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# Battered Women Syndrome: Need for Judicial Objectivity

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## Abstract

*When the victims of wife-beating are subjected to excessive violence, a syndrome occurs, which during a criminal procedure can be pleaded as BWS (Battered Women Syndrome). It is also referred to as Battered Spouse Syndrome. However; the condition is most common among women than that of men. Wife battering is the most common and least reported crimes in all types of society. Some never mention about it and bear the violence while some others seek help from the law. But there also exists a different group of battered women who kill their abusive partner without any remorse. Some scholars have claimed that is a normal reaction from a woman who has been subjected to acute battering and that they should be given defense by law while some others have opposed to this notion of Battered Woman Syndrome. BWS, as a very new concept to the legal and judicial system of Nepal, still has a lot of gaps to be filled. This paper will analyze the concept and practical implications of Battered Woman Syndrome alongside the legal and judicial trend in case of Nepal. Further, this paper will establish why Battered Women Syndrome cannot blatantly be given as a defense in all cases and yet should be considered by the judiciary. In the end, the paper puts forth the necessity of new law/legal provisions in making the judicial decisions objective and justiciable in case of battered women.*

## Background

Domestic violence has been found to be a serious problem in every country. Especially, wife beating has been found to be the most common and serious of them all. Despite the level of education, having to witness violence as a child etc. were some of the consistent risk markers seen among the abusers as per *Hotaling and Sugarman*.<sup>1</sup> The risk of being subjected to violence at home, being beaten by their own husbands is common to women in every society regardless of their social position, creed, color, class and educational level.

The Beijing Declaration and Platform for Action adopted at the United Nations Fourth World Conference on Women recognizes that violence against women is a violation of human rights and suggests strategies for eliminating violence.<sup>2</sup> The legal world has

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<sup>1</sup> Joan H. Rollins, *Women's Minds, Women's Bodies: The Psychology of Women in a Biosocial Context*, Prentice Hall, New Jersey, 1996, p. 233.

<sup>2</sup> 'Beijing Declaration and Platform for Action', A/CONF.177/20, adopted on 15 September 1995, art 9.

done much to combat domestic violence by enacting statutes and laws to protect those who are victimized by abuse but it still remains beyond the mere language of law. There is a huge gap between law in book and law in action. The situation has gotten worse with time as this issue is intertwined with psychological conditions of the victim and the abuser, reluctance of spouses to report violence, complexities of family structure, emergence of notions like the Battered Woman Syndrome that justify the actions of victims who find the courage to turn to their attackers and end violence.

In this situation, questions arise: Is there even a psychological condition like BWS and if there is, should the law recognize it? Does the courage to turn and fight against their attackers serve the victims as a legal defense? Is the killing of their abusive husbands by battered wives justifiable on legal grounds?

Battered Women Syndrome has thus become a contentious issue and different jurisdictions and scholars have dealt with it in different ways.

### Introduction:

According to Jeff Heam,

‘When violence is understood as fundamental to gender, and power is recognized as adhering to all social relationships, then a different kind of Social Theory is required: one that simultaneously deals with differences, conflict, and forms of violent contact.’<sup>3</sup>

Battered Women Syndrome is a similar theory that has a different dimension when it comes to domestic violence and wife-battering. Although it is also referred to as Battered Spouse Syndrome to make the language gender neutral, Battered Woman Syndrome is a popularly used term as the condition is more common among women than men.

When the victims of wife-beating were subjected to excessive violence, a psychological syndrome occurs, known as BWS (Battered Women Syndrome). It is also a ‘victimization syndrome, a condition.’<sup>4</sup> The more contentious issue here is: Should the women be given defense for killing her husband based on this condition or not? Although it is generally understood as a form of mental illness, it is merely a species of Post-Traumatic Stress Disorder and not a form of Mental illness.

Historically, until the past quarter-century many battered women accused of homicide had been encouraged to plead guilty by their lawyers or, if they went to trial, they were encouraged to claim the excuse of insanity rather than self-defense because there was

<sup>3</sup> Suzanne E. Hatty, *Masculinities, violence and culture*, Sage Publication, New Delhi, 2000, pp. 46-47.

<sup>4</sup> Donald A. Downs & James Fisher, ‘Battered Women Syndrome: Tool of Justice or False Hope in Self Defense Cases?’, in Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh (eds), *Current Controversies on Family Violence*, Second Edition, Sage Publications, California, 2005, p. 243. It is also often compared with other species of victimization syndrome such as rape trauma syndrome, hostage syndrome, battered child syndrome etc all of which attempt to establish that a person’s mental state has been affected.

no concept of giving a defense to women who were battered. This pattern changed in the 1970s when they started claiming for self-defense and experts like Dr. Lenore Walker and Dr. Julie Blackman began testifying on the subject of “battered women” under traditional self-defense law itself<sup>5</sup>. It was only in 1984 that Dr. Lenore Walker, a psychologist from Denver, USA wrote her first book titled “The Battered Women” and advocated for the defense to women having a condition called the Battered Women Syndrome.

