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Clough, A

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Honour Killings, Partial Defences and the Exclusionary Conduct Model

Key Words: Murder, Manslaughter, Honour Killing, Loss of Control, Coroners and Justice Act 2009

Abstract: The partial defence of loss of control, as set out in s54 and s55 Coroners and Justice Act 2009 makes clear that those fearing violence will be partially exculpated from the harsh mandatory life sentence a murder conviction mandates, while a killing out of sexually jealousy will not. What is less clear is which other circumstances, and emotions, will be included under the umbrella of the two qualifying trigger to the partial defence. This article considers if honour killings in particular will be able to achieve a successful loss of control plea, and a missed opportunity to have such cases excluded expressly by the wording of the Coroners and Justice Act 2009.

Introduction

The long awaited update to partial defences to murder was finally realised in the Coroners and Justice Act 2009, which abolishes the partial defence of provocation¹, and replaces it with a new partial defence of loss of control with two qualifying triggers. These triggers acknowledge not only the overwhelming aspects of the emotion of anger, but also include fear. The message of sections 54 and 55 of the Coroners and Justice Act 2009 is simple. Men who lash out in a jealous rage over claims or evidence of sexual infidelity no longer have a defence, whilst the unique circumstances of battered women who kill their abuser are recognised and included. What is less clear under the terms of the new partial defence is which other emotions, such as those driving an honour killing, might be recognised as deserving or undeserving of a defence to murder when acted upon.

This work will give consideration to honour killings in detail, and evaluate if such cases might achieve a successful plea of loss of control. If so, it will question if this is morally acceptable. This is vital in assessing if the new partial defence will truly serve its purpose in amending the provocation defence to something more appropriate for twenty-first century society. The new partial defence was created to include a loss of control in the defendant stemming from more emotions than mere anger and rage; specifically for those acting in fear, desperation or self-preservation to now have murder mitigated to manslaughter in some circumstances. There are many more emotions which could and might cause a loss of self-control. A non-exhaustive list might include betrayal, disgust and disrespect. Do these emotions warrant the protection of the law?

Cases of honour killings may not be as frequent and are therefore less sensationalised in academia, certainly in this country, but it does not deprive them of importance. This is why we benefit greatly

¹ Coroners and Justice Act 2009 s56

from other jurisdictions' experience and review.² Even one undeserving case being mitigated from murder to manslaughter based on a successful loss of control plea will indicate a problem with the system. These cases will undoubtedly test the safeguards that judge and jury are intended to provide, and require the courts to assess which categories of cases the new defence was meant to encompass. We need to address these potential future problems in such controversial areas and look for solutions to overcome them.³

The Judge's Power to Withdraw The Defence

It is true that every case of homicide is unique. When looking at the problems with the old provocation defence, and the new provisions contained within the Coroners and Justice Act 2009, cases are often discussed by referring to the 'category' they fall into. This categorisation, for instance is apparent, whether it be a discussion of cases of battered women who kill their abuser, or sexual infidelity-related killings. There are less widely discussed categories of killings which might have been mitigated to manslaughter under the old provocation defence, and it is worth reflecting on which of those might still reach jury consideration today. The judge does have the power to withdraw the defence if their opinion is that no reasonable jury could accept the partial defence of loss of self-control on the facts present.⁴ However, some reluctance in utilising this power will presumably still be shown, and what constitutes a 'justifiable sense of being wronged' is still to be determined; a phrase that resonates more with questions than answers. Should the judge refrain from instructing the jury on loss of self-control, it might merely lead to an appeal on those grounds, and therefore the judge may be hesitant to withdraw the defence. At the same time, if the judge does instruct the jury on the partial defence of loss of control, even though it is his prerogative to withdraw it, he is then acknowledging a willingness to potentially have the defence accepted in the circumstances, and is communicating this to the jury.⁵

Already, the judge being able to withdraw the defence from jury appraisal has caused appeal cases on this particularised matter. In the case of *Barnsdale-Quean*⁶, the judge did not leave the issue of loss of self-control to the jury, and the defendant appealed on those grounds. The defendant had maintained throughout the trial that the victim, his wife, had attacked him with a knife and then

² New South Wales, for example, have used an exclusionary conduct model for non-violent sexual advance from constituting adequate provocative conduct, Crimes Amendment (Provocation) Act 2014 Schedule 1 section 23 (3)(a)

³ Ibid.

