, at 186.

system relies on victims as a major foundation for the evidence of the crime, reporting of the incidents and seeks their cooperation till the end to achieve justice. Ashworth has expressed that the interest of the victim is of core value to any sound criminal justice system and their role is important in the prosecutorial sentencing.[54] But only recognizing the importance of victims is not sufficient. It is equally essential to give material effect to their importance by providing them their due representation and participation. Sanders argues that there is a need to enhance the freedom of the victims and that can be done if their concerns are taken seriously. In his words the 'clear commitment' to explain the action of the agencies to the victims is a far better approach than the 'lukewarm commitment' to consult which hardly gets practiced or is enforceable.[55]

The need for victim representation and participation has been duly acknowledged in all the jurisdictions. The Runciman Commission report in 1993 reflected the need to protect the interest of the victims and the way they are treated. It recommended that since the communication between the CPS and the victims is also at stake at many instances, the victim's view must be taken into consideration and they should be kept informed of the crucial decisions in their case.[56]

More aptly, in the Auld report, it was highlighted that for every crime there is a victim, either in the direct or the indirect form - but until recently the focus has been primarily on the accused-defendant rather than on the victim.[57] This was further substantiated by the survey report of British Crime Survey of 2000 which highlighted that the victims felt themselves to be the 'forgotten party', with majority of them not being confident about the fact that the criminal justice system was meeting their needs. The mid-70s marked the advent of victim support movements. However, it took quite a long time for the government to recognize the need for victim involvement and representation and the steps required in furtherance of it. It was further recognized in the report that it is in everybody's interest that the victim must be treated in a civilized manner and that one of the main reasons for giving the victims increased involvement and recognition is to enable them to have a say in their own matter.

The House of Commons Justice Committee, 2009, rightly reiterated that the public prosecutors' role is often misunderstood as the impression put forward by the government to the public is such that the public prosecutors are the champions for the victims whereas in practicality, they are not able to perform the same

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[54] ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY ch. 2 (Oxford Clarendon Press, 1994).

[55] ANDREW SANDERS ET AL., CRIMINAL JUSTICE (4th ed. 2010).

[56] VISCOUNT RUNCIMAN, ROYAL COMMISSION ON CRIMINAL JUSTICE REP., 79 (1993).

[57] LORD JUSTICE AULD, A REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES, 495-499 (2001), http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts- review.org.uk/auldconts.html.

role as is performed by a defence counsel for the defendant.[58] The extent of the public prosecutor's individual discretion must be balanced with public accountability.[59] Kirk J. Nahra in his work on role of victims in the American context, points out that the prosecutorial discretion and power has constitutional as well as public policy support.[60]

The role of the victim in a criminal justice system is very crucial since it provides the beginning point for any case and acts as the prime witness. Victims' participation is not just crucial but is also desirable. If any policy in a criminal justice system, limits such role and participation, then it may affect effective law enforcement.[61] Further, Cardenas stressed that the victim of today feels victimized not just by the crime but also by the judicial procedure.[62] The surveys with victims reflect their alienation with the criminal justice system and dissatisfaction. He further stated that the impact of the victim advocacy movements will lead to reformation of the objective of the criminal justice system and that the recognition of victim's legitimate interest in the process, can eliminate the trend of their neglect.[63]

It is clear from the above reflection on the importance of victim representation that there is a need to address the concern of suffered representation to protect the interest of the victim. The paper now focuses on the aspect of private prosecution to address the question of whether it is a viable option to protect victim representation in cases of ineffective public prosecution, or where the victim wishes to opt for private prosecution.

III. PRIVATE PROSECUTION: A VIABLE SOLUTION?

The right to initiate private prosecution appears to coexist insufficiently along with the stabilized and well recognized system of public prosecution.[64] Private prosecution has suffered from not being regarded as a constitutional safeguard and its importance has lacked due recognition.[65] In Cesare Beccaria's view, as quoted by Cardenas, crime is not a matter of private concern between the offender and the victim. Instead it is a social concern, and since the criminal justice system is obligated to secure the interest of the society, it should not allow private prosecution.[66] The general perception about private prosecution has been

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[58] The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, House of Commons Justice Committee, ¶83 (2009).

[59] Fionda, *supra* note 7, at 60.

[60] Kirk J. Nahra, *The Role of Victims in Criminal Investigations and Prosecutions*, 33(4) Prosecutor 28 (1999).

[61] *Id*.

[62] Cardenas, *supra* note 51, at 389.

[63] Cardenas, *supra* note 51, at 357-358.

[64] L.H. Leigh, *Private Prosecutions and Diversionary Justice*, Crim. L. Rev. 289 (2007).

[65] *Id*.

[66] Cardenas, *supra* note 51, at 369.

well expressed as being a right of questionable value, which can be used to act in a way which is damaging to the public interest.[67] It is feared that with private prosecution there will be wrongful convictions and frivolous prosecutions without any accountability mechanisms in place to curb this practice. However, Fairfax in his article suggests an accountability mechanism for private prosecution. He suggested the requirement of 'public reporting' by the prosecutor of all the cases that they have handled and the discretion they used. Simultaneously, he also suggested 'community review boards' wherein a panel reviews the series of cases handled by the prosecutor and observes if the prosecutor had been complying with the guidelines in handling the cases and in application of the discretion.[68] Private prosecution has always existed as a part of the system but since the initiation of public prosecution system, it has been given a backseat in the criminal justice system. The paper will now explore the possibility of private prosecution in India.

The Indian criminal justice system faces multiple challenges, including corruption, paucity of resources, delayed justice and lack of accountability mechanisms. The phrase 'today's victim is not just a victim of crime but can also be a victim of the apathy of the criminal justice system' fits aptly in the Indian context. The victims after the commission of the crime, face their second round of victimization at the hands of the police, prosecution and the judiciary i.e., the three wings of the criminal justice system. As has been highlighted before, the politicized mode of appointment and lack of incentives, leads to poor quality of appointments to the essential post of public prosecutor. With the high number of pending cases on a daily basis, there is a huge imbalance between the number of prosecutors and the workload. With no accountability system in place, the victim is left at the mercy of the prosecutors who are mostly unapproachable and unanswerable for any of their acts.

There is no established public forum where the details of the code of conduct, complaint mechanism, resource allocation or annual statistical reports are published. If a victim is dissatisfied with the performance of the public prosecutors, he is left with virtually no recourse. Even if he follows the complaint mechanism as prescribed for the government employees in general, there is no guarantee of timely redressal of the complaint. The question and the concern raised by Pradeep Kumar Roy, regarding the victim's right to engage the lawyer of his choice is very relevant in the existing state of affairs.[69] Where the accused is given the right to engage his own lawyer, the victim is left at the peril of the public prosecutor with whom he has very little communication and helplessly depends on the case diaries to know the progress of his case. Victim orientation theory indicates that there should be more involvement of the victim in the

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[67] *Jones* v. *Whalley*, (2007) 1 AC 63: (2006) 3 WLR 179.

[68] Fairfax, *supra* note 11, at 453.

[69] Pradeep Kumar Roy, *Why not the Right to prosecute by a lawyer of victim's own choice?*, 1 CRIMES 897 (1992).

investigative and prosecution stage along with a right to choose his own lawyer.[70] Radha Krishna refutes this stating that the history of Indian criminal justice system suggests that when private prosecutions were allowed it led to frivolous cases being brought to the court with the added risk of important cases being left if the victim chooses not to bring them to the court thereby leaving the criminals free in the society. Moreover, when the prosecutor is paid by the victim it endangers his ability and capacity to act properly in the public interest and shifting the monetary burden to the victim is not morally correct.[71]

Currently, the role of the private prosecutors has been kept restricted since, as stated by the Supreme Court, it is feared that, if given a free hand they would seek to get conviction at any cost without due attention to the fairness and public interest.[72] In *Kedar Nath Sen* v. *Amulya Ratan Sanyal*,[73] the court stated that the provision for private prosecution has been created to safeguard the victims from harassment to some extent. It may not be effective to a large extent due to the limited involvement, but certainly will have some impact. Section 302 of the CrPC does provide for a provision wherein at the discretion of the Magistrate the trial can be allowed to be conducted by the private prosecutor. However, there are no guidelines as to the circumstances under which this extraordinary power can be exercised by the Magistrate.[74] However, the Supreme Court stated in a case, that such permission may be granted if the court finds that by allowing private prosecution, justice would be served better.[75] In an earlier case, the Kerala (State) High Court stated that the mere apprehension that the public prosecutor will not work efficiently in the case is not enough justification for the magistrate to allow the complainant to conduct the prosecution personally.[76] However, such is not the case in case of Sessions court as there only the public prosecutor can prosecute the case, thereby removing any possibility of private prosecution.[77]

The question addressed regarding whether or not private prosecution can be a viable solution to ineffective victim representation seems promising in the Indian context. With the option of private prosecution, victims will be able to engage the lawyer of their own choice and will not be forced to suffer injustice due to the inefficiency of the public prosecutor. Moreover, with the alternative mode of private prosecution, the monopoly in the hands of public prosecutors is likely to reduce as if they continue to perform inefficiently then more and more private prosecutors will pave their way to the criminal trials. While this result might seem dubious in the England, Wales, and U.S. context as the costs of engaging private lawyers is quite high for them to be engaged on such a large scale,

[70] Sairam Sanath Kumar, *supra* note 25, at 14.
[71] Krupa Sagar, *supra* note 24, at 157-158.
[72] *Shiv Kumar* v. *Hukam Chand*, (1999) 7 SCC 467.
[73] *Kedar Nath Sen* v. *Amulya Ratan Sanyal*, 1941 SCC OnLine Cal 156: AIR 1942 Cal 79.
[74] Krupa Sagar, *supra* note 24, at 150.
[75] *J.K. International* v. *State (Govt. of NCT of Delhi)*, (2001) 3 SCC 462: 2001 AIR SCW 907.
[76] *Babu* v. *State of Kerala*, 1984 SCC OnLine Ker 3: 1984 Cri LJ 499.
[77] Krupa Sagar, *supra* note 24, at 151.

this might seem possible in the Indian context where with the large number of lawyers registering in the Bar Council every day, the costs are quite low.[78] But with the option of private prosecution, comes a very serious threat which must be addressed. Where in the current state of affairs, the state is unable to maintain accountability mechanism for the public prosecutors; it is unwise to expect them to keep an accountability mechanism on the private prosecutors by mandating performance assessment reports. Such lack of accountability coupled with the urge to establish practice amidst the heavy competition with large number of lawyers, private prosecutors might easily engage in unethical conduct leading to wrongful convictions.

Hence, for the Indian criminal justice system, private prosecution seems to be a viable solution to ineffective victim representation, only if there is an effective accountability system in place which monitors the performance of the private prosecutors and their compliance with the practicing guidelines.

IV. CONCLUSIVE ANALYSIS

Part I established the 'expectation gap' that exists. In such a scenario, option of private prosecution becomes important. There might be a situation, where the victim loses his confidence in the public prosecutors' office due to their inefficiency and prefers to have his case handled by a private prosecutor. In such a situation, if the criminal justice system places a barrier, either by banning private prosecution (as in few U.S. states), putting limitations which discourages victims to opt for private prosecution (as in England and Wales) or curtails their participation in criminal trials (as in India), it affects victim representation. Every criminal justice system should permit private prosecution as a viable option available to the victim, in case he chooses to opt for it. Because if that is not the case, victims are 'forced' to continue with public prosecution despite the potential inefficiency.

The issue of risks involved with private prosecution and its efficiency should not take away the 'option' of private prosecution from the victim altogether. The paper acknowledges that the 'expectation gap' can arise with private prosecution as well and is aware of the risks involved as highlighted by Fairfax (as discussed above), but its detailed discussion is beyond the scope of this paper. Irrespective of the mode of prosecution whether public or private, the few elements such as accountability mechanism, mode of appointment, etc. are essential to ensure their effective performance. However, the availability of the option of private prosecution gives support to victim representation and is a viable option in those cases where it has suffered.

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[78] *R.* v. *Munaf Ahmed Zinga*, 2014 EWCA Crim 1823, paras 43-45.

Suggestions to bridge the 'expectation gap'

The existing state of relation between public prosecutors and victims across jurisdictions can be best summarized in the words of Justice Committee of House of Commons, "telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality".[79] It is unfair to raise the expectations of the victims by giving them false hope, as it adds to their disappointment and tampers with their faith in the system.

The following suggestions are offered to meet the identified common challenges which results in the expectation gap as per the above analysis:

(a) Sound accountability system

Considering the discretionary and the decision making powers in the hands of public prosecutors, it is highly essential to have a sound accountability system in place. But what is meant by a sound accountability system? While designing any accountability mechanism, its practical feasibility and effectiveness must be taken into consideration. In a large jurisdiction like India, it is not feasible to have a one-to-one accountability mechanism on a daily basis. One of the models that seem effective is: community review board and public reporting, wherein the public prosecutors are obligated to submit a report of the cases they have dealt with over a fixed period of time (two or three years).[80] In the report, they must highlight the outcome of the case and the manner in which they exercised their discretionary and decision making power. The report must also include the extent of victim involvement in the case and whether the opinion of the victim was considered before the exercise of decision making power.

This mechanism will not just make the public aware of the performance of the public prosecutors in the system but will also help the governing body analyse the performance of the public prosecutors on a collective basis and help them identify the positives and negatives of the functioning of their public prosecution wing. The analysis of these reports can also help in framing a code of conduct and guidelines, which are required to ensure that public prosecutors exercise their powers in an efficient way.

(b) Effective mode of appointment

All the other measures and attempts to make the office of public prosecutor will be meaningless if the prosecutors are not competent for the role. It is extremely important to have an effective mode of appointment, which is able to

[79] The Crown Prosecution Service, *supra* note 58.
[80] Fairfax, *supra* note 11, at 453.

identify the appropriate candidate with required experience, expertise and calibre to hold the post of a public prosecutor. One of the most reliable options for the appointment is an entrance exam which can examine the knowledge (expertise) of the candidate. One of the assessments could be designed to assess the decision-making ability of the candidate as it will be required in their role as a public prosecutor. The final parameter of experience can be ensured by setting a minimum limit of experience required in the legal field. This consistent mode of appointment will ensure certainty about the quality of the public prosecutors to a great extent.