Dr. Lenore Walker was also the person to coin the term “Battered Women Syndrome”. Although she didn’t specifically define what the syndrome is (she has merely given a description of BWS), she has defined Battered Women as

One who is subjected repeatedly to coercive behavior (physical, sexual, and/or psychological) by a man attempting to force her to do what he wants ...and who, as a member of couple, has experienced at least two acute battering incidents.<sup>6</sup>

She also talks of a cycle which is composed of three phases:

- Tension-building
- Acute Battering incident
- The tranquil, loving and non-violent phase

If any 2 of the above phases is observed in a woman who has been accused of killing her husband, she is considered to be a battered woman. However, Walker in her second book demonstrated that most battering relationships do not actually exhibit the above cycle, raising a question regarding the practicality of this theory. So, many scholars have criticized the definition given by Walker and have rather attempted to give a general understanding (definition) of ‘battered women’ as ‘the women who have been abused physically/ psychologically by their partner without any concern for her personhood or rights.’ On the basis of this definition, Battered Woman Syndrome is a condition/ syndrome which can be pleaded in any case where the wife has been brutally battered by her husband without any concern for her personhood.

The battered women are said to have some of the following characteristics in common:<sup>7</sup>

- Low self-esteem
- traditional views about home, family, and sex role stereotypes
- Denial of terror and anger
- passivity and submissiveness

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<sup>5</sup> Sue Osthoff & Holly Maguigan, ‘Testimony on Battering and Its Effects’, in Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh (eds), *Current Controversies on Family Violence*, Second Edition, Sage Publications, California, 2005, p. 225.

<sup>6</sup> Nancy Gibbs, ‘Battered Women and the Courts: An Overview’, in Karin Swisher, Carol Wekesser & William Barbour (eds), *Violence Against Women*, Greenhaven Press, California, 1994, p. 265.

<sup>7</sup> Julia J. Chavez, ‘The Battered Women is a Legitimate Defense’, in Karin Swisher, Carol Wekesser & William Barbour (eds), *Violence Against Women*, Greenhaven Press, California, 1994, p. 285.

- severe stress reactions including complaints
- isolation
- distorted perception of reality compared to a non-abused person

### Issues that come along:

While discussing the case of a battered woman who kills her abusive husband, some scholars are of the opinion that it is unfortunate to have the term “Battered Women Syndrome” judicially recognized. Majority of the other scholars are found debating whether women having this syndrome should be given a defense for killing their own partners or not. The other issues in the debate include but are not limited to self-defense of the defendants and its legitimacy, the matter of granting clemency, the necessity of expert testimony and its admissibility, and the possibility and practicality of considering pardons for battered women who end up killing their partners. Is it just a matter of violence against women or also of probable violence against men is also a matter in issue<sup>8</sup> While the woman has taken up to become a murderer, contentious issue in also concerning whether that woman might have acted in a different psychological condition to protect herself and her family. How can justice be served in such a condition?

### The defense as a confrontational situation

Over the years, the experiences in criminal courts and the diminishing applicability of Walker’s theory have persuaded advocates, lawyers, and researchers to move beyond the battered women syndrome. They came to conclude that Battered Women Syndrome fails to capture the full experience of a battered woman and it results in women being portrayed as helpless and incapacitated. In fact, some advocates have shown concern over the use of the term ‘syndrome’ as it is being perceived as pathological. Based on this, scholars are found discarding the concept of BWS completely or partially.

Scholars have argued that such a perception regarding the battered women syndrome is at odds with a defense argument under which it is argued that woman’s actions were actually reasonable in light of circumstances.<sup>9</sup> So they claim that either the woman can be reasonable in doing so or mentally ill but not both at the same time and that the defense should be taken accordingly.

However, on the other side, scholars in support of Dr. Walker’s idea on Battered Woman Syndrome often claim that various development and improvements have been made in the concept of Battered Women Syndrome compared to the time it was coined and the ones that criticize do so because they’ve failed to go through the evolved and improvised concept.

A lot of media publicity is given to women who kill their husbands but psychologically,

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<sup>8</sup> If women are exempted for killing their husband in return for the violence caused to her and she is not punished for that action, is not this an unjustified action under the law?