⁴ Coroners and Justice Act 2009 s54(6)

⁵ This could account for the recent cases where the jury accepted the loss of control defence in cases where the sentencing judge deemed the provocation 'low'. For example, *Ward* [2013] EWCA Crim 3139, *Lodge* [2014] EWCA 446

⁶ *Barnsdale-Quean* [2014] EWCA 1418

killed herself. The opinion of the doctor who treated his wounds was that the injuries were not life-threatening, and in fact most likely self-inflicted. The judge decided that the defence's case was not at all consistent with the loss of control defence, and the crime, if committed as the prosecution had contended, would have involved a degree of preparation and manipulation. The appeal was therefore dismissed. In the case of *Jewell*⁷, the defendant also appealed his murder conviction for the very same reason. In this case, the defendant had driven to the victim's house with a gun, and a "survival kit", and shot him twice before leaving the scene. He claimed that the victim had previously made threats on his life, and had connections with some very unsavoury characters. He had said he was not in control of what he was doing at the time, and that he had not intended to kill the man.⁸ However, the trial judge concluded that he was acting in a controlled way, particularly having regard for the lengths he had gone to in preparation, involving borrowing a gun, and so did not leave the issue of loss of control to the jury. This appeal was also dismissed, and illustrates the more constrained ambit in which this partial defence currently operates.

The recent appeal cases of *Gurnipar and Kojo-Smith*, two appeals heard together, provided further explanation of how the judge's power to withdraw the defence should be interpreted.⁹ It was noted that the difference in the judge's role between the old provocation partial defence and the new loss of control partial defence is that the former only required 'evidence' of elements of the defence to be present for the defence to be left to the jury. The latter expressly requires 'sufficient evidence' that the elements of the defence are present.¹⁰ In the present case, this was determined to mean that the judge must be satisfied that evidence exists showing the defendant lost self-control, a qualifying trigger was present, and the objective test met:

*"It is clearly the judge's task to analyse the evidence closely and be satisfied that there is, taking into account the whole of the evidence, sufficient evidence in respect of each of the three components of the defence"*¹¹

Therefore, the judge is to consider the quality of the evidence presented, and if he decides sufficient evidence has not been presented in relation to any of the three elements, he is not obliged to instruct the jury on the partial defence. It was also noted that the judge must consider that the jury may take a different view on the evidence as presented.¹² This makes the judge's role in determining whether or not to leave the defence to the jury extremely troublesome.

⁷ *Jewell (Darren)* [2014] EWCA Crim 414

⁸ *Ibid.*, [18]

⁹ *Gurnipar, Kojo-Smith and another* [2015] EWCA Crim 178

¹⁰ Coroners and Justice Act 2009 s54 (6)

¹¹ *Gurnipar, Kojo-Smith and another* [2015] EWCA Crim 178 [12]

¹² *Ibid.*, [12]

An Exclusionary Conduct Model

Sexual infidelity is expressly excluded from providing the basis of a qualifying trigger under the Coroners and Justice Act 2009. One of the criticisms of the sexual infidelity exclusion to the new partial defence of loss of control is that it is unnecessary when there are other safeguards in place. Such safeguards are namely: the judge's prerogative to withdraw the defence; a loss of self-control based on behaviour the defendant incited for the purpose of using violence negating the defence; and a considered desire for revenge being excluded. Therefore a specific exclusion of a whole category of cases seems unwarranted. For that same reason, it is logical to presume that these safeguards are to be relied upon to prevent a successful loss of self-control plea in other 'categories' as morally repugnant as sexual infidelity.¹³ For example, honour killings. The question of why sexual infidelity was made an example of, above and beyond categories of cases for which we are generally less sympathetic, is still unanswered. As Withey notes:

"It may be asked why parliament decided that sexual infidelity deserved special treatment, when other triggers that perhaps should have been ruled out can potentially qualify".¹⁴

If their plan was to send out a message that sexual jealousy will no longer be looked upon with sympathy by the courts, it must be asked what kind of message this sends out about other specific situations – is sexual infidelity more morally repugnant than honour killings? Perhaps the reason is that juries are more likely to sympathise with a jealous man who has killed his unfaithful wife than a Muslim man who kills his daughter because he found out she has a boyfriend.¹⁵ The rationale that influenced sexual infidelity over non-exclusionary controversial issues like honour killings is questionable, and unlikely to create an adequate pathway to justice.