(c) Reasonable victim involvement

The victims in the criminal trial must be given the status of a 'party' to the trial. By the term 'party', the implication is that the victims must be informed about the developments of the case. This information should not be given subject to inquiry by the victim; instead it should be treated as a part of the duty of public prosecutor's office to intimate the victim about every progress in his case. The victim must also be consulted in the decision making process of the case. It is often argued that excessive involvement of the victim in the day to day proceedings will hamper the performance of the prosecutors and affect their independence. The point to be noted here is that there could be a balance between the two extreme approaches - granting a right of full participation and control over the decision-making process at various stages of the proceedings, or no involvement whatsoever except for the mere right to seek the information regarding the progress of the case.[81] A balanced solution could be that in case of any disagreement with the victim, the authority to make final decision is given in the hands of the public prosecutors subject to consultation with higher authorities. This will help provide an opportunity to the victim to be involved in his case and will also retain the independence of the public prosecutor in decision making.

V. CONCLUSION

In addition to the issues discussed in the paper, on a concluding note, the paper leaves the readers with the following observation: There is a need to revisit the interpretation of the role of the prosecutors as it exists today. It is often stated that the prosecutors are the ministers of justice and have to assist the court with the true picture of the case without any aim of securing conviction. This interpretation hampers victims' interest and representation directly. The view maintained by the North Carolina Court in *State* v. *Westbrook* about the role of the prosecutor presents the ideal interpretation.[82] It states:

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[81] Gittler, *supra* note 5, at 177.

[82] *State* v. *Westbrook*, 279 NC 18 (1971).

> The role of the prosecutor while discharging its duty of representing the state is to secure the objective of the state. That objective should not be to secure the conviction regardless of the guilt; instead it is to secure conviction of the guilty and acquittal of the innocent. To perform this role, the prosecutor 'need not act as neutral'; he is the advocate of the state and must perform that role.

This approach for the role of prosecutors along with the suggestions (as proposed in the paper) can hopefully succeed in bridging the 'expectation gap'.

BATTERED WOMEN: THE GENDERED NOTION OF DEFENCES AVAILABLE

—Keerthana Medarametla*

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

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

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

* B.A., LL.B. (Hons.), NLU Delhi, currently a Senior Research Fellow, Centre for Constitutional Law, Policy and Governance, NLU Delhi. The author thanks Dr. Mrinal Satish, Arshu John, Hemangini Kalra, the peer reviewer and the editors for their feedback and comments on the previous drafts of the article.

I. INTRODUCTION

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

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1 Lenore E. Walker, The Battered Woman Syndrome 45 (Harper, 1980).

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

3 As available on legal databases.

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

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

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

While critiquing the law, feminist scholars often look beyond the written word to determine the gendered constructions of the law. They criticise laws for echoing the male point of view, and for excluding the myriad experiences of varied communities, including women.[7] A common criticism of the Indian criminal justice system by the feminist school of thought is of the underlying biases in the defences to homicide in the Indian Penal Code, 1860.[8] The argument is that the qualifying 'imminent attack', 'reasonable person' and 'grave and sudden' attached to the defences of self-defence and provocation have been shaped without taking into consideration the perspectives and experiences of women.[9]

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

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reference to the syndrome.

6 Motives of Murder and Culpable Homicide not Amounting to Murder During 2015, NATIONAL CRIME RECORDS BUREAU, (2015), http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Table%203.2.pdf.

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

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

9 *Id*.

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

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

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

13 As per e-legal databases.

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

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

II. BATTERED WOMAN SYNDROME

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

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

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

[16] Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA Women's L.J. 99, 101 (1997); Lenore E. Walker, *supra* note 1.

[17] Lenore E. Walker, *supra* note 1.

[18] Lenore E. Walker, *supra* note 1, at 95-104.

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

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

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

III. NALLATHANGAL SYNDROME: THE BWS OF INDIA

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

[19] LENORE E. WALKER, *supra* note 1.
[20] LENORE E. WALKER, *supra* note 1, at 65.
[21] LENORE E. WALKER, *supra* note 1, at 96.
[22] LENORE E. WALKER, *supra* note 1.
[23] LENORE E. WALKER, *supra* note 1.
[24] LENORE E. WALKER, *supra* note 1.
[25] Rebecca D. Cornia, *supra* note 16, at 103.
[26] Bess Rothenberg, *"We don't have time for Social Change": Cultural Compromise and the Battered Women Syndrome*, 17(5) GENDER & SOC'Y 771-787 (2003).
[27] *Id.*
[28] Michael R. Slaughter, *The Battered Woman Syndrome and Self Defense*, 1 WOMEN'S L.J. 78 (1997).
[29] Lenore E. Walker, *Who are Battered Women?*, 2(1) FRONTIERS: A JOURNAL OF WOMEN'S STUDIES 52-57 (1997).
[30] *Id.*

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

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

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

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[31] *Supra* note 4.

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

[33] Lenore E. Walker, *supra* note 1.

[34] Lenore E. Walker, *supra* note 1.

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

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

[37] Leela Khanna, *The State and Domestic Violence: The Limitations of India's Dowry Prohibition Laws*, Senior Projects Spring Bard College (2015); Vidya Venkat, *No Country for Women*, The Hindu, Mar. 8, 2015, http://www.thehindu.com/sunday-anchor/no-country-for-women/article6969953.ece. .

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

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

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

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

IV. SELF DEFENCE

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

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

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

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

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

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

44 LENORE E. WALKER, *supra* note 1.

45 LENORE E. WALKER, *supra* note 1.

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

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

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

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

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

A. Battered-Woman Syndrome and Self -Defence

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

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

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

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

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

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

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

[55] Lenore E. Walker, *supra* note 1, at 142.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. PROVOCATION

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

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

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

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

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

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

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

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

69 *The Crimes (Homicide) Act 2005.*

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

71 Thomas Crofts, *supra* note 64.

72 *The Crimes (Homicide) Act 2005*. The Victorian Law Reform Commission, Defenses to Homicide Final Report, 2004: "failed to be persuaded by arguments that provocation is a necessary concession to human frailty or that provoked killers are not murderers".

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

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

A. Sudden and Temporary Loss of Self-Control

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

(a) Nature of the Provocative Act

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

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[73] *Id*, at xxviii.

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

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

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

[77] Katherine O'Donovan, *Defences for Battered Women Who Kill*, 18 J.L. & SOC'Y 219 (1991).

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

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

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

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

(b) Relevant Circumstances of the Act

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

(c) The Sensitivity of the Accused

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

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

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

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

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[81] Alison Young, *supra* note 78.
[82] Alison Young, *supra* note 78.
[83] *R.* v. *Ibrams*, (1982) 74 Cr App R 154.
[84] Lenore E. Walker, Terrifying Love: Why Battered Women Kill And How Society Responds 106 (HarperCollins, 1990).
[85] *Who are Battered Women?*, *supra* note 29.

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

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

C. Advancement of the Defence of Provocation

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

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

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

[88] Alison Young, *supra* note 78.

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

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

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

[92] Discussed in the following section.

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

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

VI. PROVOCATION IN INDIA

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

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

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

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

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

[95] Pen. Code, No. 45 of 1860, India Code (1860), http://indiacode.nic.in, § 300.

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

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

[98] Stanley Yeo, Unrestrained Killings and the Law 27 (Oxford University Press, 2002).

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

A. Sustained Provocation and Battered Women in India

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

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

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

[100] *Supra* note 4.

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

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

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

[104] *Supra* note 4.

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

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

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

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

B. 'Nallathangal Syndrome': Criticism

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

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

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

[108] *Supra* note 4.

[109] Lenore E. Walker, *supra* note 1.

[110] Pen. Code, No. 45 of 1860, India Code (1860), http://indiacode.nic.in, § 304B:

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

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

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

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

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

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

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

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[113] LENORE E. WALKER, *supra* note 1.
[114] LENORE E. WALKER, *supra* note 1.
[115] *K.M. Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605: 1962 Supp (1) SCR 567.
[116] *Kaliyaperumal* v. *State of T.N.*, (2004) 9 SCC 157: AIR 2003 SC 3828; *Yashoda* v. *State of M.P.*, (2004) 3 SCC 98.
[117] LENORE E. WALKER, *supra* note 1, at 95-104.

VII. DIMINISHED RESPONSIBILITY

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

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

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

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

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[118] *R.* v *Byrne*, (1960) 2 QB 396, 403: (1960) 3 WLR 440.
[119] The Homicide Act 1957, 65 Eliz. 2 c. 11, § 2(1), http://www.legislation.gov.uk/ukpga/Eliz2/5-6/11.
[120] *R.* v. *Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.
[121] *R.* v. *Kiranjit Ahluwalia*, (1993) 96 Cr App R 133.
[122] Elizabeth Kenny, *supra* note 63.
[123] Alison Young, *supra* note 78.

VIII. DIMINISHED RESPONSIBILITY IN INDIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[129] Discussed in the following section.

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

[131] Terrifying Love, *supra* note 84, at 176-78.

[132] Terrifying Love, *supra* note 84, at 176-78.

[133] Janet Loveless, *R. v. GAC : Battered Woman "Syndromization"*, 9 Crim. L. Rev. 655 (2014).

[134] Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman*, 81(1) N. Carolina L. Rev. (Dec., 2002). *See also*, Cynthia K. Gillespie, Justifiable Homicide: Battered Women, Self-Defense and the Law 179-180 (1990).

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

[136] Alison Young, *supra* note 78.

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

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

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

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

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

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

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

141 *Id*.

142 *Id*.

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

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

X. CONCLUSION

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

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

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

AN UNCLEAR EMPIRICISM: A REVIEW OF THE DEATH PENALTY INDIA REPORT

—Kunal Ambasta*

I. INTRODUCTION

Empirical studies on death row populations, often exploring effects of socio-economic or racial marginalization, are not uncommon across several legal systems that used to, or continue to retain the death penalty on their statute books.[1] Studies indicating over-representation of certain communities in prisons in India have also appeared with more or less regularity over the years, mostly depending on the data released periodically by the National Crime Records Bureau, through its annual "Prison Statistics India" report.[2] A comprehensive survey of the men and women on death row in India, however, had not been carried out till the publication of the Death Penalty India Report by NLU Delhi in 2016.[3] This, being the first of its kind study carried out in the Indian context is a welcome development in the country's legal scholarship.[4]

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* Kunal Ambasta is an Assistant Professor at National Law School of India University, Bangalore and practices at the High Court of Karnataka.

1 These studies have been carried out across several states in the U.S.A. Not only have they produced significant amounts of legal scholarship, but have also diversified into allied issues of death row conditions, such as solitary confinement, legal representation, and method of executions.

2 Irfan Ahmad, and Md. Zakaria Siddiqui, *Democracy in Jail: Over-representation of Minorities in Indian Prisons*, 52(44) Econ. & Pol. Wkly 98 (2017).

3 Centre on the Death Penalty, The Death Penalty India Report (National Law University, Delhi Press 2016), http://deathpenaltyindia.com/The-Death-Penalty-India-Report-2016.jsp.

4 The Amnesty International Report on the Death Penalty in India was published in 2008 and focused on the judgments of the Supreme Court in capital sentencing cases between 1950 and 2006. The Law Commission of India has also submitted three reports on the death penalty, the latest being the 262nd, which recommended the abolition of the death penalty except in cases of terror and those affecting national security. That Report marked a quantum shift of stance from the recommendation of the retention of the penalty in the 35th Report of 1967. The 187th Report of the Law Commission of India was submitted in 2003 and studied the mode of execution.

Noteworthy in the Report and its design is the fore fronting of the experiences and 'voices' of the individuals who have been sentenced to death. It is this feature of the report that lends it the strength of personalization and effect, and ensures that it is not merely an inert legal analysis of the area. Strategically speaking, one may even concede that this may be the most meaningful way to engage with the systemic and structural problems of the Indian legal system, by highlighting instances of specific failures in capital cases.[5] The Report also explores the lives of the families of surveyed convicts, and attempts to present a comprehensive view of the devastation that the death penalty brings in its wake. I would count these features as being the successes of the Report, and crucial improvements in, and additions to, the discourse around the death penalty in India.

My claim in reviewing the Report, however, is that the implication of several methodological decisions taken during the collection and analysis of data for the Report is to render some findings susceptible to easy challenge and refutation by 'retentionist' voices. Here, I claim that certain data that has been presented in the Report would require a secondary level of analysis rather than the primary number crunching that has taken place, to make a suitable argument with an implication on the justness of the death penalty. I also claim, as a secondary point, that the reliance placed by the Report, on certain positions of law is misplaced.

II. WHEN DOES 'DEATH ROW' BEGIN?

The task of counting the number of people on death row in India presented its own challenges to the researchers of the Report, and the same has been highlighted by them as well.[6] What is to be noted is that the Report has considered all persons who have been sentenced to death by trial courts as persons on death row. In law, a sentence of death passed by a Session Court must be confirmed in order for the sentence to become executable.[7] One must also note that this is legally distinct from an appeal or a mercy petition, which must be made by or on behalf of the convict, and is, in some sense, discretionary.

One would therefore assume that for a sentence of death to really have the potential for being carried into action, a confirmation must have necessarily occurred. A significant number of respondents in the Report consist of those who have been sentenced to death by trial courts, and whose confirmation cases are

[5] The primary focus of the Report must be noticed to be on the experiences and backgrounds of the men and women on 'death row' in India. Careful consideration is given to the working of the legal process in the cases of these people which led them to be sentenced to death. Report, *supra* note 3, at 8.

[6] Report, *supra* note 3, Vol. I, at 16.

[7] Code of Criminal Procedure, Act No. 2 of 1974, § 366. This is also noted in the Report, *supra* note 3, Vol. I, at 37, 40. This, as the Report notes, is true for all cases which are tried under the Code of Criminal Procedure, 1973, and therefore, for all offences under the Indian Penal Code, 1860.

currently pending before various High Courts.[8] At the outset, one can foresee two effects of this decision on the study itself. First, that the number of persons on 'death row' increases significantly since it is well known that only a small percentage of trial court death sentences are confirmed by High Courts.[9] The inclusion of all prisoners who have been sentenced to death after trial, irrespective of the status of the confirmation proceedings, inflates the number of people on death row and therefore shifts the focus from the persons whose death sentences may have been confirmed or those who may have reached an advanced stage in the proceedings leading toward execution.