<sup>9</sup> Osthoff & Maguigan (n 5), p. 229.

there is no real difference between the battered women who kill their abuser and who don't. They may still be the same when it comes to having this syndrome. The difference lies in the extremely life-threatening nature of the violence to which they are subjected and from which some of them can escape alive only by ending their abusers' lives. Angela Brown, who worked together with Lenore Walker found that the only difference was that women who kill their husbands were subjected to a greater degree of violence and they perceived a greater threat from their abusers.<sup>10</sup>

Relying on well-established self-defense law, justifications are represented in favor of Battered women's homicide charges what is called *Confrontational* situations. On the basis of this, murders committed by battered women are often divided into three categories:<sup>11</sup>

1. *Confrontational homicides*

The battered woman kills her abuser spontaneously during a battering incident. The main legal issues in these cases are whether to allow expert testimony on Battered Woman's Syndrome and whether the defendant is/ will be able to introduce evidence of past abuse.

2. *Non-confrontational homicides:*

The victim, a battered woman, typically attacks her abuser while he is asleep. The legal issues that arise are whether there is an entitlement to a self-defense argument and whether Battered Woman's Syndrome can be used to explain how there was an imminent threat to the woman, despite her abusive husband being asleep.

3. *Solicited homicides:*

The victim hires a person to kill her abuser. The defendant tries to prove that the action was induced by the Battered Woman's Syndrome and it was reasonable under that circumstance.

### **Violent action over leaving abusive relationship: Why do battered women make this choice to kill instead of leaving?**

Some psychologists claim that manifestations of Battered Women Syndrome are characterized as *learned helplessness*. According to Walker, "The victim falls into this state after a few repetitions of the given cycle and the process of learned helplessness results in a state with deficits in 3 specific areas".<sup>12</sup>

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<sup>10</sup> Rollins (n 1), p. 234.

<sup>11</sup> Sara M. Sandler, 'Battered Woman's Syndrome: Setting a Standard in Florida', *Nova Law Review*, 2007 available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=https://www.google.com.np/&httpsredir=1&article=1204&context=nlr>, accessed on 26 July 2018.

<sup>12</sup> Ibid.



- in the way battered women think,
- in the way they behave
- in the way they feel

They believe that this behavior, resulting from the repeated battery, stops the women from leaving an abusive relationship instead of attacking him or opting for violent measures. Some don't leave also because there exists no safe place where the enraged husband can't find them or their children. Gender inequality and stereotypical gender roles imposed by society further trigger the helpless response of battered women. Husbands who beat their wives do it with utter impunity because they consider it to be a private privilege of marriage and that neither police nor the public can/ will interfere in such a private matter.<sup>13</sup>

Women are also reluctant to leave because they don't want to leave their loved ones in the hands of and around their abusive partners. According to M.J. Strube (1988), there are 4 theories<sup>14</sup> that answer why the women choose to stay in an abusive relationship

- Psychological entrapment whereby individual increases commitment to a previously chosen, although it is a failing course of action
- Learned helplessness, as a concept given by Dr. Lenore Walker
- Exchange theory whereby the victim of abuse does a cost-benefit analysis. If the woman perceives that the economic, social and psychological costs will be greater by leaving than by staying, then she is more likely to stay.
- Reasoned action whereby an individual's normative belief determines her behavior. She decides based on what she believes the significant other thinks about her decision, such as to leave an abusive partner.

However, there is no consensus on the validity of the concept of 'learned helplessness' and the concept is contradicted by the views of many practitioners stating that women rather develop a condition of "hyper-vigilant awareness of their batterers' behavior"<sup>15</sup>. One way or another, scholars who argue that Battered Women Syndrome is a legitimate defense, come to a conclusion that underneath the grim cycle of tension, violence, and forgiveness, each partner may come to believe that there is no better option than death, not even separation. The women are so acutely battered and mentally disturbed that she kills her own partner without any remorse of doing that. In this condition, should the battered woman who killed her own partner receive any kind of defense or leniency in punishment is still a question in hand.

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<sup>13</sup> Shobha Saxena, *Crimes against Women and Protective Laws*, Deep and Deep Publications Pvt. Ltd, New Delhi, 2004, pp. 168- 208.

<sup>14</sup> Rollins (n 1), pp 229-232.

<sup>15</sup> E.W. Gondolf, *Battered Women as Survivors: An alternative to treating learned helplessness*, Lexington Books, New York, 1983, pp. 731-732.