The clause excluding sexual infidelity has already proved problematic and indefinite. In the 2012 case of *Clinton and others*¹⁶, the Court of Appeal decided that although sexual infidelity may not equate to a qualifying trigger on its own, it can provide the backdrop against which the courts can view the other provocative incidents. The trial judge in *Clinton* did not leave the loss of self-control defence to the jury due to the presence of sexual infidelity. Clinton killed his wife after she confessed to having affairs, taunted him over his apparent wish to commit suicide, and told him she would leave him to cope with their children. At face value, the trial judge seems to be correct in ruling there was insufficient evidence of the loss of self-control defence to instruct the jury on it. Without

¹³ Such safeguards within the Coroners and Justice Act 2009 are the judge's power s54(6), and the exclusion of killings done with a considered desire for revenge s54(4)

¹⁴ C Withey, 'Loss of Control', (2010) 174 Criminal Law and Justice Weekly 14, 197, 198

¹⁵ S Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 Journal of Criminal Law 223, 230

¹⁶ *Clinton, Parker, Evans* [2012] EWCA Crim 2

any infidelity revelations, there is only her taunting him for looking up suicide websites, and telling him he can have custody of their children. Once the sexual infidelity element is added to the situation, it appears much more serious, and certainly more likely to have caused an emotional outburst which may have caused a loss of self-control. The Coroners and Justice Act 2009 tells us to disregard this, but the Court of Appeal would have us believe that the intention behind the exclusion was to prevent the partial defence being used in cases where sexual infidelity was the only factor. Is this ever expected to occur? It is highly unlikely.

This decision by the Court of Appeal gives merit to the idea that the exclusion within the Coroners and Justice Act 2009 was mostly a political statement, with cases of sexual infidelity actually being dealt with on their merit rather than outright excluded. Therefore, the question remains as to why this was also seen to be the answer for cases of honour killing.

Should All Honour Killings Constitute a Murder Conviction?

The basis of the traditional provocation defence was undoubtedly that of honour, from a nineteenth century duel to sexual infidelity cases twenty years ago.¹⁷ Morgan described the foundation of provocation as enabling men to avoid a murder conviction, “who felt that their honour had been violated”¹⁸. The concept of loss of control is not related to this notion at all, as Wells has observed:

*“Concepts of outrage and honour are quite distinct from the excuse of loss of self-control that dominates the modern day provocation doctrine”.*¹⁹

The concept of honour, and violating one’s honour, differs dramatically between religions and cultures. Here it is the old-fashioned view of a man’s honour, at a time when a woman was considered a chattel. Notions of honour have diminished in modern day western culture, but this is not true of all religions and cultures. Such an association between honour and homicide in the UK is now mainly applicable to only ethnic minority groups.²⁰ The homicides we refer to as ‘honour killings’ occur when a male family member kills a female family member for bringing dishonour upon the family through sexual activity outside of marriage, although it can be embraced within instances of flirting, refusing to marry a man chosen by their family, or even in instances of rape. This is usually due to either a religious or cultural belief that standardises and inculcates loss of control. In the UK, Keyhani describes the clash of cultures as being responsible for this importation:

¹⁷ *Mawgridge* [1707] Kel 119 84 ER 1107, *Mason* (1913) 8 Cr App R 121 CCA

¹⁸ C Morgan, ‘Loss of Self-Control: Back to the Good Old Days’ (2014) 77 *Journal of Criminal Law* 119, 119

¹⁹ C Wells, ‘Provocation: The Case For Abolition’ Chapter 6, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 87

²⁰ N Keyhani, ‘Honour Crimes as Gender-Based Violence in the UK: A Critical Assessment’ (2013) 2(1) *UCL Journal of Law and Justice* 255, 266

“Honour crimes punish women who have become too ‘westernised’ in the eyes of their male family members and therefore harmed the girl’s gharat (family honour)”²¹.