Second, when an inquiry necessarily looks into factors such as disparate impact on marginalized groups, systemic bias, and vulnerability, the true effect of such factors may be made visible, or even more patently visible, once the sustained effects of the said system are perceived on the test subject. A solid demonstration of disparate impact of the death penalty along axes of marginalization would have to do two things, one, engage in a comparative analysis of cases which may be similar in terms of allegations and nature of crime, but with materially different results.[10] This would establish the foundational fact that similar cases are being decided differently. This, the Report does not engage in.[11] Two, it would have to demonstrate the disparate impact as a function and result of the system.[12] A focus on a restricted death row population, such as those whose death sentences had been confirmed, or those whose mercy petitions had been rejected, would have been more helpful to an analysis of the fairness or justness of the system as a whole as the systemic or structural problems which may exist, may not be all apparent or perceptible at the trial stage alone.

Furthermore, from a purely legal perspective, duration on death row is calculated at the very least from the date of confirmation by the High Court or, after the dismissal of the appeal to the Supreme Court.[13] Considering the trial court

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[8] This number comes to 270 prisoners out of the 385 that the Report considers part of its study. Report, *supra* note 3, Vol. I, at 41.

[9] The Report itself notes this fact. Report, supra note 3, Vol. II, at 158, 162.

[10] In the present context, this would imply that the probability of the award of death sentences varies if the socio-economic backgrounds of either the victim or the perpetrators are varied, the nature of crime being kept constant.

[11] The Report stresses on socio-economic indicators to show that the burden of being on death row falls along certain socio-economic axes. However, it denies all causative links into the two features. Further, the Report sets a comparative analysis as out of its scope. Report, *supra* note 3, Vol. I, at 101.

[12] This is only done very fleetingly in the Report when a stage-wise analysis of the composition of capital cases is carried out. The data here shows that the proportion of SCs/STs under a sentence of death increases with the advancement of the stage of proceedings. Report, *supra* note 3, Vol. I, at 111.

[13] *Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678. The discussion in the present case revolves around the duration of time spent by a prisoner on death row and the delay in the disposal of mercy petitions by the Executive as a supervening circumstance. The terms indicate the judicial pronouncement attaining finality, which could, one may argue, begin even after the confirmation by the High Court. It is not, however, consistent with the period beginning from the date

verdict as determinative may not be the most accurate method, since at that stage, a wide ranging and automatic scrutiny into the penalty is underway at the High Court and there exists a significant chance that the penalty will be commuted.

The reason the Report provides for considering such prisoners to be on death row is that the conditions of incarceration change as soon as the sentence of death is handed down by the trial court. This practice is certainly true in several states, and the shifting of convicts to special barracks or cells does occur once a sentence of death is passed. However, the conditions of this new confinement are not uniform.[14] It should also, in my opinion, not be conflated with illegal and dehumanizing incarceration such as solitary confinement. Not all death row confinement is solitary, and all solitary confinement which is not in accordance with Sections 73 and 74 of the IPC is illegal.[15] Another use that duration on death row may be put to is to raise the legal ground of delay as has been done in Triveniben and other cases. However, there exists ample guidance on how it is to be calculated, and it does not begin from the date of the trial court verdict.[16]

The method followed in the Report further gives the perception that the time taken for the confirmation proceedings constitutes delay, which would be incorrect. Even the reasoning of the Report for considering the trial court verdict as determinative of the beginning of death row appears to be on weak foundations. It would be correct to state that the conditions of imprisonment would change, but this, as the Report itself notes, does not always imply imposition of solitude, nor does it automatically lead to the onset of the psychological trauma that renders death row cumbersome or egregious.[17]

It may be said that a focus on the narrow time period of "death row" as it is traditionally acceptable to employ the term in law, would have lent itself to a

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of the trial court verdict. The same position has been followed in *Shatrughan Chauhan* v. *Union of India*, (2014) 3 SCC 1. This method of looking at death row is important because it is this duration which is considered to be egregious and especially causative of mental agony and distress associated with death row. The duration of time spent in prison awaiting judicial outcomes does not accrue into a legal benefit for the prisoner. Further, if one were to see the interpretation given to the term "prisoner under the sentence of death" for the purpose of considering conditions of incarceration according to prison rules, the Supreme Court has included within this category only those prisoners who have exhausted their judicial remedies in such a manner that the sentence of death may be carried out without any further intervention. *See Sunil Batra* v. *Delhi Admn*., (1978) 4 SCC 494, at para 223.

14 The conditions in which prisoners under sentences of death are kept vary considerably depending on the state in which they are incarcerated. This is clear when one sees Graphic 2 of the Report, *supra* note 3, Vol. I, at 31. Not all prisoners sentenced to death are shifted to Central Prison facilities in all states, or to prisons which have the gallows machinery or dedicated death yards. Further, full segregation of prisoners may not be effected until the mercy petitions have been rejected by the President, which also, as the Report notes, is followed in certain states. Report, *supra* note 3, Vol. II, at 74-75.

15 *Sunil Batra* v. *Delhi Admn*., (1978) 4 SCC 494, at para 219.

16 *See supra* note 13.

17 *See supra* notes 13 and 14.

sharp analysis of the factors which lead to a consistent imposition of an executable sentence of death, and which would have been a more reliable analysis of the circumstances under which the sentence is awarded, given the next sections of the Report.

III. WHITHER DISPARATE IMPACT?

Though the Report does not claim any direct causation between marginalization and the imposition of the death penalty in India, the analysis of disparate impact of the death sentence on marginalized communities is clear. This is sought to be provided to the reader through statistics of the over representation of certain classes or communities of people on death row in India. An analysis that proceeds on this premise alone is susceptible to a seemingly perverse objection. For example, to the argument that African Americans are over represented in prisons and on death rows across the United States of America, one of the responses that did get elicited was that the crime rate of these communities was equally high, and therefore, there was no over representation.[18] A similar argument could be made about socio-economically marginalized groups as well. Therefore, in order to make a disparate impact or a disproportional representation argument, what would be necessarily required is a relative or comparative frame, which would analyse similarly placed cases and dissimilarly placed perpetrators/victims to demonstrate the presence of systemic bias. The Report does this only at the place where it analyses the changing composition of death row cases as they travel further into the legal system.[19] To my mind, this point merited far more detail and importance than what it did receive. Instead, the primary focus of the Report is on a much weaker and facile point, which is analysed below.

The primary focus of the Report's claim on the compositions of death row populations across various states is to present data on socioeconomic vulnerability and make a back door argument towards disparate impact of the death penalty. The Report clearly states that its attempt is not to make causative links, but to test the perception, from studies on death row populations in the USA, that it is the marginalized who get sentenced to death.[20] However, a close look at the data presented in the Report does not hold out any evidence to prove disparate impact or overrepresentation of the socio economically vulnerable.

The data is further convoluted by the fact that the Report chooses a sui generis model of testing economic vulnerability, which would render, given the current status of economic development in Indian society, a considerable proportion of the population marginalized or "economically vulnerable". For example, it is curious as to how the Report came to a decision on the actual size of agricultural

[18] *See* John C. McAdams, *Racial Disparity and the Death Penalty*, 61(4) L. & CONTEMPORARY PROBLEMS 153 (1998).

[19] *See supra* note 12.

[20] Report, *supra* note 3, Vol. I, at 90.

landholding to decide one of the factors of economic vulnerability. The size of the landholding, below which an agriculturist would be treated to be economically vulnerable in the Report would, given studies on agricultural land holdings in India, include almost all agriculturists in the country.[21] A model such as this is susceptible to the argument of being over-broad, that is, of making eligibility criteria so wide, that all results fit into the category of vulnerability.

The problem with keeping fluid and flexible models as the basis for segregation of data is that the frame of reference with which such data must be compared to gauge disparate impact must also then become flexible. For example, if the same indicators were used which are employed to measure poverty, one could have had the advantage of comparing the statistics presented in the Report with the proportion of the population below the poverty line, which would have, at least, introduced a standardly accepted criteria for comparison. Such an exercise is not possible for most readers with the model that the Report follows. The different axes of vulnerability which are taken as determinative, may not be amenable to analysis with the general population. In such a situation, any claim of over representation or disparate impact becomes vacuous.

Further, the Report's analysis of representation of death row prisoners from Scheduled Castes and Scheduled Tribes does not establish disproportionate impact of the death sentence on such populations. One can observe, in fact, that state death rows, with the notable exception of Maharashtra and Bihar, correspond to the proportions of the actual populations within the state.[22] In fact, some of the data from states may even suggest an under representation of the sample population. To repeat, an exercise such as this cannot, by itself, unless it adopts some model of comparative analysis with the non-subject population, carry forth any value to an argument of disparate impact. The stage-wise analysis of the Report begins this exercise, but is not sufficiently developed. The stage wise analysis should have encompassed a comparison between the cases that went out of the death sentence system at each stage, and compared them with those that did not. Such a framework could have established disparate impact. As it stands presently, the Report unfortunately does not engage in such an analysis, but picks the low hanging fruit readily available from primary data.

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[21] Report, *supra* note 3, Vol. I, at 99-100. The findings of the Agricultural Census, 2010-2011 (Phase-II) may be used to put the same in perspective. The size of agricultural holdings that are considered a marker of "economic vulnerability" in the Report constitute approximately 95% of all agricultural holdings in the country by number. The Census may be accessed here: http://agcensus.nic.in/document/agcensus2010/allindia201011H.pdf. With regard to educational status, I could not observe a discernible difference between the studied sample and the literacy rates prevalent on either national or state levels. With regard to both the presence and nature of employment, it is not possible for them to be compared to actual rates with specificity.

[22] As compared with the data of the 2011 Census available here: http://censusindia.gov.in/Tables_Published/A-Series/A-Series_links/t_00_005.aspx.

IV. A HAGIOGRAPHY OF BACHAN SINGH

In the section where sentencing practices are discussed, we find an assertion that is startling, and arguably deeply problematic in capital sentencing in India. Undoubtedly, it is correct to assert that the sentencing guidelines laid down in Bachan Singh[23] are not strictly followed by trial courts in India. It is a completely different matter to call the framework itself robust and arguably the best in a retentionist context.[24] Such an assertion forgets the genesis of Bachan Singh itself, coming as it did from a line of cases which were far more progressive than it. These cases were decided in light of the enactment of the Code of Criminal Procedure of 1973, which introduced a requirement for special reasons to be given for passing the sentence of death.[25] Though facially innocuous, the import of the legislative change brought in thus could scarcely be overstated. In the context of the requirement of "special reasons", the Supreme Court had delivered the judgment in *Rajendra Prasad* v. *State of U.P.*,[26] with the majority opinion being pronounced by Justice V.R. Krishna Iyer for himself and Justice Desai.[27] The constitutionality of the death sentence having at that time been settled by Jagmohan,[28] the Court was concerned with how to canalize sentencing discretion within a retentionist model. In what is undoubtedly a fascinating judgment, the Supreme Court engages on a wide ranging and comprehensive survey of the legislative movement on the death penalty in India, concluding that the scope of the punishment has been consistently narrowed, and never broadened.

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[23] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684.

[24] Report, *supra* note 3, Vol. II, at 55.

[25] Code of Criminal Procedure, Act No. 2 of 1974, § 354(3).

[26] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646.

[27] It is instructive to note that Justice Iyer had also delivered the opinion in *Ediga Anamma* v. *State of A.P.*, (1974) 4 SCC 443, where he had taken note of the then pending bill to amend the Criminal Procedure Code and the consequent insertion of § 354(3), requiring special reasons to be given prior to awarding the death sentence. He observes that the legislative development would be beneficial and provide guidance to judges. Especially illustrative is the treatment given by the Court to the decision in *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20, the scope of which is restricted to the question of constitutionality, therefore leaving it open to restrict the application of death sentences through statutory provisions or guiding principles. In Ediga, the Court holds that the unusual brutality of a crime would be a factor to award the death sentence. However, Justice Iyer himself overruled this point later in Rajendra Prasad, where he held that in light of the Code of Criminal Procedure Code, 1973 being enacted, details of the crime could no longer be examined to determine the sentence. The scope had to be restricted to the criminal to decide whether he could be sentenced to death. This position of law was again overruled in Bachan Singh. Incidentally, Justice Sarkaria, who was on the Bench in Ediga, delivered the majority opinion in Bachan Singh.

[28] *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20. This case was the first challenge to the constitutionality of the death sentence in India. It was argued that the death sentence was violative of Articles 14, 19 and 21 of the Constitution. A major thrust of argument was that there did not exist clear or necessary guidelines for the award of the death sentence. The Supreme Court upheld the validity of capital punishment and held that judicial discretion on the basis of legal principles as well as rights to appeal were adequate basis for the award of the sentence.

The Supreme Court, in its decision in Rajendra Prasad case, renders almost insurmountable, the task by which the death penalty may be given in a particular case. Not only does it establish the extreme narrowness of cases where the penalty may be awarded, but also lays emphasis on the difficult process which must be negotiated by both the prosecution and the judge before a court may pass a sentence of death.[29] The case also establishes the position, that the sentence of death is per se an infringement of Fundamental Rights, and therefore may be passed only where a compelling state interest may demand it.

Contrary to this, the decision in Bachan Singh was by all means, a step back from the potential of Rajendra Prasad. The majority opinion, by harking back to Jagmohan, rendered the development of law in Rajendra Prasad redundant. Not only were the strict requirements placed in the latter case removed, they were replaced by vague markers in ostensible deference to the legislature and because it was considered that the judiciary could not set inflexible guidelines. The markers to be relied on, as laid down by Bachan Singh, are not only vague, but allow for the exercise of discretion that may not be channelized in all cases. The oft repeated refrain of "rarest of rare" was only a 'footnote'[30] in the decision, after the damage of overruling Rajendra Prasad was done.

Further, any perfunctory study on the impact of Bachan Singh may clearly display the havoc it has played in sentencing guidelines in capital cases. Taking advantage of the vagueness of standards therein, and also the subsequent interpretation given to it in Machhi Singh,[31] it is possible to achieve any outcome and reverse reason it to fit the available judicial guidelines. These effects would continue irrespective of whether sentencing hearings are carried out with detail and precision, and the availability of resources, the lack of which the Report laments. The argument that exists of course is to say that the standards for sentencing someone to death themselves are vague and prone to conflicting outcomes. Needless to say, the Supreme Court itself has noted the lack of consistency in standards of sentencing on multiple occasions.[32]

In the given context, it is therefore difficult to see why the Report considers Bachan Singh model to be highly beneficial or desirable to capital sentencing

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[29] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646, at paras 46-59, 64. One may argue that the decision of Rajendra Prasad confined the imposition of the death sentence to the narrowest conspectus possible without abolishing it altogether. The judgement goes far enough to state that the award of the death sentence is in fact, anathema to the constitutional scheme of rights, and is justifiable only as a necessary violation of Fundamental Rights.