### Arguments in support of defense for battered women:

1. For battered women, the *perception of imminent threat* as well as of *reasonableness* should be modified and therefore the meaning of self-defense should be understood differently for a battered woman. It is an imperfect form of self-defense<sup>16</sup>
2. Advocates resorted to BWS because of the belief that the traditional standards of self-defense laws are inadequate to account for the actual dangers that the battered women confront.<sup>17</sup> The law of self-defense requires that deadly force is used only when the threat of death or serious bodily harm is imminent or when the defendant reasonably believes that such force is necessary under the circumstances. But it cannot be the same in the case of battered women, whereby the law of self-defense should be cognizant of the possible special dangers the woman is likely to face<sup>18</sup>. Rules of Self-defense were designed to deal with two men caught in a bar fight, not a woman co-habiting and caught up in a violent relationship with a stronger man. So the notion of imminent threat and reasonableness should be understood differently and in light of these special circumstances in the case of a battered woman.
3. In the majority of cases where expert testimony is used, this testimony addresses a range of social and psychological issues related to the reasonableness of a defendant's use of force to protect herself. It doesn't focus on the woman's incapacity or lack of reason.<sup>19</sup> BWS is rather based on the logic of a special kind of reason and not a form of impaired reason.<sup>20</sup>
4. It is not necessary that every case of husband killing in the aftermath of acute battering is to be given a defense of BWS. But if the shreds of evidence independently show the necessity and reasonableness of the situation alongside expert testimony, battered women should be provided defense. BWS has been given judicial recognition by various different courts all around the world and is closely analyzed before providing judgment and giving a defense. So, there is no reason to reject Battered Woman Syndrome as a defense.

### Arguments against the defense for battered women:

1. While there are situations and times of necessity whereby killing of a person can be counted as a matter of necessity and claimed to be reasonable, BWS cannot be that absolute situation in which killing of her own partner is justifiable in a way that it supports the premise: past violence is an excuse for present illegal

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<sup>16</sup> Chavez (n 7), p. 289.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Osthoff and Maguigan (n5), p. 227.

<sup>20</sup> Ibid, p. 242.



retaliation. Battered women do not have a license to kill.<sup>21</sup>

2. History of violence can be taken as a supportive argument to justify killing in a specific situation but not to replace such defense completely. Battered Women Syndrome cannot be an absolute and independent defense to justify all sorts of husband killing and in all circumstances.
3. Some scholars who argue that women having BWS shouldn't be given defense claim that if she was acutely abused as she claims, she should have left him or found another way out instead of killing him.
4. She isn't subjected to imminent threat so; self-defense shouldn't/can't be given.
5. BWS is either poor social science or empathy caricatured and may explain why Dr. Lenore Walker has been able to find self-defense in cases that a layman would recognize as first-degree murder. All this sounds more like a tract than a treatise. BWS isn't a physician's diagnosis but an advocate's invention and it is very unfortunate that a judicial recognition has been given.<sup>22</sup>
6. The entire concept is just unable to explain why the women are so helpless that they are capable of undertaking violent measures like stabbing, shooting or hiring hit-man (like in solicited homicide) but are incapable of non-homicidal measures such as leaving the house. This is also the major reason to why the scholars are brutally criticizing the theories given by Dr. Walker, especially the notion of learned helplessness.
7. This is learned violence, not helplessness whereby the woman is seeking revenge for a history of victimization.<sup>23</sup>
8. Under modern law, such acts are forbidden. Only the state has a monopoly on punishment. This requires the victim to seek protection of the law, instead of undertaking violent measures themselves. On the later stage, the state should proceed to give better protection in law, so that the citizens don't have to go as far as opting for violent means in the name of self-defense and threat.
9. Battered women defense should not be given because it doesn't in any way serve the goal of reducing family violence. In fact, it may promote such violence.<sup>24</sup>
10. Batterers have rights too. If victims have the right to defend themselves from violence, Batterers must be allowed to defend them when unjustifiably attacked

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<sup>21</sup> Donileen R. Loseke, Richard J. Gelles & Marry M. Cavanaugh (eds), *Current Controversies on Family Violence*, Second Edition, Sage Publications, New Delhi, 2005, p.233.

<sup>22</sup> Gerald Caplan, 'Courts should not allow testimony on Battered Woman's Syndrome', in Karin Swisher, Carol Wekesser & William Barbour (eds), *Violence Against Women*, Greenhaven Press, California, 1994, p. 303.

<sup>23</sup> Ibid. p. 305.

<sup>24</sup> Stanton Peele, "Battered Women who kill do not deserve Clemency", in Karin Swisher, Carol Wekesser & William Barbour (eds), *Violence Against Women*, Greenhaven Press, California, 1994, p. 307; A traditional proverb which reads "An eye for an eye leaves the whole village blind".

or killed. It is not the victim who is supposed to punish the abuser in such a brutal manner.