It is unfortunate that our domestic courts are not well equipped to deal with such cultural differences²², and while religious beliefs and cultural norms were highly unlikely to establish the old provocation defence factorisations²³, there were instances where the sentencing judge found it predicated a good case for leniency. In the case of *Hussain*²⁴, the defendant was given a more lenient sentence for a murder conviction because the judge noted there was some provocative conduct which would have been particularly offensive to someone of the defendant’s religious beliefs. This is particularly problematic because it implies stereotypes of cultures and depicts them as unchanging.²⁵ As Dogan has noted:

“It is governed by a particular cultural understanding of honour and shame, which is likely to be alien and inexplicable to both the jury and the trial judge in England”²⁶.

Dogan believes that the government have made a substantial error in assuming that honour killings are based on revenge motives, and therefore will be excluded from the provisions of the 2009 Act. His opinion is that there are some honour killing cases which deserve to reach the jury, as many have a final triggering incident after cumulative events, and not all are based on a notion of revenge.²⁷ He also claims that a motive of revenge is not the only false assumption made about honour killings.²⁸ While the public will assume that the defendant in a case of honour killing is content with their actions, his study of Turkish prisoners convicted of such crimes found that this is not always the case, with around fifty percent claiming that they would have acted differently in retrospect.²⁹ The killings stem from a much more wide-ranging collection of emotions such as desperation, shame, humiliation and betrayal.³⁰ The killing is often undertaken because there is overwhelming pressure from the community to which the defendant belongs to restore family honour, which is more important than any one individual life.³¹ His study was of defendants convicted of honour crimes in another jurisdiction, nevertheless it is still relevant to honour killings in western societies because

²¹ *Ibid.*, 258

²² *Ibid.*, 265

²³ See case of Rukhsana Naz where cultural aspects were considered in regards to a plea of provocation but ultimately rejected. *Shakeela Naz* [2000] EWCA Crim 24

²⁴ *Hussain* [1997] EWAC Crim 2876

²⁵ R Reddy, ‘Gender, Culture and the Law: Approaches to “Honour Crimes” in the UK’ (2008) 66 *Modern Law Review* 510, 516

²⁶ R Dogan, ‘Did the Coroners and Justice Act 2009 Get it Right? Are All Honour Killings Revenge Killings?’ (2013) 15 *Punishment and Society* 488, 490

²⁷ *Ibid.*, 488

²⁸ *Ibid.*, 507

²⁹ *Ibid.*, 489

³⁰ *Ibid.*, 495

³¹ *Ibid.*, 492

the reasons behind it stem from the same cultural values, without reflection of which country the defendant and victim reside in. Social conditions do change of course when people migrate, but the cultural norms and values are still passed on from generation to generation. Dogan has even gone as far as to point out that it may be harder for a family to deal with behaviour which could eventually lead to an honour killing in the UK because they do not have the support of a tight-knit community and therefore less avenues for help with the situation.³² Although honour crimes being dealt with by the English legal system are likely to have occurred because the religious and cultural traditions of the defendant's ethnic minority community are incompatible with the norms of a more westernised lifestyle, such confliction is surely something to be expected when living in western society. Therefore, such cultural norms cannot be so stringently applied, nor a lesser culpability than murder sought. Allowing cultural norms which are detrimental to gender equality to 'seep from society to the criminal justice system' is a dangerous precedent to set.³³ Although the courts need to be accepting of multicultural societies varied norms in relation to discovering what is deemed socially acceptable behaviour, perpetuating those which are gender-based rather than culture based is a misguided notion.

Parallels With Sexual Infidelity

It would be easy to rationalise honour killings being omitted as a specified exclusion to the partial defence, since this is not a vast problem in our society. Sexual infidelity is a common occurrence in our culture, but honour killings are not something we deal with on a scope as large as countries such as Pakistan, where defendants can be acquitted³⁴. As our society continues on the multicultural journey it navigates now, it will be more of an issue in the future. At the moment, these cases are exactly the type the safeguards of judge and jury are designed to rule out.