[30] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, at para 209. The 'rarest of rare' test was hardly a doctrine which Bachan Singh laid down, but more of a final passing remark in the conclusion of the judgment. It does not find mention in the actually determinative portions of the judgment.

[31] *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470.

[32] *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498, at paras 104-110.

in India and premises its analysis of the actually occurring sentencing practice on its fidelity to the same model. What would have been more interesting, and perhaps also of permanent value, would be an attempt to evolve a guideline for sentencing that judges should normatively follow, and not the ones that they necessarily are required to, given the resources and limitations that operate in the Indian context.

V. CONCLUSION

I have not, in writing this review, focused on the parts of the Report which detail police investigative malpractices and concern with the quality of legal assistance to convicts awarded the death sentence. I believe that these problems have been the subject of much discussion and study elsewhere,[33] and though those studies may not strictly apply to death sentence cases, the factors which actuate these problems remain the same. The reason why the Report has analysed these problems in detail appears to be the fact that the death penalty stands on a qualitatively different footing from other punishments, and therefore it must place a "higher burden to be met in such cases".[34] Undoubtedly, it is true that sentencing people to death in a system which is plagued with recurrent and persistent problems at each stage of the legal process presents concerns that cannot and should not be underplayed by a comparison with the general state of affairs. However, in my opinion, that would be, strictly speaking, the disproportionate effect of such problems in death cases, and not factors which are causative of the problems themselves.

Lastly, I do believe that the Report opens up many ways and means by which India may engage in a meaningful conversation about the death penalty, and determine legislative policy on the subject as well. I wish that the Report had, as a benefit of the direct empirical research carried out by them, taken a publicly articulated stance on the desirability of the death penalty itself. Currently, the same feels like an undercurrent through the work, but remains unarticulated. One can hope that the research and result of this Report spurs further work into the many lives of the death penalty in India.

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[33] The Ribeiro Committee, 1998-99 and the Sorabjee Committee, 2005 are illustrative examples.

[34] Report, *supra* note 3, Vol. II, at 202.

TENUOUS LEGALITY: TENSIONS WITHIN ANTI-TERRORISM LAW IN INDIA

—Manisha Sethi*

This paper examines the evolution of the anti-terror legislation in India from Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), through Prevention of Terrorism Act 2000 (POTA) to Unlawful Activities (Prevention) Act (UAPA). This paper attends specifically to the jurisprudential tension between the promise of constitutional safeguards on the one hand, and the legal erosion of these rights inhering in these laws on the other.

The paper seeks to understand how this tension is resolved, philosophically and jurisprudentially in addressing challenges to these laws in the Supreme Court. How, first, did the Supreme Court respond to the allegation that these laws suffered from the "the vice of unconstitutionality". Second, having upheld the constitutional wholesomeness of these laws, how did different courts respond in actual cases being tried under these laws – which legally subverted established evidentiary rules?

It is argued that the tension remains unresolved – despite professions to the contrary – and can be seen operating in the juridical field.

* Manisha Sethi teaches at Jamia Millia Islamia and is the author of Kafkaland: Law, Prejudice and Counterterrorism in India (Three Essays, 2014).

I. INTRODUCTION

It has often been argued by laymen and experts alike that all laws are amenable to 'misuse' – that laws by themselves are inert and objective, but turn into a tool of prejudice or harassment only when in the hands of unscrupulous police and prosecutors. This paper examines the evolution of the anti-terror legislation in India from Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA'), through Prevention of Terrorism Act, 2000 ('POTA') to Unlawful Activities (Prevention) Act, 1967 ('UAPA') to test this hypothesis. To be clear, this is not an exercise in mapping the distance between "law in books" and "law on the ground", but attends to the jurisprudential tension between the promise of constitutional safeguards on the one hand, and the legal erosion of these rights inhering in these laws on the other.

The paper seeks to understand how this tension is resolved, philosophically and jurisprudentially in addressing challenges to these laws in the Supreme Court - how, first, did the Supreme Court respond to the allegation that these laws suffered from "the vice of unconstitutionality"? Second, it looks at the tribunals constituted to examine the "reasonableness" of declaring an association as unlawful under the UAPA. It is argued that the tension remains unresolved – despite professions to the contrary – and can be seen operating in the juridical field.

We tend to think of exceptional laws as rather recent—and indeed distinct from ordinary laws – in provenance and scope. And yet, only a year after the Constitution was adopted, the First Amendment invoked 'public order' to impose restrictions on free speech, corroding the Constitutional promise of fundamental rights to citizens.[1] It summoned from recent history, repressive colonial laws, which had barely disappeared through the document for a new India. The immediate cause for the abridgment of freedom of speech by the government is said to have been a spate of judicial pronouncements that upheld citizens' right to freedom of speech and expression against the executive's attempt to censor it. In fact, the statement of 'Objects and Reasons' at the introduction of the First Amendment Bill quite plainly admitted that during the first "fifteen months of the working of the Constitution" the courts had held citizens' rights under Article 19(1)(a) to "be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and the press is not regarded as debarring the State from punishing or preventing abuse of this freedom."[2] In particular, Nehru had seized upon the Patna High Court's assertion while rebuffing the state government's censorship of a political pamphlet that "if a person were to go on

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[1] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 38-63 (1999).

[2] Among other reasons cited for the curtailment of rights was the plea that the government's progressive agenda of Zamindari abolition and land reforms was being bogged down by litigation on the right to property.

inciting murder and other cognizable offences either through the press or by word he would be free to do so."

There were vigorous debates over whether the Provisional Parliament based on a limited franchise was competent to bring about this amendment, and whether such an amendment would spell the death knell of free speech. In the end, the Select Committee had to prefix the restriction with the clause of 'reasonableness', which afforded some protection to the rights and freedom from arbitrary curtailment by the executive.[3]

A perusal of the parliamentary debates through 1951 to 1963 - when the Sixteenth Amendment was passed which further truncated the right to association and assembly, resulting ultimately in the passage of Unlawful Activities (Prevention) Act in the fifth Lok Sabha in 1967 - provides for depressing reading. As early as 1951, it was realized that curtailment of fundamental rights in the name of national security would be deployed to criminalize political dissent. That provisions of emergency laws were being incorporated into ordinary law by taking recourse to the sovereignty and integrity of India did not escape prescient members of the Parliament.[4] Nonetheless, the UAPA was passed. The UAPA enabled the Centre to declare an organization as unlawful if it was of the opinion that the association "has become an unlawful association". Throughout its life, the law has been fortified and made 'stronger' – and with each successive amendment, its scope has become broader, the state more powerful, and the right to association more fragile. Specifically, when POTA was repealed in 2004, in fulfilment of the election promise made by the incoming United Progressive Alliance, many of the provisions of the repealed law were absorbed wholesale through amendments into the UAPA. Thus, a new chapter on terror crimes and a schedule of terrorist organizations was added to the UAPA. Though POTA's most contentious provision, that of admissibility of confessions as evidence, was renounced in the newly minted UAPA, the clause for punishment for malicious prosecution that at least theoretically existed in POTA was also excluded.

In the following pages, I first draw out a brief history of the anti-terror laws to illustrate the inherently partisan nature of these laws; in the subsequent section, I examine specifically the workings of the UAPA.

II. THE BIAS OF LAW: A BRIEF HISTORY

Before the UAPA was transformed into an anti-terror law meant to target not only unlawful activities but also terrorist ones, and even before POTA, there existed the TADA. Enacted in 1985, following the assassination of Mrs. Indira

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3 Austin, *supra* note 1.

4 On Parliamentary debates on UAPA, *see* The Terror of Law: UAPA and the Myth of National Security, CDRO Report (2012).

Gandhi, and originally promulgated for areas designated as 'terrorist affected' – essentially Punjab – TADA quickly spread out, and at the time of its expiry, covered 23 states and two union territories. TADA departed dramatically from the principle of procedural fairness by allowing for admission of confessions made before police officers, adding new offences of abetment of terrorism without precisely defining "abet", introducing summary trials and truncated appellate procedure and allowing for secret witnesses, thereby severely affecting the accused's right to cross examine and defend oneself.

TADA's appeal lay in its usefulness as a tool to quell dissent, suppress movements and torment minorities – all through a law legislated by the Parliament and sanctioned by the Supreme Court. In Punjab, thousands, virtually all of them Sikh, were arbitrarily arrested under TADA and detained for prolonged periods without being told of the charges against them. But the abuse of TADA was not limited to Punjab: statistics show that by August 1994, Gujarat had arrested 19,263 people under TADA – even more than in Punjab! In 1994, the National Commission for Minorities documented that 409 out of the 432 arrested under TADA in Rajasthan belonged to minority groups.[5]

Between the 1970s and 1990s, when struggles over land and labour intensified in Bihar, and bitter armed conflicts between the landless (always almost Dalit) and landlords (almost without fail, upper caste) broke out, the violence of the landless Dalits was met with the most draconian law at the disposal of the state: TADA. Even in the few instances when TADA was applied to leaders and foot soldiers of the upper caste private militias, it was swiftly withdrawn. One of the beneficiaries included Ramadhar Singh, leader of the Swarna Liberation Front, accused in the murder of 16 Dalits in Sawanbhigha and Barsimha (both in 1991).

In fact, only the rural lower caste poor were finally ever tried under TADA in all the cases of violence during those years. In a case of dispute over a water chestnut pond in Bhadasi (Arwal) dating to 1988, in which a police officer and three alleged 'extremists' lost their lives, twenty persons belonging to the poorest sections of society faced trial for the alleged commission of various offences punishable under the Indian Penal Code, 1860 ('IPC'), TADA and the Arms Act, 1959. The accused were given life imprisonment (two died during trial and two were held to be juveniles) by the Sessions Judge Jahanabad-cum-Special Judge, TADA.[6] Similarly, the Bhadasi killings of Bhumihar landlords by low caste landless labourers in 1992 in Gaya were tried and prosecuted under TADA. The designated court over a period handed out the following sentences: death sentences

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5 Rohit Prajapati, Anti-terror laws: Tools of state terror, Submission to South Asia sub-regional hearing, International Commission of Jurists in New Delhi (27-28 February 2007).

6 *Madan Singh* v. *State of Bihar*, (2004) 4 SCC 622.

to four accused; rigorous imprisonment for life u/s 3(1) of TADA to another four; and death to yet another set of accused.[7]

The previous year, in 1991, the Swarna Liberation Front, Sun Light Sena and Jwala Singh's militia had killed over 54 Dalit agrarian workers. No one from these Senas was convicted – and as already noted above, TADA was invoked in a few of these cases, only to be withdrawn.[8]

In the violence in Mumbai (then Bombay) in 1992-93, TADA was invoked in the terrible communal violence that followed the demolition of the Babri Masjid as well as the serial blasts. However, the difference in preliminary investigation had already determined the judicial outcome of the cases. Not one person was convicted in the communal violence against minorities, while Yakub Memon was executed amidst controversy in 2015 for his role in the bomb blasts. The Special Public Prosecutor in the Blasts case, Ujjwal Nikam, dismissed charges of partisanship by pointing to the difficulties in tracing the accused. However, it is a matter of record that the victims had provided a list of assailants, with names and addresses, as many were neighbours. Nonetheless, a majority of the cases were closed with the files marked as: "true but undetected".[9] The cavalier approach towards communal violence can be contrasted with the urgency with which the Blast case was treated, for which a Special Investigation Team was set up under the supervision of the then joint commissioner of police M.N. Singh.[10]

TADA was allowed to lapse by the Parliament in 1995 when it was due to be reviewed and extended. The large-scale outcry that this law was a mechanism of persecution also received substantiation from Justice Ranganath Misra, the then Chairperson of NHRC. Misra, in a letter to Parliamentarians in early 1995 appealed to them to not renew the law, dubbing it "draconian in effect and character" and "incompatible with our cultural traditions, legal history and treaty obligations".[11]

POTA was enacted in March 2002 in an extraordinary joint session of the Parliament. The spectacular attack on twin towers in the USA in September 2001 had already created an international turn towards stricter anti terror legal

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7 Appeals in Supreme Court resulted in either commutation or acquittal. *See Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81; *Bihari Manjhi* v. *State of Bihar*, (2002) 4 SCC 352; *Vyas Ram* v. *State of Bihar*, (2013) 12 SCC 349.

8 Chronology of Massacres in Central Bihar (1977 -2001), South Asia Terrorism Portal, http://www.satp.org/satporgtp/countries/india/terroristoutfits/massacres.htm.

9 Jyoti Punwani, Why there is no noise about the Mumbai Riots, Rediff.com (Feb. 4, 2014), http://www.rediff.com/news/column/jyoti-punwani-why-theres-no-noise-about-the-mumbai-riots/20140204.htm.

10 Jyoti Punwani, Tale of two crimes, The Times of India (Sep. 19, 2006), http://timesofindia.indiatimes.com/edit-page/Tale-of-two-crimes/articleshow/2003635.cms.

11 Justice Ranganath Misra, Annual Report 1994-95, National Human Rights Commission (1995), http://www.rwi.lu.se/NHRIDB/Asia/India/Annual%20Report%2094-95.pdf.

regimes internationally. The attack on the Indian Parliament in December that year cast the die in favour of a hard law. Still, opposition was rife. Opposing the Prevention of Terrorism Ordinance, 2001 ('POTO') introduced by the NDA government, S. Jaipal Reddy had laid out four grounds of objection to the Act: "First, it is destructive of the basic democratic liberties; second, it has been demonstrated empirically in our own country that this a remedy worse than the malady; third, it has been prompted, by malignant political motives; and fourth, it jettisons the basic established principles of criminal jurisprudence without a necessary protective shield."[12]

The fears of those who opposed the new Act did not prove unfounded. The experience with POTA was hardly different from that of TADA. In Gujarat in 2002, when the ordinance had not even been formalized into an Act, the state government filed charges under POTO against 62 Muslims (including seven minors) for their alleged involvement in Godhra train burning. Though public outcry forced the government to withdraw the charges then, a year later, POTA charges were reintroduced in the case against 121 individuals.[13] In contrast, no one was ever charged under the anti-terror law for the mass violence and brutality against the minorities that occurred thereafter. Moreover, nine omnibus conspiracy cases were filed under POTA against Muslims for planning terrorist attacks in retaliation against the communal violence.[14] By 2004, over 280 individuals had been charged under POTA in the state, all but one of whom were Muslim.