11. We need to stop posing men as violent and women as victims; men killing their partner as an act of domestic violence and women killing their partner as Pre-Menstrual Syndrome and Battered Women Syndrome. We need to stop condoning pre-meditated murder, be it for women or for men. Homicide is a crime regardless of who it is.
12. Some pioneers of the legal field have also argued that the battered women they represented had been reasonable and justified when they defended themselves against their abusers<sup>25</sup>. It is to be said that women rights' should be protected but that does not give convenience to the women offender to plead for such rights' naming it as a result to domestic violence. If the defense is given in such manner, there are maximum chances of the law being misused (for an instance, even if the wife has intention and motive to kill her husband, she might plead defense based on battered woman syndrome.).

## **The Legal and judicial trend in the context of Nepal:**

### **Laws regarding Battered Woman Syndrome:**

Nepal doesn't have a specific law or statutory provisions regarding Battered Woman Syndrome. The only statute that deals with wife battery is the Domestic Violence (Offence and Punishment) Act, 2066 B.S. It mentions about what constitutes of domestic violence, how the court must proceed in such cases and the punishment to the offender. According to the Act, anybody having knowledge of commission or likelihood of commission of domestic violence can file a complaint before National Women Commission, police station or a local body and the perpetrator must be produced within 24 hours of such complaint about the statement.<sup>26</sup> Similarly, it has also mentioned that the court may grant following interim order to the perpetrator to allow the victim to continue to live in the shared house, to provide him/her with food, clothes, to not cause any physical injury to him/her and to behave with him/ her in a civilized and dignified manner or to make necessary arrangements for the separate stay of the perpetrator in a case that it's not conducive for them to live together, and make necessary arrangements for the maintenance of the victim.<sup>27</sup> It also mentions about camera hearing and adoption of summary procedure. It also mentions about the establishment of a service center for the purpose of immediate protection or for the separate accommodation of the victim during the course of treatment. The Act has mentioned that the person convicted of committing an act of domestic violence is to be punished with a fine of three thousand to twenty-five thousand rupees or six

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<sup>25</sup> Osthoff and Maguigan (n 5), p. 226.

<sup>26</sup> Domestic Violence (Offence and Punishment) Act, Nepal, 2009 (*Gharelu Himshaa (Kasur ra Sajaye) Ain 2066*), s 4.

<sup>27</sup> *Ibid*, s 6.

months of imprisonment or both.<sup>28</sup>

### Judicial trend:

The judicial attitude regarding Battered Woman Syndrome can largely be traced from the following major cases in the context of Nepal:

#### **Laxima Badi vs.. HMG<sup>29</sup>**

Laxmi Badi killed her husband Suku Badi using sickle when he was asleep in his room on the date 2057/11/21. Laxima Badi and Suku Badi together had 8 children whereby her husband was a regular drunkard. During her testimony before the court and the investigation officer, she unveiled her husband's drinking habit and the threat given by her husband. Offender defended her action stating that she acted in such a way because she was subjected to domestic violence repeatedly and that if she wouldn't kill her husband, he would kill her.

Here, the court took into consideration the family status, offender's life, minor children, economic status of the family while giving the decision. As the defendant killed her husband, she was convicted under culpable homicide and punishment as per no. 188 of the Chapter on Court Management of Muluki Ain, 2020 B.S. She was given a punishment of 7 years of imprisonment.

#### **Nepal Government vs. Joak Kumari Karki<sup>30</sup>**

Ambar Bahadur Karki was murdered by his wife Joak Kumari Karki. He was a drunkard, who on the day of incident, arrived home drunk and abused his wife. Joak Kumari Karki, in response, hit her husband with a wooden log and later with an ax. The cause of death was severe head injury. Further Joak Kumari tried to hide the body in a dumping site (*malkhaad*). The corpse was found after 10 days of the incident. Here, Joak kumari testified that she committed homicide out of anger and threat of being killed by her husband.

Here the Battered Woman Syndrome was taken into account alongside the fact that the offender had minor children. On the basis of this, 10 years of imprisonment was given as a punishment under no.188 of Chapter on Court Management of Muluki Ain 2020 B.S.

#### **Gurans Devi Lama vs. Radhika Shrestha<sup>31</sup>**

In this case, Radhika Shrestha murdered her own husband Sagar Shrestha. She was subjected to domestic violence for a long time and was battered repeatedly. She killed

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<sup>28</sup> Ibid, s 13.

<sup>29</sup> Laxmi Baadi vs. HMG, Decision No. 7246, 2060 (2003).

<sup>30</sup> NG vs. Joak Kumari Karki, Decision No. 8223, 2066 (2009).