Interestingly, honour killings share some parallels to sexual infidelity killings. A woman might be killed consequential to simple flirting with another man, sexual activity with a man other than her husband, or refusing to have a relationship with a particular person. This list is as compatible with sexual infidelity killings as it is honour killings³⁵. Tripathi and Yadav have noted that honour killings are rooted in, "the concept of women as a commodity"³⁶. This is the constitutive simulacrum of why

³² Ibid., 496

³³ P Sen, 'Crimes of Honour: Value and Meaning', L Welchman and S Hussain, *Honour: Crimes, Paradigms and Violence Against Women* (Zeb Books, 2005)

³⁴ A Mohammed (1993), *Pakistan Criminal Law Journal* 557, see also Niaz A Shah Kakakhel, 'Honour Killings: Islamic and Human Rights Perspectives' (2004) 55 *Northern Ireland Quarterly* 78

³⁵ A Tripathi and S Yadav, 'For the Sake of Honour: But Whose Honour?' (2004) 5 *Asia-Pacific Journal on Human Rights and the Law* 63, 64

³⁶ Ibid., 65

sexual infidelity killings were more accepted in the past. In the United States of America some states accepted killing a love rival as a justifiable homicide, which is very similar to the situation in Jordan where a “plea of honour” is a legitimate defence³⁷. Both sexual infidelity killings and honour killings could also be said to stem from the emotion of anger owing to the conduct of the deceased. If sexual infidelity killings are specifically excluded, so should be honour killings, as Powers has stated:

“Putting it crudely, we might ask why, if it is no longer acceptable for male members of the dominant group to resort to patriarchal values to excuse violence against their adulterous wives, should it be acceptable for men of minority cultures to do so on the basis of its being an apparently acceptable, perhaps required, way of defending male and familial honour – a “bona fide” cultural practice?”³⁸

Intriguingly, if honour killings were excluded so as to specifically prevent the killing of a female family member for the sake of the family’s “honour”, there might exist the same loophole which the sexual infidelity exclusion will encounter. For example, if the man involved in the extra-marital sexual activity was killed rather than the family member, the exclusion would be evaded straight away³⁹. Similarly with sexual infidelity, if the love rival is killed rather than the person committing the sexual infidelity, would that killing really be excluded? The love rival does not owe any fidelity to the defendant therefore the partial defence could be considered by the courts.

In cases of battered women who kill their abuser, the victim being partly responsible for their own demise is often given as sound reasoning for partially excusing their actions. In the case of sexual infidelity, even though the victim’s actions can be said to be morally improper, the government has shown a zero tolerance approach to partial exculpation on the predicate of excuse for fatal violence. In the case of an honour killing, members of the family would argue that the victim was accountable for her dishonourable behaviour and therefore her own death by bringing shame upon the family through sexually deviant behaviour. It can be expected that the courts will take a similar zero tolerance approach as they were intended to in the case of sexual infidelity.

The Role of Women

Much like sexual infidelity killings, assuming that honour killings are an action of male violence is a misconception. Even though it is female family members who are victimised for acting against traditional religious and cultural norms, the perpetrators can also be female. While it is true to say that women are rarely involved in committing the physical act which ends the life of the victim, they

³⁷ Civil Law of Crimes of Honour, Article 340 Jordanian Penal Code (No. 16, 1960)

³⁸ H Power, ‘Provocation and Culture’ [2006] Criminal Law Review 871

³⁹ *Ali (Chomir)* [2011] EWCA Crim 1011, the defendant’s two sons had killed the boyfriend of their sister.

still often play a 'significant part'.⁴⁰ For example, in the case of *Naz*, it was her mother who held her down while her brother strangled her using a plastic cord. When her younger brother tried to stop this event, the victim's mother fended him off and told him to 'be strong'.⁴¹ Female family members also often play a role in covering up such deaths to prevent stigma for their family which might prevent the younger female family members from marrying.⁴²

The Case of Mohammed

In the case of *Mohammed*⁴³, the defendant was a devout Muslim and the victim was his daughter. She lived with him in the family home. On the day of the fatal act the defendant returned home from mosque to find a young man in his daughter's bedroom. He had suspected her of having a relationship with this man, which she had previously denied. By the time the defendant had fetched a knife from his own bedroom, the young man was climbing out of the victim's bedroom window. When the defendant headed downstairs to give chase, his daughter tried to block his way, and he stabbed her to death, turning her face to his. There were more than nineteen knife injuries. Mohammed raised the defence of provocation, along with lack of intent, claiming he was a "peaceable, non-violent man, with deep and sincerely held religious beliefs, who possessed ordinary powers of self-control"⁴⁴. He claimed that he believed his daughter and the young man had engaged in sexual activity, and from this point onwards he lost control. Mohammed was convicted of murder, and subsequent appeals were dismissed.