In Andhra Pradesh and Jharkhand, studies found POTA being used as a tool of political vendetta and suppression. By February 2003, an astonishing 3200 individuals had been accused under POTA (and as many as 202 arrested). In Andhra Pradesh, 50 cases involving 300-400 people were filed in the second year of POTA's existence. In both states, filing of charges under POTA was linked to the political activities or caste and tribal status rather than involvement in criminal activity.[15]

In 2004 after the UPA government came into power, POTA was repealed in fulfilment of its promise to scrap the law.[16]

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[12] Combined Discussion on Statutory Resolution Regarding Disapproval of Prevention of Terrorism (Second) Ordinance, Lok Sabha Debates (Mar. 18, 2002).

[13] MANOJ MITTA, THE FICTION OF FACT-FINDING: MODI AND GODHRA (2014).

[14] MANISHA SETHI, KAFKALAND: PREJUDICE, LAW AND COUNTERTERRORISM 27 (2014); Manisha Sethi, *An Architect of Conscience: Mukul Sinha (1951-2014)*, 49(22) ECON. & POL. WKLY (2014), http://www.epw.in/journal/2014/22/web-exclusives/architect-conscience.html.

[15] Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20(1) COLUM. J. ASIAN L. 148, 174 (2005).

[16] According to one commentator, the repeal of POTA was at least partly a strategy to stitch together a ruling coalition, whereby the promise of repeal of POTA was made to win over the DMK, which had been a particular victim of the law. See Sanjay Ruparelia, *Managing the United Progressive Alliance The Challenges Ahead*, 40(24) ECON. & POL. WKLY 2407 (2005).

III. CONSTITUTIONALITY AND ANTI-TERROR LAWS

Both the TADA and POTA have received challenges in the Supreme Court. In *Kartar Singh* v. *State of Punjab* ('Kartar Singh'), the petitioners agitated that TADA was ultra vires on the grounds that, first, the Central Legislature had no legislative competence to enact the legislations, and second, that some of the provisions (especially § 15, which allowed for admission of confessions made before police officers as evidence) were in conflict with the fundamental rights specified in Part III of the Constitution. They also charged that TADA was "in utter disregard and breach of humanitarian law and universal human rights", lacked impartiality and miserably failed the basic test of justice and fairness, which is the touchstone of law.

The Supreme Court hearing the petition noted that the petitioners made a "scathing attack seriously contending that the police by abusing and misusing their arbitrary and uncanalised power under the impugned Acts are doing a 'witch-hunt' against the innocent people and suspects stigmatizing them as potential criminals and hunt them all the time and overreact and thereby unleash a reign of terror as an institutionalised terror perpetrated by Nazis on Jews."(sic)[17]

Almost identical objections were raised by Peoples' Union for Civil Liberties (PUCL) against POTA ('PUCL').[18] However, the allegation that these laws suffered from "the vice of unconstitutionality" – in terms of their provisions which attacked the fundamental right to fair trial by subverting established evidentiary rules and allowing the admission of confessions, secret witnesses, long detention etc. – were rebuffed in the voice of constitutionality. The Kartar Singh judgment upheld the constitutionality of TADA while the Supreme Court asserted that of POTA in PUCL. In both cases, the Supreme Court upheld the legislative competence of the Parliament to enact these laws since terrorism, in the court's view, dealt neither with "law and order", nor "public order" but with the "defence of India". In both judgments, the court invoked the spectre of terrorism to override concerns about civil liberties. In his trenchant critique of the Kartar Singh majority judgment, Balagopal has sardonically called it the "KPS Gill view of terrorism".[19]

In Kartar Singh, the Supreme Court affirmed the Constitutional wholesomeness of TADA by introducing some safeguards in the recording of confessions and by recommending a quarterly review of cases. It might be mentioned here that Justice Misra in his impassioned critique of TADA dwelt on the safeguards instituted by the Supreme Court in an apparent bid to make the provisions less harsh. Misra thought these safeguards to be a failure: "My honourable colleagues

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[17] *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569.

[18] People's Union for *Civil Liberties* v. *Union of India*, (2004) 9 SCC 580.

[19] K. Balagopal, *In Defence of India: Supreme Court and Terrorism*, 29(32) Econ. & Pol. Wkly 2054 (1994).

and I in the Commission are aware of the fact that the Supreme Court in Kartar Singh case has made attempt to water down some of the harsh provisions. … The quarterly review of cases, as directed by the Supreme Court, does not appear to have sufficiently met the grave situation arising on account of the abuse of statute. During these eleven months following the judgement, the expected result has not been achieved. The Commission has involved itself in the process with all seriousness; yet the desired effect remains illusive (sic)."[20]

And yet when the time came for a judicial examination of the clauses of POTA, Justice Misra's experience of TADA was disregarded. The adoption of safeguards in the recording of confessions (as delineated in § 32) as statutory provisions in POTA was hailed as a great advance and testimony to the will of the legislature to ensure a check on abuse of executive power.[21]

Thus, though the menace of terrorism trumps citizens' rights and liberties – because the fight against terrorism cannot be "regular criminal justice endeavour" (as held in PUCL) – the Supreme Court does not abandon that project altogether. By introducing safeguards and review committees, the Supreme Court continues to claim its role as a custodian of human rights. However, the gap between the promise of rights and the legal erosion of these rights through these laws was too great to be filled.

IV. UNLAWFUL ACTIVITIES PREVENTION ACT

We now move to the working of the UAPA, which allows the Central Government to ban an organization by declaring it as an unlawful association under § 3(1). Action under the Act can be taken by the Central Government "for activities of objectives which are secessionist or which are punishable under § 153 A (promoting enmity between different groups on grounds of religion, race, place of birth, etc.) or 153 B (imputations, assertions prejudicial to national integration)" of the IPC. Thus, if the central government comes to form an opinion that an organization is indulging in any of the above, it can proscribe it and punish those who continue to further its activities. However, § 4 of the Act also requires that within 30 days of such a declaration a tribunal be instituted, which

[20] Misra, *supra* note 11.

[21] The Supreme Court held: "If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Sections 32 (4) and (5) is a fortiori legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confession statement." People's Union for *Civil Liberties* v. *Union of India*, (2004) 9 SCC 580.

"shall call upon the association affected by notice in writing to show cause … why the association should not be declared unlawful."

The provision of the serving of notice, specifying the grounds, disclosure of the facts on which they are based, the adjudication of the existence of "sufficient cause" by the organization so declared unlawful, hold out a promise of procedural fairness as well as a guarantee that restrictions imposed under UAPA would be "reasonable". The Act claims for itself objectivity and due process, the status of a judicial determination, which not only distinguishes it from preventive detention laws, but in fact places it at a plane superior to it. A distinction was drawn by the Supreme Court in the V.G. Row case[22] between, on the one hand, preventive detention or externment which rests on suspicion and is perforce anticipatory, and on the other hand, the declaration of an association as unlawful, which could only be grounded in facts "capable of objective determination by the Court". In *Jamaat-E-Islami Hind* v. *Union of India* ('Jamaat-E-Islami'), where the constitutionality of UAPA was challenged, the Supreme Court reiterated the principle enunciated in V.G. Row and warned that the "tribunal is not required to be a mere stamp or give an imprimatur on the opinion already formed by the Central Government".[23]

The following section examines this gap between the formalistic legality of the UAPA and its actual effects, which can be patently unlawful and even illegal. It does so through examining the tribunals set up to adjudicate the ban on Students' Islamic Movement of India ('SIMI'). It will be shown that the state merely caricatures and parodies its practices in the tribunal. Beginning from the appointment of the High Court judge to head the tribunal, it is the executive which drives the proceedings, and indeed the outcome.

V. THE SIMI TRIBUNALS:

In September 2001, just days after the attack on the Twin Towers in the USA, the Government of India declared the Students Islamic Movement of India (SIMI) to be an "unlawful" organization. The government claimed that SIMI was in close touch with militant outfits and was supporting extremism/militancy in Punjab, Jammu & Kashmir and elsewhere; that it supported claims for the secession of a part of the Indian territory from the Union and worked for an International Islamic Order; that it published objectionable posters and literature which are calculated to incite communal feelings, the speeches of its leaders used derogatory language for deities of other religions and exhorted Muslims for Jihad; and that it was involved in engineering communal riots and disruptive activities in various parts of the country.[24]

[22] *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.

[23] *Jamaat-E-Islami Hind* v. *Union of India*, (1995) 1 SCC 428.

[24] *Union of India* v. *Students Islamic Movement of India*, 2002 SCC OnLine Del 340: (2002) 63 DRJ 563.

Within a week of banning SIMI, hundreds of cases were booked against young men who had been associated with SIMI before its ban; or had known SIMI members; and sometimes just young men who could be shown to be members of the organization. Since then the ban has been renewed and re-imposed in 2003, 2006, 2008, 2010, 2012 and 2014. With the most recent amendment to the Act, the term of the ban will be five years and not two as it was previously. As per the requirement laid out in § 4, each declaration of the ban was followed by reference to a tribunal. Barring once in 2008, every single tribunal has upheld the ban on SIMI. The 2008 tribunal headed by Justice Geeta Mittal found that no fresh grounds had been presented by the state in support of its extension of the ban. The continuation of the ban was thus unwarranted in this tribunal's view. The state immediately appealed to the Supreme Court for a stay against the lifting of the ban, and was granted one instantaneously. Interestingly, the Supreme Court has never heard appeals filed by Falahi against the tribunal orders upholding the ban.

VI. THE QUESTION OF LOCUS: A GAME OF CHARADES

It is noteworthy that erstwhile members and office bearers of SIMI have consistently contested its proscription appearing in every tribunal seeking the revocation or quashing of the ban. Indeed, one of the touchstones of procedural fairness of banning an association under UAPA is said to be the opportunity given to the banned organization to demonstrate its lawfulness and challenge its proscription. But how does an organization, outlawed and criminalized, represent itself before the might of the law? Under the circumstances that an organization remains proscribed almost continuously – as has been SIMI – the very act of challenging the ban, as its former office bearers have, turns into proof of the continuance of the unlawful organization.

Shahid Badr Falahi, who was the all India president of the organization when it was banned in 2001, appeared before the tribunal to contest the ban. However, his appearance was looked at with suspicion by the tribunal. In 2006, for example, the tribunal noted that though a notice was served to him, it was in his capacity as an office bearer, and not as an individual. If the organization ceased to function and exist, Falahi had no reason to challenge the ban in the tribunal's view. "[N]ot only that he decided to contest the present ban against the respondent association in his individual capacity, he is also found to have been at pains to issue a press release on behalf of it", the tribunal noted.[25] The fact of this press release, in the court's view flew in the face of the assertion that the association had ceased to exist. The tribunal openly wondered why Falahi, who had stated that he had barely enough financial resources to sustain himself and his family after his release from prison, bothered to seek financial help from his friends

[25] Order of the 2006 UAPA tribunal headed by Justice B.N. Chaturvedi. Copy on record with the author.

and relatives in order to mount a legal challenge to the ban before the tribunal. Surely, the interest and the trouble that Falahi endured to ensure that the proscription did not go uncontested legally, the tribunal recorded that "it does appear that he continues to hold the reins of the respondent organisation in spite of having crossed the age limit for its membership."[26]

Though the 2006 tribunal did not deprive Falahi of his locus to challenge the ban, it did underline the vulnerability of those challenging the ban exposing themselves to the possibility of being prosecuted for continuing the activities of an "unlawful organization" under §§ 10 and 13 of the UAPA.

On the contrary, Falahi's contention that SIMI had ceased to exist after the ban led to the state objecting to his very participation in the tribunal in 2008 on grounds that he was "neither the office bearer of the association nor its member in view of his statement made before the tribunal that SIMI has ceased to exist after the first ban notification."[27] The state thus urged the tribunal to disallow his counsel from contesting the prohibition or cross-examining any witnesses. The ASG insisted that a reading of § 4 of the Act showed that only the association / its office bearers or its members would be the adverse parties in the proceedings before the tribunal - and that Dr. Shahid Badar did not fall within the definition of "adverse party" as defined under the Indian Evidence Act, 1872.[28]

Though this tribunal magnanimously permitted Falahi to participate in the proceedings "in the interest of justice", the 2012 tribunal concurred with ASG that individuals, "who may have had an association with the banned organization earlier and have since ceased to be associated or claim to have detached themselves from the association, cannot be permitted to be represented in these proceedings".[29] Reading the Act "literally", it held that the words "office bearers" or "the members'" cannot include ex-office bearers, thus denying them locus to respond to the notice issued by the tribunal. But in a sleight of hand, the tribunal allows them to participate surrogately (to invent a term in the spirit of the tribunal). "They are allowed to participate in the proceedings as members of a 'continuing organization'", the tribunal concluded. In so doing, the tribunal also concluded that the unlawful organization continued to function.[30]

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[26] *Id*.

[27] Order of the 2008 UAPA Tribunal presided over by Justice Gita Mittal. Copy on record with the author.

[28] *Id*.

[29] Order of the 2012 UAPA tribunal presided over by Justice V.K. Shali. Copy on record with the author.

[30] *Id*. The 2010 Tribunal in contrast liberally interpreted the words "office-bearers" and the said section was to give opportunity to contest the claim of the Central Government. This opportunity should be fair and not a mere formality. Tribunal headed by Justice Sanjeev Khanna. Copy on record with the author.

This renders the association in many ways unrepresentable. The unrepresentability of the banned organization is reiterated in many ways.