<sup>31</sup> Gurans Devi Lama vs. Radhika Shrestha, Decision No. 9242, 2071 (2014).

her husband by setting him on fire in a closed room on 2068/01/29. The cause of death as per the post-mortem report was 'burn injury'. The case was further referred to the Supreme Court for confirmation (साधकजाच). Defendant Radhika Shrestha, while making a confession in the police custody as well as in the court, confessed committing the crime because she was being subjected to repeated battery, unbearable torture and violence.

The court upheld the decision of Appellate Court, Patan to imprison the defendant for 10 years without confiscating her property. Further, the court also issued a standing order in the name of Council of Ministers and Secretariat of the Legislature-Parliament to introduce laws and amend the existing laws and manage other infrastructures at the earliest possible regarding BWS in the context of Nepal.

### **Case analysis in comparison with legal provision of Nepal:**

In the above mentioned cases, the lower court's interpretation regarding BWS was limited to the application of no. 188 of the Chapter on Court Management. Here the question arises whether it is important to point out that Battered Women Syndrome is a recognized defense and simply proving that a woman was abused by her victim is ground for acquittal or not? While answering the question, it is important to point out to the jury the number of differences between the behavior of a battered woman and the behavior of a non-battered woman in order to show how and why battered women would attack for abuse done in past, whereas a non-battered woman would not. In the context of Nepal, with BWS being a completely new issue in psychological and legal field, it is quite difficult to deal with such cases. In the above cases, we can clearly see the BWS related cases being interpreted using section 188 of Chapter on Court Management of Muluki Ain 2020 BS. which seems irrelevant. Cases of BWS in Nepal clearly indicate that Nepal has no separate provision regarding BWS. Here, the waiver in punishment is given traditionally by using the provision of Chapter on Court Management's Section 188.

The case of Radhika Shrestha can be taken as a progressive change on the judicial practice on such sensitive issues. Here the Supreme Court has set a precedent that the perpetrator of a crime triggered by battered women syndrome (BWS) should be subjected to less punishment than other cases. The bench stated that considering expert testimony on BWS as admissible evidence is a necessity of the time and every necessary legal arrangement should be made to lessen the sentences or to give amnesty to such battered women. The bench has explained that in the case of a battered woman, the deceased himself triggers the crime by repeatedly subjecting her to forceful physical and psychological behavior. Therefore, such cases root the necessity to welcome new law as per the change in society and change in the complexity in crime.

### **Analysis in comparison with new laws:**

Battered Women Syndrome, in the first place is caused due to subjection of women to extreme violence and battery. At its worst, women end up killing their abusive partners

as a means of resistance. Advocates of BWS have resorted to this as a normal reaction to abnormal situations. Scholars against it argue that killing cannot be justified based on a speculative and erroneous theory like BWS, which has no scientific grounds for justification. Arguments as to whether or not such women should be given defense based on BWS are a second aspect. In the first place, state and the judiciary should also try to find means of addressing the root causes.

The state cannot jump in to give legal and judicial recognition to the concept of battered woman syndrome as it could mean two things:

- There are chances of women being subjected to acute battery and domestic violence unless it comes to notice of the state and its agents and that state can fail to prevent such violence.
- Women, who are failed to be protected by the state against domestic violence may have to turn up to their abusers themselves to protect their lives because the state has failed to do that.

So, it should be noted by the state that the laws of domestic violence shall be made effective at first. Then after, the implementation of such laws is equally important. Even if the data shows that the husbands' violence on wives has decreased, it can be attributed to the actions of law, empowerment, and employment of women. But it also can be attributable to the fact that people may have been reluctant to report severe marital violence because diminishing attention of public and the media to it as a crime.

If police and the legal system entirely responded more quickly and sensitively to the calls of domestic violence, the situation wouldn't reach that far wherein a wife has to kill her own husband. Law should be able to give enough protection, rehabilitation, and counseling to women who are victims of acute battery before the situation becomes more serious and runs out of hand. Basically, women shouldn't feel that there is no other way to be safe. Enough measures of protection should be ensured for women who are facing acute battery from their own partners.

In the first place, the law should aim to address the problem of acute wife battering and ways of preventing and resolving it. Only after that, the law should address the matter of giving the defense to the woman on the basis of battered woman syndrome. It should not be done as a way of overcompensating for our failure (as a society) to adequately hold batterers responsible for their actions and later for to justify the killing of abusive husbands on the basis of past violence.