Utilising the facts of this case and hypothecate presented, would a successful plea of loss of self-control be likely under the umbrella of extant law? It is evident, not only by the defendant's own admission, but by the substantial amount of knife wounds which would suggest a frenzied attack, that this defendant lost self-control. On assessing the defendant's actions it is asked if a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have acted in a similar way⁴⁵. This might depend on whether the defendant's religion and culture can be said to be the 'circumstances of the defendant'. If the defendant could be attributed these 'characteristics', the answer would likely be yes. Without it, the question is merely asking if a man who found his daughter in her bedroom with a young man would have killed her. Without the religious context, the actions have no immensely offensive meaning. Withey speculated that the daughter's conduct would indeed count as a qualifying trigger under

⁴⁰ Keyhani n(20) 262

⁴¹ *Shakeela Naz* [2000] EWCA Crim 24

⁴² Keyhani n(20) 263

⁴³ *Mohammed* (2005) EWCA Crim 1880

⁴⁴ *Ibid.*, [29]

⁴⁵ Coroners and Justice Act 2009 s 54(1)(c)

s54(4) of the Coroners and Justice Act 2009, but identifying a justifiable sense of being wronged would prove much more difficult.⁴⁶

Assessing The Second Qualifying Trigger Alongside Religion and Culture

Did the victim's conduct constitute circumstances of an extremely grave character causing the defendant to have a justifiable sense of being seriously wronged? Undoubtedly, Mohammed felt this, due to his religious beliefs. In an interview after the incident, he said the following:

"It's in our holy book, the Koran, without marriage, a man and woman cannot sleep together on the same bed. If they sleep together, they can't call themselves Muslim. There is no alcohol allowed in our religion, and there is no sex allowed before marriage. This is not allowed in our religion. If it was disallowed in your religion, you would have done that".⁴⁷

Not only did the defendant view the circumstances as seriously grave, but he also considered that any reasonable person of his religion would have acted in the same way. Religion is a crucial aspect here, and certainly the defendant's religion and culture affected the gravity of the situation for him. Whether or not it could be included in "the circumstances of D"⁴⁸ is debatable and there is no doubt it will be deliberated by the courts at some point. Stanley Yeo⁴⁹ noted that it is not merely the values that religion asks you to live your life by, but your emotional disposition moulded by those values that will affect how you react to a situation that is threatening to your moral integrity:

"The Indian approach fully appreciates that the accused's reaction to the provocation is not solely the result of its being an affront to her traditional or cultural values but is also the result of her emotional and psychological disposition moulded by those values".⁵⁰

He also observes that this might be exceptionally difficult for migrants who were not raised in our culture and therefore not exposed to 'the various socialising institutions of the host country'.⁵¹ Reilly commented that emotion in fact is 'an appraisal of surrounding circumstances' with particular emphasis on 'the role of the social environment in shaping that appraisal'⁵². If this is indeed the case then to overlook a person's culture when assessing how they would have reacted to a particular behaviour is failing to take into account external factors beyond the defendant's control. To view an honour killing without the religious and cultural background would be as difficult as the problems created by the sexual infidelity exclusion – the context is vital. As Dogan asserts:

⁴⁶ Withey n(14) 198

⁴⁷ *Mohammed* (2005) EWCA Crim 1880 [14]

⁴⁸ Coroners and Justice Act s54(1)(c)

⁴⁹ S Yeo, 'Lessons on Provocation From the Indian Penal Code' (1992) 41 *International and Comparative Law Quarterly* 615

⁵⁰ *Ibid.*, 618

⁵¹ S Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 11

⁵² A Reilly, 'The Heart of the Matter: Emotion in Criminal Defences' (1997-98) *Ottawa Law Review* 117, 129

“Disregarding all cultural evidence irrespective of context in which they occur cannot be a solution for the courts”⁵³.