Notices of banning were served on the organization, as recorded in orders of the successive tribunals, at its head office at Zakir Nagar, New Delhi. One may note here that the said office was raided and sealed the day the organization was first declared unlawful and has continued to be sealed to this day.[31]

In contrast with the reluctance of the state to allow erstwhile members of the organization to challenge the ban in the tribunal, notices have been served to several people at their addresses to appear before the tribunal if they wished to challenge the ban. Indeed, the 2014 tribunal noted that it "received a number of representations claiming that notices issued to them should not have been issued as they were neither members of SIMI nor were they involved in any of their activities and that no case had been registered against them. In fact, during the hearing at Udaipur Zahir Mohammad Pathan, Kalim Mohammad Kazi and Mohammad Yasin Ali appeared in person and also filed affidavits stating that they had never been the members of SIMI, and no case had ever been registered against them. They also submitted that the tribunal may take any view on the issue of ban on SIMI. They submitted that despite the above, notices are served to them whenever a tribunal is constituted. The matter was enquired into by the tribunal and it was found that they were being issued notices on count of the information received from the state special branch in 2010."[32]

VII. VAGUE GROUNDS AND OBJECTIVE DETERMINATION OF "FACTS"

The bulk of the "grounds" for notifications through the years have been vague accusations such as that SIMI leaders out on bail have been regrouping[33] or "radicalizing, brainwashing the minds and indoctrination of Muslim youth by Jehadi propaganda and through provocative taqreers (lectures/speeches), CDs, etc."[34], holding meetings including secret meetings, making strategies to induct new members discussing and raising funds and liaising with like-minded organisations like Popular Front of India and Hizb-ut-Tahrir".[35]

These allegations lack the tangibility that could invite a rebuttal on "facts" – the sacred benchmark of the UAPA's reasonableness.

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[31] *Students Islamic Movement of India* v. *Secy., Home*, 2010 SCC OnLine Del 1111: ILR (2010) 6 Del 88.

[32] Order of the 2014 UAPA tribunal presided over by Justice Suresh Kait. Copy on record with the author.

[33] Background Note on SIMI, Ministry of Home Affairs, 2006.

[34] Background Note, MHA, cited in 2012 order.

[35] Background Note, MHA, cited in 2014 order.

In so far as actual criminal cases are concerned, the basis for alleging these to be crimes of SIMI are the confessions under § 161, Code of Criminal Procedure – otherwise meaningless in a criminal trial – where the accused 'confess' to the police their continuing membership of SIMI. The admittance of confessions as evidence of SIMI's existence – now as a clandestine and underground organization indulging in acts of 'terror' – has been challenged consistently in every tribunal, as has been the slipping in of sealed and secret material presented in almost every sitting of the tribunal as conclusive proof of the robust pace of the anti-national activities of the organization. However, these challenges now bear the character and feel of a ritualized drama whose denouement is predetermined and scripted.

Proceedings before the tribunal admittedly are not a criminal trial but a civil one where the rules of evidence are to be followed "as far as practicable" rendering the Indian Evidence Act inapplicable stricto sensu.[36] From the first tribunal onwards, it has been the cardinal principle that since the proceeding before tribunal is not a criminal trial against the accused persons but merely a civil adjudication to determine whether the organization was unlawful in its objectives and activities, the use of confessions would not be hit by § 25 of the Indian Evidence Act, 1872, which prohibits custodial confessions from entering evidence.

Jamaate e Islami too carved out exception within the due process which it had glowingly upheld, by cautioning that requirements of natural justice should be tempered when "the public interest so requires". It thus stamped its approval on withholding "sensitive information" from the association and its members challenging the ban.[37]

In 2006, the background Note issued by the Ministry of Home Affairs failed to mention a single new case registered against the organization between the period of last ban and the date of issuing of notification. And yet, the tribunal upheld the ban on SIMI on the basis of secret materials alone. In 2014, upholding the ban yet again, the tribunal conceded that there may be "defects, incoherency, contradictions and procedural irregularities during the recording of these statements [confessions] which may prove fatal during the trial when placed under the scanner of Indian Evidence Act", but the confessions cannot be ignored for the purpose of determining the "sufficiency of cause".

To give another example of the "jurisdiction of suspicion", the UAPA heralds is the list of over ground organizations which the Centre alleges are fronts for

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[36] Rule 3(1), The Unlawful Activities (Prevention) Rules, 1968 - "In holding an inquiry under sub-section (3) of section 4 or disposing of any application under sub-section (4) of section 7 or sub-section (8) of section 8, the Tribunal or the District Judge, as the case may be, shall, subject to the provisions of sub-rule (2), follow, as far as practicable, the rules of evidence laid down in the Indian Evidence Act, 1872 (1 of 1872)."

[37] *Jamaat-E-Islami Hind* v. *Union of India*, (1995) 1 SCC 428.

the SIMI which it submits as part of the background note. While many of these are fictitious, several are lawful organisations, even registered trusts undertaking charitable works, such as the Popular Front of India, Minority Rights Watch and Khair-e-Ummat Trust.[38]

A. The Transaction between Civil and Criminal trial

What is interesting here is not simply the bending of evidentiary rules in the tribunal as much as the effects such a long-term ban on/criminalization of an organization like SIMI may have on the criminal trials in which actual persons accused of the crime of being a SIMI member are tried. One of the most pernicious consequences of the endless extension of the ban on SIMI has been the proliferation of SIMI cases across the country. The ban is extended citing the large number of SIMI cases, and Muslim youth are arrested and charged for being members of SIMI on flimsy grounds. It is a tragic tautology that has played out for the past decade and more.[39] At the heart of the UAPA are the twin arteries of membership (of unlawful organizations) and conspiracy (of furthering the activities of the unlawful organization). Both, membership to an organization that no longer exists legally, and nebulous charges of conspiracy, are notoriously difficult to pin down. Is it any surprise then that Khandwa police in its most high-profile operation yet 'seized' membership forms of SIMI – duly filled in by the accused – conveniently lying around their homes? That seized literature constitutes the bulk of evidence of the conspiracy?

Let me cite two examples here as illustrative of the way in which the ban feeds into the registration of cases and the manner in which it shapes the prosecution of the accused. In the first case from Kota (Rajatshan), several men were picked up or threatened into surrendering three months after the serial blasts in Jaipur in 2008.[40] They were only wanted for routine pooch taach (questioning) in connection with the blasts; no charges were to be pressed, the police repeatedly assured the frightened men and their families. Days of illegal detention and torture later, these men were accused of spreading communal venom against Hindu gods and goddesses, talking against national unity, integrity and secularism, of involving Muslim youth in anti-national activities, and of carrying on activities of SIMI despite it being outlawed. All of these charges remained vague, with neither the FIR not the chargesheet making any precise link to any specific terror activity. Nonetheless, elliptical allusions to Jaipur and Ahmedabad serial blasts were made by the police, and the newspapers didn't take long to present them as key suspects in these blasts.

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[38] Order of the 2014 UAPA tribunal presided over by Justice Suresh Kait. Copy on record with the author.

[39] *See* Guilt by Association: UAPA cases from Madhya Pradesh, Jamia Teachers' Solidarity Association (2013).

[40] *See* The Case that Never Was: The SIMI trial of Jaipur, Jamia Teachers' Solidarity Association (2012).

Four and a half years later, the court acquitted the accused.[41] Of the 43 witnesses lined up by the prosecution, 38 turned hostile, swearing in court that they had been made to sign blank papers by the police. The allegedly proscribed literature seized by the police turned out to be perfectly legal, as it dated to before the ban. This case is fairly representative of the manner in which UAPA cases are framed and prosecuted. The elusiveness of charges is matched only by the infirmity of evidences. Media trials, which link the accused to acts of terror they are not even formally charged with, are conducted; and bail applications rejected repeatedly. The prosecution hopes till the last moment that no one will miss the required sanction. Only, not everyone is as lucky as these men from Kota.

In *State* v. *Irfan* (FIR No. 251/01, PS Gwaltoli, Indore), the accused was convicted despite a glaring lack of evidence. The prosecution case was that, on the intervening night of 27-28 September, 2001 (the day SIMI was banned) at 12.15, Irfan was pasting posters of the banned organization SIMI on pillar number 14 of the Sarvate bus stand (Indore). He was screaming that though the government had banned SIMI, he would continue to be its member. His antics attracted a crowd. He was arrested and charged under § 10 of the UAPA. The prosecution presented seven witnesses. Of these, three were police witnesses including the Investigating officer; two were from the Ministry of Home Affairs who confirmed the signatures of the authority who granted the sanction for prosecution under the UAPA. The only two independent witnesses – Chandar and Rajesh – denied the police story totally. An expert witness testified that the Urdu literature seized contained nothing against the State or society, and in fact only consisted of veneration of God. It was also accepted by the prosecution that there was nothing against the State in the seized material.

The court convicted Irfan under § 10 of the UAPA, sentencing him to two years of imprisonment and Rs 500 as fine because the police witnesses had testified that they had seen the accused pasting SIMI posters and propagating the banned organization SIMI. Such is the basis of numerous convictions across the state: police witnesses, dubious seizures and little else.

Then there is the domino effect. The Pithampur case of Dhar (FIR no. 120/2008), one of the most prominent SIMI cases of Madhya Pradesh, is also significant in that it set off a chain reaction resulting in the registration of near identical cases across the state. Arrests of 13 leading SIMI activists were allegedly made on 27 March 2008. Immediately after the arrests, on 29 March 2008, the Senior Superintendent of Police, Dhar, shot off letters to various districts of Madhya Pradesh asking for registration of similar cases. These letters immediately set of a chain reaction, resulting in 18 cases within one month, and another four over next six months. This surely must have been a record of sorts! How can we be sure that it was the SSP's letters that produced this result? Not only

[41] *Id*.

do some of these cases so registered make an explicit reference to this letter (for example FIR No. 180/2008, PS Neemach Cantt., dated 08.04.2008), the Investigating officer of the case, B.P.S. Parihar, himself produced 18 of these letters in the SIMI UAPA tribunal in 2010.

In the Pithampur case, the court overruled all objections of the defence, dismissing the lack of panchnamas, overlooking the missing signatures of policemen who recorded the disclosures, and details such as FIR number from the disclosure statements of the accused, rejecting the absence of site map of the farm house from where recoveries were made, as mere procedural lapses. On the other hand, it gave no credence to the delay between the alleged raid in a factory called Silver Oak in Pithampur, and the bakery in Indore, the fact that seizures had not been proved, the presence of the same witnesses throughout the operation which lasted over several days, the absence of local witnesses, and even non-intimation to the local thana in Indore by the raiding party, as perfectly natural and understandable.

It turned down the argument put forth by the lawyer for two of the accused from whose farmhouse the recoveries had allegedly been made, that that there was no evidence to prove their culpability in any unlawful activity. True, said the court, nothing documentary has been placed before it to prove their guilt. "However, this does not have an adverse impact [for the prosecution's case] because it is not usually possible to find such proof; one cannot in fact expect or desire formal proof."

The defence also argued that the printed material seized from the farmhouse was literature of a religious nature and therefore not banned. Therefore, no crime could arise from the mere possession of such literature. To this the court said "PW 24 BPS Parihar in his cross examination has refused the suggestion that this literature does not pertain to sedition but only to religion. This seems appropriate since there is Jihadi talk about seeking revenge and it also excites feelings against other community and class. It is a clear and pernicious articulation of the ideology of the banned terrorist organization, and as such may be deemed to be banned, whether or not a notification to that effect has been issued or not."

First, the court does not provide any details of this so-called combustible printed material, which had the potential to excite passions against a particular community or against the State. All it says is that "from the Hindi translation of the texts, it is clear that the following is written: SIMI members are ready to offer any sacrifices on the path of God". It also quotes from another article on Babri Masjid. It similarly refers to lectures and articles in CD and pen drives with titles such as "Jihad in Islam" but does not explain in any length how precisely they may be inflammatory or seditious.

VIII. CONCLUSION

It would appear that the loosening of standards of evidence in the tribunal – a civil adjudication –which leads to the continuous banning of SIMI seeps into the criminal trials as well where due process is short circuited and weak evidence is seen as satisfying the requirements for conviction. The judges while upholding the constitutionality of TADA and POTA had already placed anti terror laws outside the criminal justice regime – as a kind of 'public order plus', an excess of law which alone could deal with the problem of the magnitude of terrorism. The UAPA, with its avowed procedural fairness inhering in the tribunal and deference to "objective determination of facts" rather than executive decision making pretends to approximate a criminal justice system rather than a preventive detention regime. But thrives as it does, on paranoia and sense of threat, it is barely masked jurispathy.

RECONCEPTUALISING RAPE IN LAW REFORM

—Shraddha Chaudhary*

While rape is a predominantly female social experience, the offence of rape continues to be viewed and defined in law from the male social perspective. Since penetration is central to the male idea of sex, it is also the focus of the offence of rape, regardless of its disconnect with female sexuality, desire, or violation. The Criminal Law (Amendment) Act, 2013, though progressive in many ways, is also steadfast in its adherence to the penetration paradigm. In this paper, I argue that rape should be viewed as a violation of sexual autonomy and bodily integrity, rather than an act of penetration, and the legal definition of the offence ought to be expanded accordingly. This would facilitate a more wholesome, gender-just approach to the crime.

I. INTRODUCTION

Much has been said about the sociology, psychology and biology of rape. Much has been written and discussed about the law against it. Several attempts

* Shraddha Chaudhary is a graduate of the B.A., LL.B. (Hons.) Course of the National Law School of India University, Bangalore, currently working as a legal researcher at the Centre for Child and the Law, NLSIU. She is interested in a career in teaching and research advocacy. Though she enjoys all things Criminal Law, her core area of interest is sexual offences, and their interdisciplinary study.

have been made, across the world, to effectively punish, and eventually prevent rapes. And in these historical, political, social, scientific, and legal processes, the way the term 'rape' is understood has undergone a great many changes. These changes have reflected themselves, inevitably, in the way laws have been reformed to deal with the offence, and have affected, in turn, the way society has perceived the act.

In this paper, I offer a re-conceptualisation of rape, and a more holistic, gender-just, legal framework to deal with it, taking the 2013 Amendment to rape-related provisions in the Indian Penal Code, 1860 as a frame of reference.[1]

There has been much debate in Indian and international scholarship on nearly every aspect of the 2013 Amendment: the question of gender neutrality, the ambit of the law, its adequacy, and so on. But none of these debates have challenged the idea of what rape *is*, meaning that the starting point of all discussions has been rape as an act of unwanted penetration. I argue that this assumption is set in a male view of what constitutes sex, and does not consider what rape means for the victim. Therefore, this conceptualisation needs reconsideration.