Especially in countries like Nepal, it has to be taken into account that bringing evidence of past violence is almost impossible. Lay-witnesses, records, photographs, and expert testimony can be the possible evidences which are very hard to access. In the Nepalese society, where women are either staying at her husband's home or only with her husband, the reluctance of family members to testify against the abusive husband can be a major hurdle. Similarly, women themselves are also reluctant to testify against her partner and disclose about her personal life in most cases. We have an expected gender role in our society. Women are expected to be loyal and understanding in a marital relationship

whereas wife beating is considered to be justified. A weakening of marital bond is often credited to wife. It occurs within the four walls of the house and cannot be easily proved because of the nature of the crime and the overwhelming social compulsions, where fighting back results to more severe beating, situation getting out of control, fear of being left by the husband.<sup>32</sup>

In Nepal, although the law itself hasn't failed to address the diverse issues regarding violence of women, there still exist practical social problems. Much depends on the discretion of judges. If the judges find it appropriate, the victim will be sent back to stay with her abusive husband until the final decision is made. Even if the court decides based on law and issues an interim order to the perpetrator to live together with the victim without subjecting her to any sort of violence, there is no guarantee of the order being implemented completely. The law has no answer to what happens if the abuse and battering continues during that transitional period.

The law mentions that anybody having knowledge of the incident of domestic violence can file a complaint. This increases the chances of such incidents being reported. However, the law has failed to incorporate such incidents in which the victim herself is reluctant to take the case proceedings further against her husband. The law also mentions about a specific service center for the shelter and protection of victims of domestic violence. The existence of such domestic violence service centre was nowhere detected by the researcher despite efforts to search for those. This raises a major question: where are the victims of domestic violence sheltered and how are they kept safe from their abusive husband.

In such conditions, where the law hasn't been able to successfully prevent or resolve the issue of domestic violence against women and it isn't able to give another choice to the victim in order to be safe, the homicide by wife should be considered normal reactions in abnormal situations. What else can the women do to keep herself and her loved ones safe?

However, even if a situation of pleading defense based on Battered Woman Syndrome arises, woman making claims of battered woman syndrome should be given defense only on a reasonable basis and based on their specific situation. The reasonability and necessity in each type of confrontational, non-confrontational and solicited homicide should be analyzed alongside the expert testimony in order to give a decision.

Battered women defense doesn't in any way serve the goal of reducing family violence. In fact, it may promote such violence as a vicious cycle of violence keeps running around in a family. BWS has been given judicial recognition by various different courts all around the world and is closely analyzed before providing judgment and giving a defense. But in the case of Nepal, until now, judicial recognition has been interpreted in accordance with number 188 of Chapter on Court Management (Muluki Ain 2020 B.S.), which provides the judges a discretionary power to mitigate the punishment.

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<sup>32</sup> Saxena (n 13), pp. 168- 208.



However, the government's new Criminal Code which came into effect on 1<sup>st</sup> Bhadra, 2074 B.S. has replaced the General Code- nationally and previously known as Muluki Ain that has been guiding Civil and legal proceedings for the last 165 years. The new Criminal Code has stern provision that replaces the provision regarding the discretionary power of the chief authority on wavier of the punishment. Here the above mentioned Section, no. 188 of Chapter on Court Management, Muluki Ain, 2020 B.S. has been replaced and amended with an additional clause in Criminal Procedure, 2074 B.S.<sup>33</sup>

The judiciary of Nepal has recognized Battered Women Syndrome as a defense in the case of *Gurans Devi Lama vs. Radhika Shrestha* whereby the decision was given based on no. 188 of Chapter on Court management (Muluki Ain, 2020 B.S.). The Supreme Court of Nepal stated that:

‘on the basis of established principles, changed context, demand of the time and seriousness of BWS, it is necessary to manage legal provisions in order to regulate the matters like testing of BWS, admissibility of examination report and expert’s testimony on BWS as an evidence, claims of leniency on punishment made by the defendant in the murder case related to BWS.’

Moreover, in a condition that BWS hasn't yet been incorporated in the law, the existing judicial trend shows that they tend to connect the issue of BWS with Section 39<sup>34</sup> (specifically subsection 'h') of the Muluki Criminal Code Act and Sentencing Act, 2074 B.S.'s section 15 which explains about grounds for determining sentence.<sup>35</sup> Legal analysts have raised question on this new provision, as it is still so ambiguous and leaves multiple layer of interpretation on the part of government and judiciary. It permits the monopoly of judges over such cases which, whereas instead, it has to be clearly and precisely analyzed by the court and the experts. Along with this, problems have successfully occupied its territory relating to BWS because of the idealistic approach

<sup>33</sup> The National Penal (Code) Act, 2017 (*Muluki Aparaadhb (Sambhita) Ain 2074*), s 145, sub-s 1(a), See Chapter 14; The clause was added on 2076 B.S. Baisakh 2. It has been stated that, in accordance to prevailing law if confession is made by the accused in a case involving punishment of imprisonment for life pursuant to law, where the adjudging chief of office in view of the circumstance of commission of the offense, realizes the punishment as referred to in law will be so severe if it is imposed on the accused and lesser punishment should be imposed on him or her, then the chief of office shall determine the punishment imposable by law, and explicitly set down in the reference memorandum such opinion as he or she has made, along with the reason for the same, and judgment shall be referred accordingly.