It might be true to say that families involved in honour killings are actually socialised into thinking that an honour killing is the “correct response” in some situations.⁵⁴

It is safe to say the courts will be tested on the “circumstances of D” issue. Yeo⁵⁵ has cogently observed that in our modern multi-cultural society, much can be learned from the Indian Penal Code. Their law comprises a much more subjectivised ‘ordinary person’. Although this sounds contradictory, the basis of this is not an individual’s own personality traits. Factors affecting not only gravity of provocation, but also powers of self-control, are attributed to the ordinary person for the purposes of the objective test if they are a common characteristic of the subculture to which the defendant belongs.⁵⁶ Not only this, but there is also no requirement that the reasonable person might have acted as the accused did; merely that the reasonable person would have lost self-control. These requirements are more in concurrence to a society which is multi-cultural and are in accord with respecting the different religious views and values expressed within modern day society. Yeo also pointed out that the Law Commission’s recommendations were fairly similar to the Indian Penal Code’s provisions:

“The Commission’s definition of provocation lends itself to this formulation since it speaks of the provocation being “sufficient ground for the loss of self-control” without more, and also removes the troublesome words “do as he did”⁵⁷

The Coroners and Justice Act 2009 does not stretch to these lengths to accommodate the religious and cultural aspects of society, leaving the “circumstances of D” as the only point at which they may be incorporated. In the leading Indian case, that of *Nanavati*⁵⁸, Subba Rao J stated the following:

“The test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused was placed would be so provoked as to lose self-control”⁵⁹

If such provisions were applied to an honour killing case like that of *Mohammed*, it would likely result in a successful plea. Under the Coroners and Justice Act 2009, would it reach the jury? Without following the Indian Penal Code’s very tolerant and accepting guidelines as to the effect of culture and religion not only on decisions but on the ability to make decisions, the answer would

⁵³ Dogan n(26) 505

⁵⁴ Dogan n(26) 492

⁵⁵ Yeo n(49) 615

⁵⁶ Provocation law in India is encompassed by Exception 1 section 300 Indian Penal Code 1861

⁵⁷ Yeo n(49) 625

⁵⁸ *Nanavati* A.I.R. 1962 S.C.605

⁵⁹ *Ibid.*, 630 (Subba Rao J)

likely be no. It is questionable if the law should take into account a lack of exposure on the part of a migrant defendant as having no fair opportunity to act in an objective way.⁶⁰

The American Institute Model Penal Code's notion of extreme emotional and mental disturbance would likely be equally as lenient as Indian law, at least in comparison to the provisions of the Coroners and Justice Act 2009. It could be described as being vague, although it has been also described by the Law Commission for England and Wales as "preferable to a test based on loss of self-control"⁶¹. Murder can be reduced to manslaughter if committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse⁶². It is probably a more practical approach and more easily determined. Extreme emotional outbursts are perhaps more easily identified than a loss of self-control, which is easily linked to anger-related emotions, and therefore more likely to cover situations of betrayal and dishonour. However, the states which have adopted the defence, known as the reform states, have had problems surrounding its implementation and reasoning behind it – mainly in regards to the emotions having to be reasonable but not the actions.⁶³ There merely needs to be a reasonable explanation or excuse for the emotional disturbance⁶⁴, and this does not seem like enough.

Conclusion

The widening of the provocation doctrine by the creation of a new partial defence, which encompasses more emotions than merely anger, could be seen in both a positive and negative light. In order to open the defence up to be inclusive of more emotions so that battered women who kill are sufficiently included, other categories of cases could also be included within the partial exculpation umbrella.