II. UNDERSTANDING RAPE LAW AMENDMENT IN INDIA

'Rape laws', a crude, but convenient, term for laws dealing with rape, have been amended twice since the Indian Penal Code, 1860 ('IPC'),[2] and the Indian Evidence Act, 1872 ('IEA')[3] were enacted. The first amendment was made in 1983, in the wake of the judgement of the Supreme Court in *Tukaram* v. *State of Maharashtra*,[4] ingrained in popular memory as the *Mathura Rape Case*. The Supreme Court, reversing the judgement of the Bombay High Court, had acquitted the accused policemen of charges of custodial rape of a 14-16 year old tribal girl. The rationale was that she was 'habituated to sexual intercourse', that she had not successfully shown vitiation of consent by fear, and that she had not offered proof of her resistance against two fully grown policemen, in a police station, at night.

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1 No comment is sought to be made on the Criminal Law Amendment of 1983, beyond what is necessary to show that the trend of rape-law reform in India has been to address the specific problems that trigger them. Further, though I believe that a gender neutral provision of rape should include transgender persons, I shall use cisgender terms. Discussing the modalities of a law that includes transgenders would require inquiry (into the power dynamics amongst transgender persons) which goes beyond the scope of this paper. Similarly, while it is my position that marital rape, and consequently § 376B ought to be scrapped, I shall not attempt to make such suggestions because it requires and deserves far more detailed discussion than is possible here.

2 Indian Penal Code, No. 45 of 1860, India Code (1993), vol. 2.

3 Indian Evidence Act, No. 1 of 1872, India Code (1993), vol. 2.

4 *Tukaram* v. *State of Maharashtra*, (1979) 2 SCC 143.

Perceived widely as a gross miscarriage of justice amongst the 'intelligentsia',[5] and ordinary citizens alike, the judgement generated sufficient outrage for the creation of 'autonomous organisations', unaffiliated with any political party. These groups, in turn, created enough political pressure for the government to amend the law. Unfortunately, however, the Criminal Law (Amendment) Act, 1983 ('1983 Amendment'),[6] ignored several of the suggestions of women's groups to make the law against rape more comprehensive.[7] The changes included, instead, special provisions for aggravated forms of rape (such as custodial rape, gang rape, and rape by public servants), being added to the *IPC*, and the insertion of a reverse onus clause in the *IEA*.

These amendments altered the conceptualisation of rape in the sense that the law recognised the coercive power which comes with a position of authority. It acknowledged that the presumption of innocence of the accused, and the burden of proving guilt beyond reasonable doubt, was unjust when the victims of the crime were so utterly powerless.[8] In so doing, the understanding of rape evolved from an act of force to an act of power. However, these changes, the reader will note, were aimed specifically at addressing the lacunae exposed by *Mathura's Case*. Therefore the observation of the Supreme Court, that the amendment had failed to empower victims of rape to report cases, or to increase the rates of conviction, or, indeed, to prevent victims from being re-victimised on the stand, is not surprising.[9]

Almost thirty years after the *1983 Amendment*, another heinous incident of gang-rape came to light on the night of December 16, 2012. A 23-year-old, middle-class girl had been vaginally and anally penetrated by a group of men using their hands, their penises, and an iron rod. She did not survive the assault. The incident took over the news cycle and agitated the middle class like never before. Protesting masses demanded a stricter, more comprehensive legislation, since the law's understanding of rape had thus far been limited to penile-vaginal intercourse. Other forms of penetration were, indeed, covered by § 377, *IPC*, which proscribes carnal intercourse against the order of nature,[10] but the censure asso-

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5 *See*, An Open Letter to the Chief Justice of India written by Upendra Baxi, (1979) 4 SCC J-17.

6 Criminal Law (Amendment) Act, 1983, No. 46, Acts of Parliament, 1983 (India).

7 Maithreyi Krishnaraj, *The Women's Movement in India: A Hundred Year History*, 42(3) SOC. CHANGE 325, 329-330 (2012).

8 Shraddha Chigateri, Mubashira Zaidi and Anwesha Ghosh, *Locating the Processes of Policy Change in the Context of Anti-Rape and Domestic Worker Mobilisation in India*, prepared for the United Nations Research Institute for Social Development (UNRISD) project WHEN AND WHY DO STATES RESPOND TO WOMEN'S CLAIMS? UNDERSTANDING GENDER EGALITARIAN POLICY CHANGE IN ASIA 20-21 (April, 2006).

9 *Delhi Domestic Working Women's Forum* v. *Union of India*, (1995) 1 SCC 14: 1994 Supp (4) SCR 528, at paras 534 G-H, 535 A-B.

10 § 377, Indian Penal Code, 1860: Unnatural offences.-

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ciated with the offence was against homosexuality, rather than rape. The underlying idea, discussed in detail in the next section, being that non-consensual, penile-vaginal intercourse was an offence graver than any other kind of sexual violation.

The Criminal Law (Amendment) Act, 2013,[11] was enacted within five months of the incident. The amended provisions are highly progressive.[12] The understanding of 'consent' embodied by the statute clearly conveys the intention to shift focus away from the actions and sexual history of the victim, and onto the actions of the accused. Hence, a lack of resistance, or submission, is distinguished from overt agreement or consent. Further, consent is required, not as a one-time *carte blanche*, but for specific sexual acts. Although it may be conveyed in words, gestures or other forms of verbal or non-verbal communication, the fact that consent must be unequivocal, leaves little room for victim-blaming, if judges stay true to the philosophy and purpose of the provision. Similarly, the amendment takes into account the vitiating effect of unequal power relations on consent, prescribing a harsher sentence for a broad range of circumstances in which the victim is in a disadvantaged position compared to the perpetrator.

The definition of rape has also been greatly expanded. But, as with the *1983 Amendment*, the changes made to the *conceptualisation* of rape seem geared to respond to the problems highlighted by the incident that prompted the amendment. Thus rape now includes, beyond penile-vaginal penetration, penetration of the mouth, anus, urethra, or any other part of a woman's body by a penis, by manipulation, by 'applying the mouth', or by an object.

The scope of the law in terms of who may be victims and perpetrators also remains severely gendered and constrained. The proposal to make the law gender neutral was opposed by most feminist groups, citing the patriarchal social reality of the country. It was argued that, given the power structures of Indian society, the perpetrators of rape were almost always male, and the victims, female. The offence of rape, to reflect these conditions, would have to be gender specific.[13] This does not explain, however, why homosexual rape (of men by other men, or of women by other women), and the rape of, or by, transgendered persons was not included. The reason cannot be that § 377 already covers these acts because, by that logic, the expansion of the definition to include acts beyond penile-vaginal intercourse amongst heterosexuals would also be redundant. Further, the social sanction and outrage against an offense under § 377 is very different from that

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Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

[11] Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

[12] Mrinal Satish, *Forget the Chatter to the Contrary, the 2013 Rape Law Amendments are a Step Forward*, The Wire (Aug. 22, 2016), https://thewire.in/60808/rape-law-amendments-2013/.

[13] Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37(9) Econ. & Pol. Wkly 844, 847 (2002).

against rape, and the provision is used today more as a sword against consenting homosexual adults, than as a shield for victims of rape (with the exception of cases of child sexual abuse).[14]

III. THE TRADITIONAL CONCEPTUALISATION OF RAPE

The manner in which the term 'rape' plays out in the popular subconscious has changed drastically over time. The entry of rape into the domain of crimes was not as a crime against the human body, but as a property crime, an offence against the father, the brother, or the betrothed of the woman, and a violation of his proprietary right over her. Moreover, it was considered to be rape only when it was inflicted upon a virgin.[15]

Even as the common law definition of rape evolved to mean "the carnal knowledge of a woman without her consent",[16] the act continued to be understood from a very *male* perspective. The victim was required to show that the carnal knowledge was obtained against her will, by use of force. Further, she was required to prove that she had used sufficient force to resist the attack, which, it has repeatedly been argued, is a typically male response to a physical attack. Women are not ordinarily socialised to respond to force with force.[17] Similarly, carnal knowledge had to be obtained by sexual intercourse, which in turn meant penile-vaginal penetration.[18] This is not difficult to understand, given that rape, as previously discussed, emerged as a property crime, and was conceptualised by men. The consequence of penile-vaginal penetration was seen to be graver than other forms of physical violation, since it could result in a pregnancy and disturb patrilineal succession by casting doubt on paternity. The male focus on penile-vaginal penetration was a manifestation of the need to control the reproductive capacity of women.

Compared to this idea that rape is basically *sexual intercourse*, just missing consent, is Brownmiller's conception of rape as violence. For her, the focus of the act ought to be the imposition of the will of one person, by sheer physical and/or social force, on another, and not the penetration itself.[19] Mackinnon contests this idea of rape as violence. It is her position, simplistically put, that in the paradigm of male supremacy where violence is often eroticised as sexual, it is nearly impossible to distinguish rape from sex. The issue is less whether there was force, since the socially male understanding of sex considers *some* degree of force intrinsic to sex. The real issue is whether, given hierarchical gender relations and

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14 *Id*.
15 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 18 (1975).
16 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (1769).
17 Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1092 (1985-86).
18 Lundy Langston, *No Penetration- And it's Still Rape*, 26(1) PEPP. L. REV. 1, 4 (1998).
19 Brownmiller, *supra* note 15, at 378.

the eroticisation of violence ad domination, the consent given by a woman can ever be meaningful.[20]

IV. 'RAPE' IN THE 2013 AMENDMENT

With the incursion of feminist jurisprudence into law-making and judicial discourse, there have been several reforms in the laws against rape. Yet, the centrality of penetration remains. And the *2013 Amendment*, despite being a forward-looking piece of legislation, is also bogged down by this obsession with penetration. While the ambit of the 'act' of rape has been expanded from penile-vaginal intercourse to penetration of other orifices using substitutes for the penis,[21] the essence of the act continues to be (some kind of) *penetration*. In fact, the provision justifies criminalising the touching of the *labia majora* as rape, also, by *deeming* it to be penetration.[22]

I submit that from a victim's point of view, penetration is not the essence of the offence of rape. It is the denial of sexual autonomy. Subjecting the victim, without her/his consent, to any overtly sexual act, whether penetrative or not, and the humiliation and degradation that accompany this physical invasion, make a travesty of the autonomy of an individual to determine who (s)he wishes to engage in sexual interactions with, at what time, and to what extent. This was recognised as the 'harm' caused by rape even in the report of the Justice Verma Committee.[23] Till the definition of rape was limited to penile-vaginal penetration, the factor that distinguished rape from, say, acts amounting to sexual harassment, was the possibility of pregnancy. Aside from disturbing patrilineal succession, a pregnancy could be a huge physical, emotional and financial burden on the victim. However, once the definition was expanded by the *2013 Amendment*, this distinction disappeared. But the focus continued to be penetration. Touching the *labia majora* of a woman without her consent is a violation of sexual autonomy. It is degrading and humiliating *per se*, and not because the law has deemed it to be penetration. Similarly, fondling a woman's breasts, or touching one's penis to her breasts, or ejaculating onto her face or body or into her mouth without ever even touching her, or making her suck on one's testicles, or even forcing a kiss on her, is no less invasive, violative, and humiliating than the kinds of penetration now recognised as rape.

I submit that there is no longer a reason to distinguish penetration from other overtly sexual acts. For one, ever since the focus of the crime became the

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[20] Catharine A. Mackinnon, Toward a Feminist Theory of the State 172-78 (1989).

[21] Brownmiller, *supra* note 15, at 378. "And while the penis may remain the rapist's favourite weapon…it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the 'natural' thing".

[22] § 375, Explanation 2, Indian Penal Code, 1860, read with § 375(c), Indian Penal Code, 1860.

[23] Justice J.S. Verma, Justice Leila Seth, and Gopal Subramanium, Report of the Committee on Amendments to Criminal Law 94 (Jan. 23, 2013).

woman,[24] the possibility of conception has not been as much of a concern as the violation of bodily integrity, and the physical, mental and emotional injury caused by it.[25] If this were not the case, there would be no rationale for expanding the ambit of the act to non-penile-vaginal penetration. Moreover, if the harm sought to be prevented was conception, the perpetrator could wear a condom, or pay for the contraceptive pills of his victim, and escape liability. For another, the obsession with penetration draws from a male understanding of what sex itself means. The idea that sexual intercourse is necessarily some sort of penetration, preferably penile, is an inherently male concept, linked to male pleasure. A female's orgasm does not *require* any kind of penetration, and is far more likely to be achieved by the stimulation of the clitoris.[26] "Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality."[27] It is important to highlight this because the politics of sexual intercourse cannot be separated from the politics of rape. Rape is about power, it is about violence, but it is also an inherently physical act, intrinsically linked to sex. How we understand sex, therefore, is inevitably linked to how we understand rape.

V. THE PERCEIVED RISKS OF A BROADER DEFINITION

The criticism against expanding the definition of rape beyond penetration is that it runs the risk of over-criminalisation, and consequently, dilution of the value of criminal sanction. I submit two counter-arguments. First, any kind of criminalisation poses the danger of over-criminalisation, and is likely to have some unintended consequences. For instance, the Protection of Children from Sexual Offences Act, 2012 ('POCSO') criminalises all sexual contact with a minor, presuming that a minor is incapable of consenting. In the process, it also criminalises consensual sex between minors, thereby denying their autonomy and evolving capacity. But this does not mean that the criminalisation itself is invalid. It serves the legitimate aim of protecting children, who are vulnerable to grooming and predation by adults, from sexual abuse. What is required, is for the theory and practice of law to develop a more nuanced understanding of consent, and for there to be a targeted education programme that empowers citizens (minors and majors alike) to consent meaningfully. Similarly, the reconceptualization of rape to include non-penetrative sexual acts serves the legitimate purpose of recognising the denial of a victim's sexual autonomy as criminally punishable. It would, therefore, be a legally and socially sound step forward.

[24] Here, the term "woman" is not used biologically, but socially. In a heteronormative, male supremacist paradigm, the "acted upon" is socially female, whereas the "actor" is socially male.

[25] Satish, *supra* note 12.

Also *see*, Article 2(b), Declaration on the Elimination of Violence Against Women, 1993: "Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere trafficking in women and forced prostitution."

[26] Langston, *supra* note 18, at 25.

[27] Mackinnon, *supra* note 20.

Moreover, given the complexity of social reality, a line drawn anywhere runs the risk of being arbitrary. For instance, while research has shown that there is often little difference between the brain of a teenager, and a person in their mid-20s, the age of consent has been set at 18.[28] Much like the definition of rape, the age of consent has evolved over time, and has almost always faced criticism from different quarters. There has never been consensus on when a child is old and mature enough to consent, nor has there been agreement on precisely what amounts to rape. But this does not mean that every change in the age of consent has been over-reaching, just as every expansion of the definition of rape does not automatically amount to over-criminalisation.