<sup>34</sup> The National Penal (Code) Act, 2017 (*Muluki Aparaadhb (Sambhita) Ain 2074*), s 39.; The factors mitigating the gravity of offence include: Clauses (a-l) (a) If the age of the offender is less than 18 and more than 75 years old, (b) if the offender has no intention, (c) if the culprit has been provoked or threatened by the victim against whom the culprit has committed the crime, (d) if any grave crime is to be occurred against the offender or any of the close relatives of the culprit, (e) if the culprit confess the crime committed or regret on committing such offense, (f) if the culprit surrenders in front of respective authority, (g) if the culprit confess the crime done and provides compensation to the victim or agrees on providing such compensation, (h) if the culprit has diminished capacity because of physical, mental ability or disability, (i) the extent of loss or harm caused to the victim and the society being insignificant, (j) if the offender rendered assistance in judicial proceedings, (k) if the culprit promise on not committing any criminal offenses in future, (l) if the culprit commits crime under influence.

<sup>35</sup> The Criminal Offences (Sentencing and Execution) Act, 2017 (*Faujdaari Kasoor (Sajaye Nirdhaaran tatbaa Kaaryamayan) Ain*), s 15.

rather than a pragmatist approach.

While discussing on the part of approaches and the laws adequate for such syndrome many questions arises but the common can be heard as, whether or not law is doing anything to prevent violence against women? There is a law but it is adequately protecting the women or has the law been able to make women believe they are safer outside the homes where they are battered, that they have a choice to make? If women are left with no option, the court should think twice before convicting such women of 1st degree murder.<sup>36</sup>

Domestic violence is a root cause of Battered Women Syndrome. So the state should take its obligation to protect victims of battery and violence seriously. So, Domestic Violence (Control and Prevention) Act has to be amended as it is not women-friendly. Domestic violence issues have to be seen sensitively by the government and the court rather than privatizing such issues. When it comes to introducing laws on BWS, it should not be recognized as an absolute defense in all situations. Law should be introduced as a means of maintaining and enhancing social order and not as a means of justifying extra-judicial killings and promoting family violence. Judiciary should objectively analyze the circumstances in individual cases, identify the psychological condition of the victim, reasonableness of the action in light of concept of Battered Woman Syndrome. Laws that recognize and give space to Battered Woman Syndrome should be introduced but it should be flexible enough for the judiciary to analyze and interpret objectively and rigid enough for the judiciary to not misuse the discretionary power handed to them. Not only legal recognition but also the judicial objectivity is utmost when it comes to matters like BWS.

### **Conclusion:**

Awareness should be raised among women regarding the mechanisms of law for the protection of victims of violence against women. This is for the reason that women can escape before they fall prey to the Battered Women Syndrome and consequently end up killing their own husbands. Awareness regarding BWS as a defense may create more problems in an entire societal structure as it creates situations and times of necessity whereby killing of a person can be counted as a matter of necessity and claimed to be reasonable giving them a 'license to kill'. Here what has to be clear is that BWS cannot be that absolute situation whereby a woman killing her own partner is marked justifiable.

The justice system cannot be functional in a way that it approves past violence as an excuse for present illegal retaliation.

Individual cases have individual character but they also possess some patterns of behavior. Once a individual case study is done, research is to be conducted to identify actual problems of battered women to help those with this syndrome and also to find

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<sup>36</sup> Loseke, Gelles & Cavanaugh (n 21), p.245.

ways of preventing it from arising in the first place. Preventive measures are suggested more than curative measures. Men should also be counseled regarding domestic violence. Shelter homes should be provisioned for victims of violence.

If women actually end up killing their partners, assessment should be done, evidence should be looked upon minutely before concluding that it is a legitimate defense or not. Battered Women Syndrome cannot blatantly be given as a defense in all cases. Women rights should be protected but it should not be used as a means to plead defense in criminal activities and escaping the execution of the law. If the defense is given in such manner, there are maximum chances of the law being misused (for an instance, even if the wife has intention and motive to kill her husband, she might plead defense based on battered woman syndrome).

Individual case-based analysis is preferable to the application of general notion. While the self-defense claims of battered women need to be taken seriously, we must critically examine the circumstances of each case. If done so, the judge will be honoring both the law and showing due regard for the defendant. There can be no perfect justice but perhaps it will be as close as we can get.