As Dressler has asserted, society certainly excuses too many killings⁶⁵. Perhaps the easiest and most effective way to select which killings *should* be excused is by excluding those that *should not* be excused. Nevertheless, the sexual infidelity exclusion and the case of *Clinton* are harsh reminders that an exclusionary conduct model is not necessarily successful in its purpose.⁶⁶ That being said, the new partial defence represents an opportunity lost as far as excluding groups of cases without

⁶⁰ Wells n(19) 104

⁶¹ Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004) [3.49]

⁶² American Law Institute Model Penal Code Section 210 3(1) (b)

⁶³ See generally, J C Blue, 'Defining Extreme Emotional Disturbance' (1990) 64 Connecticut Bar Journal 473

⁶⁴ American Law Institute Model Penal Code Section 210 3(1) (b)

⁶⁵ J Dressler, 'When "Heterosexual" Men kill "Homosexual/" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard' (1994-1995) 85 Journal of Criminal Law and Criminology 726, 737

⁶⁶ D J Baker and L X Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 Journal of Criminal Law 254

merit.⁶⁷ There still remains potential for an exclusionary model much more extensive than that contained in the Coroners and Justice Act 2009, which would need appropriate legislative drafting. Honour killings could have justly been excluded from providing a basis for a loss of control partial defence along with sexual infidelity, regardless of the potential for the courts to find a loophole for the most deserving of cases. There is a fine line between tolerating other cultures norms and values in a multicultural society, and ruling out behaviour which western society believes should be universally unacceptable.⁶⁸ A commitment must be made to recognising situations which could create misuse of the partial defence, and will not be tolerated regardless of any religious or cultural reasoning.

The new defence means to represent our understanding of the role of emotion in excusing behaviour and affecting judgement. As Reilly states:

*“Although actors might have no control over the arousal of emotion, they have a significant level of control over how to deal with the feelings invoked”.*⁶⁹

It is unlikely that an honour killing would result in a successful plea of the loss of self-control defence. Even if the elements of the defence were met to the point where a judge would feel obligated to leave the defence to the jury, it is implausible that a jury would accept that the objective test was met, unless the ‘circumstances of D’ were determined as including religion and culture. If religion and culture are to be included in the objective assessment, then they should be viewed within the context of the westernised society they are acting within, and whose legal rules and constraints they are governed by. If the government were prepared to specifically exclude whole groups of cases as they have done with the sexual infidelity exclusion, there is no reason why these so-called ‘honour’ killings could not have also been excluded, regardless of whether the defendant has shown remorse for their actions or felt pressurised by their community.⁷⁰ Possibly they neglected to do so because this category of killing does not represent as large a problem as sexual infidelity does in the courts, or because such cases are much less likely to be met with sympathy from the jury, nevertheless to include it would have provided an absolute solution.⁷¹ It is difficult to imagine the gravity of the provocative conduct in an honour killing case if you do not have those religious beliefs that make the victim’s conduct seem so debauched. It is much easier to imagine the betrayal you would feel if your partner committed sexual infidelity. It may be this reason that a jury would be

⁶⁷ Honour killings remain at the mercy of the judge and jury

⁶⁸ Mison has noted that any acceptance of such a defence condones homophobia. R B Mison, ‘Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation’ (1992) 80 California Law Review 133, 136

⁶⁹ A Reilly, ‘The Heart of the Matter: Emotion in Criminal Defences’ (1997-98) Ottawa Law Review 117, 133

⁷⁰ Dogan n(26)

⁷¹ For example, perhaps excluding cases of non-violent homosexual advance would convey a clear message of the law’s stance on homophobic violence, if nothing else.

more sympathetic towards a sexual infidelity killing because they can visualise the situation, and how the defendant would have felt, that made it necessary to exclude it.⁷² This would be the only way to prevent acceptance of the partial defence in such circumstances.

With the loss of control partial defence as it stands now, the judge and jury are called upon to reject the defence in cases of honour killings, something they could seemingly not be relied upon for in cases of sexual infidelity. Specifically excluding honour killings would have sent a very clear message – that such cases will never be met with empathy. If the government were prepared to communicate their dissatisfaction with sexual infidelity killings having being deemed manslaughter by way of provocation in the past, it is unclear why they are leaving the courts to do this in the case of honour killings. Keyhani suggested that honour killings should never be a defence because “the human rights breaches of such crimes override any links to the cultural heritage of the victims or their perpetrators”.⁷³ While this statement contains much merit, changing cultural norms must still be addressed and reflected in twenty-first century law, much like the Indian Penal Code has for many years.⁷⁴

⁷² Edwards n(15) 230

⁷³ Keyhani n(20) 276

⁷⁴ See generally, Yeo n(49)