This inherent danger in criminalisation brings me to my second point. The reason an expansion of the definition of rape causes discomfort is not the possibility of over-criminalisation, but because it goes against long-standing beliefs, nurtured and perpetuated by patriarchy, about sex and rape. This is the same conditioning that makes judges less likely to believe that a woman was raped on a date, or when she was voluntarily intoxicated, and her rapist "thought she consented", compared to when she was bound and gagged or physically forced.[29] But, as is widely accepted now, there is no universal rape script, and rape cannot be defined from the point of view of the perpetrator.[30] There is no reason, then, to hold on to this male/perpetrator driven conceptualisation of rape.

The second perceived risk posed by this expansion is likely to be that a provision against rape, so defined, will be misused (the Hail Mary argument against any law which seeks to protect a marginalised social class). My response to it is two-fold. *First*, the mere possibility of misuse is no reason not to enact a law that addresses a systemic issue. Instead, mechanisms ought to be developed to check misuse. *Secondly*, it is intriguing that the clamour of misuse only surrounds social justice legislations/provisions (§ 376, § 498-A, § 498-B, reservation for socially and economically backward classes, and so on), while tax evasion by the rich and powerful is conveniently rechristened 'avoidance'. Similarly, there is no outrage against the frequent use of other provisions in the *IPC* during family or property disputes. This is not to suggest that the misuse of some laws justifies the misuse of others, but that the prevalent understanding of 'misuse' inevitably comes from a place of privilege, and ought not to be allowed to undermine legitimate legal efforts to solve social problems.

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[28] Carl Zimmer, *You're an Adult. Your Brain*, *Not So Much*, N.Y. Times (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html?mcubz=2&_module=ArrowsNav&contentCollection=Science&action=keypress&region=FixedLeft&pgtype=article.

[29] *See generally*, *Mahmood Farooqui* v. *State (Govt. of NCT of Delhi)*, 2017 SCC OnLine Del 6378, Ashutosh Kumar J.

[30] *See* Rebecca Chennells, *Sentencing: The "real rape" Myth*, 82 Gender & the Legal System 23 (2009).

VI. THE MYOPIC REACH OF THE PENETRATION STANDARD

Finally, penetration is a standard that is unjust not only to women, but also to male victims of rape. The obsession with penetration, for which, ordinarily, a voluntary act is required: using one's penis/fingers/tongue/or an object to penetrate, implies that the penetrator initiates the act, or, at the very least is an equal participant in it. Especially in so far as the penis is concerned, the assumption is that there can be no penetration without arousal. An erection is equated with the desire to have sex, an assumption which is not borne out by fact.[31] Thus, the rape script, with its emphasis on penetration, makes it impossible to visualise the penetrator, the purportedly empowered one, as a victim of rape.[32] It prevents the law from taking note of the myriad non-penetrative acts which might violate the sexual autonomy and bodily integrity of a man, for instance, a woman sitting on a man's mouth. It also prevents an understanding of the many extraneous factors that may make a sexual act non-consensual for the penetrator, such as blackmail, the threat of force, manipulation, or even the inability to refuse or resist due to a past relationship.[33] Thus it becomes impossible to view women as rapists, for how can they rape if they are the ones traditionally being penetrated, and therefore, assuming the passive role?[34]

I submit that the focus of rape laws on penetration makes the conceptualisation of rape inaccurate, incomplete, and unjust. It also prevents the evolution of a gender-inclusive law. But, why is a gender neutral law desirable?

The very fact that men get raped, more often by men, but occasionally also by women,[35] and have no redress in law, means that a whole segment of the population is excluded and made invisible before law. Merely because women are raped more often than men, does not justify this distinction. Moreover, our estimations of the number of male victims are likely to be severely understated *because* the act is not considered a serious crime, meaning that there have been no efforts to record its incidence.[36] This is a violation of Article 14, Constitution of India, which requires equal protection of laws to all persons placed in equal circumstances.[37] In this regard, it was argued by feminists in response to the *Criminal Law (Amendment) Ordinance*, *2013*, which had sought to make the offence gender neutral, that men and women, as social classes, are *not* equally placed. The reality of rape is that it is a manifestation of the deep-rooted gender hierarchy in

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[31] Philip Rumney and Martin Morgan Taylor, *Recognising the Male Victim: Gender Neutrality and the Law of Rape: Part Two*, 26 ANGLO-AMERICAN L. REV. 330, 331-332 (1997).

[32] Bennett Capers, *Real Rape Too*, 99(5) CALIF. L. REV. 1259, 1292 (2011).

[33] Rumney and Taylor, *supra* note 31 at 334.

[34] Rumney and Taylor, *supra* note 31 331-332.

[35] *See generally*, Rumney and Taylor, *supra* note 31.

[36] Michael Amherst, *Rape is Not Just a Women's Issue*, THE GUARDIAN (Mar. 17, 2010), https://www.theguardian.com/commentisfree/2010/mar/17/stern-review-male-rape.

[37] INDIA CONST. art 14.

society, overwhelmingly, an expression of male power against women.[38] However, this does not take away from the fact that men may be victims of rape by other men, as well as specific women, who by virtue of their particular circumstances, may be in a position of power over them. If rape is indeed an expression of power, anyone who is powerless may be a victim, and deserves recognition in law. Taken to its logical conclusion, this line of reasoning would suggest that the law should include women as perpetrators of rape against other women unconditionally, and against men, upon proof that they held a position of power (whether physical, or socio-economic, or a combination thereof) over the victim.

The reason why the law ought not to include women as perpetrators of rape unconditionally and in all circumstances is the potential chilling effect this might create against actual victims of rape, given the current gender hierarchy of Indian society. Since men are already in a position of power over women, and the justice system, starting from the police, up to the higher judiciary, is inherently and indisputably patriarchal, counter-complaints by men may be used to intimidate women into withdrawing genuine complaints of rape.[39]

VII. A DEPARTURE FROM PENETRATION

The Canadian Criminal Code[40] and the UN Handbook for Legislation on Violence against Women,[41] both suggest that the focus be taken away from penetration. Penetrative acts which currently constitute the offence of rape, as well as non-penetrative acts which violate the sexual autonomy and bodily integrity of the victim, would then be consolidated into 'sexual assault', with gradations based on harm. This approach was considered by the Justice Verma Committee, but was not recommended for India, because it was felt that 'sexual assault' did not carry the same social opprobrium as 'rape'.[42] I have two responses to this. *First*, that if this moral opprobrium comes from the idea that penetrative acts are more harmful than other acts, then it is antiquated, male-centric morality which ought to be discarded. *Secondly*, that if it is the term itself which carries the opprobrium, then the meaning of the term may be expanded to include non-penetrative acts as well, so that these acts may face the same censure. Clearly, this was the rationale motivating the expansion of the ambit of rape to include non-penile-vaginal penetration.

This raises the question whether merely changing the definition of rape in law will change the way people, including police*men* and judges, view the offence.

[38] Nivedita Menon, *Gender Just, Gender Sensitive, NOT Gender Neutral Rape Laws*, Kafila (Mar. 8, 2013), https://kafila.online/2013/03/08/gender-just-gender-sensitive-not-gender-neutral-rape-laws/.

[39] *Id*.

[40] §§ 265 and 271-273, Criminal Code, R.S.C. 1985, c. C-46 (Canada).

[41] United Nations, Handbook for Legislation on Violence against Women (2009), http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf.

[42] Justice J.S. Verma, *supra* note 23 at 111.

In all likelihood, it will not. The recent decision of the High Court of Delhi in *Mahmood Farooqui* v. *State (Govt. of NCT of Delhi)*,[43] is proof. The Court, though applying § 375, IPC as amended by the *2013 Amendment*, held that it was usual for one party to be hesitant, or even unwilling in a sexual encounter, and therefore, a "feeble no" would not be enough to convey a clear lack of consent. Doctrinal law may have come a long way, but it is still common for rape to be viewed as a crime against the honour of the family or community rather than against the victim. The rape script, which sees 'chaste' victims of rape, or women who physically resist an attack, as more deserving of justice compared to 'unchaste' victims, or women who did not resist enough, is still religiously adhered to.[44] By the same logic, the expansion of the ambit of acts which qualify as rape in the *2013 Amendment*, does not mean that they would all be treated on par. Judges are still more likely to convict for, or award harsher sentences to, rape which is penile-vaginal, than any other kind. However, this is not a problem that legislation can address on its own, and thus, must not be allowed to stand in the way of reform. It is a problem that needs to be solved through a number of simultaneous processes such as education, sensitisation, and training. At the same time, the power and role of the law as an agent of social change cannot be underestimated. If history is any indication, the law can be both an expression, and a catalyst of change. Consider, for instance, the prohibition of sati, or facilitation of education for women, or, indeed, the aspirational portions of the Constitution of India, such as Part IV, or Article 17.

Given this, I suggest the following changes in the language of provisions, in the *IPC*, dealing with rape:

First, that certain provisions which cover indisputably and overtly sexual acts, violative of sexual autonomy and bodily integrity of the victims, be collapsed into one offence called 'rape' or 'sexual assault'. These include § 354 (assault or criminal force against a women to outrage her modesty),[45] § 354B (assault or criminal force against a woman with the intent to disrobe her),[46] and § 375 (rape).[47] § 375, *firstly-seventhly*, and the explanations, provisos and exceptions appended to the provision should remain unchanged. Rape, so defined, should continue to be

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[43] *Mahmood Farooqui* v. *State (Govt. of NCT of Delhi)*, 2017 SCC OnLine Del 6378, Ashutosh Kumar J, at paras 46, 47 and 78.

[44] MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW (1st edn., 2016).

[45] § 354, Indian Penal Code, 1860:
"Whoever assaults or uses criminal force to any woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year, but which may extend to five years, and shall also be liable to fine."

[46] § 354B, Indian Penal Code, 1860:
"Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing, or compelling, her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine."

[47] § 375, Indian Penal Code, 1860.

punishable by imprisonment of either description for not less than seven years, but extending to imprisonment for life. The gradation of punishment ought to be determined, not by the 'act' itself, but the manner in which it was committed. Thus, causing hurt or injury, threat or fear of death, wrongful restraint, or blackmail, among others, may be considered aggravating factors, meriting harsher sentences. The threat or fear of death or injury need not be explicitly stated, but may be implicit in the circumstances. This would be similar to the distinction between theft and robbery in the *IPC*. Other factors may also call for stricter sentences. For instance, where the act was committed as revenge or punishment, or where it was committed by a person in a position of trust, such as a relative, or intimate partner.

Secondly, overtly sexual acts must be distinguished from sexual overtures, demands, or requests for sexual favours, and sexually-coloured remarks, which are covered by § 354A.[48] Overtly sexual acts would necessarily require physical contact, either directly (such as fondling a body part) or indirectly (such as ejaculating on a person). They would include acts which are ordinarily part of a sexual encounter including, but not limited to, disrobing, kissing or petting, and any kind of penetration, done without the consent of the victim. The distinction between acts which require physical contact and those which do not is meant to prevent the provision from becoming overbroad, and to preserve parity between the offence and its sentence.

Thirdly, the provision ought to be entirely gender neutral insofar as victims are concerned, and conditionally gender-neutral as concerns perpetrators. A woman may be prosecuted for rape of another woman in all circumstances, and of a man when it can be shown that she was in a position of power or authority over him, thereby changing the gender relations between them. In such cases, the burden would be upon the victim to show that such a power hierarchy existed in order to invoke § 114A, *IEA*, which should also be amended accordingly.[49] Subject to these conditions, §§ 376A-376E should also be made gender neutral. For § 376D (gang-rape),[50] where the victim is male, and the perpetrators are either all female

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[48] § 354A, Indian Penal Code, 1860: Sexual Harassment and Punishment for Sexual Harassment.

[49] § 114A, Indian Evidence Act, 1872: Presumption as to Absence of Consent in Certain Prosecution for Rape.-

"In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m), clause (n) of sub-section (2) of the Indian Penal Code, where sexual intercourse by the accused is proved, and the question is whether it was without consent of the woman alleged to have been raped, and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

Explanation.- "In this section, 'sexual intercourse' shall mean any of the acts mentioned in clauses (a) to (d) of Section 375, Indian Penal Code".

[50] § 376D, Indian Penal Code, 1860: Gang Rape.-

"Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape, and shall be punished with rigorous imprisonment for a term which shall not

or a mix of men and women, it would be sufficient to show that any one of the perpetrators was in such a position vis-à-vis the victim.

VIII. CONCLUSION

In this paper, I argued that the legal definition of rape (in India) continues to be deficient in its scope, despite amendments, because of its focus on penetration. This focus stems from a male understanding of sex, and therefore, does not account for the (socially female) victim's bodily integrity and sexual autonomy. The obsession with penetration also prevents a more gender-just and inclusive conceptualisation of rape. 'Men' as penetrators are almost impossible to imagine as victims, and 'women' as passive recipients of the penetration, cannot be visualised as perpetrators.

It is my position that the 'harm' sought to be addressed in criminalising rape is no longer an unwanted pregnancy or "defilement". It is the destruction of the victim's sexual autonomy and violation of her bodily integrity. This is evident from the expansion of the definition of rape in the *2013 Amendment* to include forms of penetration other than penile-vaginal. There is nothing to explain, therefore, why non-penetrative sexual acts which cause the same harm to the victim, are not understood as rape. Expanding the scope of the offence beyond non-consensual penetrative acts, I submit, serves a legitimate purpose, and would not amount to over-criminalisation. Furthermore, the perceived risks of such an expansion are more a reflection of entrenched, patriarchal, heteronormative views of what *really* amounts to sex, combined with privileged speculation, than tangible risks.

I propose a conceptualisation of rape in which any explicit, overtly sexual act done without the consent of the victim is punished on the same footing as penetration currently is. Gradations of sentence may be based on the manner in which the act was committed, the purpose for which it was committed, and the person who committed it. In this paradigm, the culpability for rape could be determined based not only on the unequal power dynamic between genders, but also on specific circumstances which reverse the said dynamic.

This reconceptualization of rape would place the sexual autonomy and bodily integrity of the victim at the focus of the offence, rather than an antiquated, male notion of sex and rape. And in so doing, it would give voice to the thousands of victims of rape, both male and female, who have, thus far, found no redress in the law.

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be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of the person's life and with fine".

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