Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

Provocation prior to murder is regarded as extenuating grounds that reduces charges to manslaughter under the law of homicide.\(^1\) Under section 4 Homicide Ordinance (Cap.339),

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

The two-limb test here suggests that (1) the provoked person (the defendant) has to have sudden and temporary loss of self-control at the time of killing\(^2\) and that (2) the power of self-control to be expected of an ordinary person of the same age and physical characteristics of the defendant would affect the gravity of the provocation offered.\(^3\) Having said that, whether the provocation was enough to make a reasonable man do as the defendant did, individual peculiarities of the defendant affecting his power of self-control should not be taken into account for the purposes of that test.\(^4\) In *Luc Thiet Thuan*, mental characteristics may only be taken into account if where the provocation is by words such as taunts or insults about the characteristic. This would

---

2 *R v Duffy* [1949] 1 All ER 932; confirmed in *R v Ip Siu Man* [1985] HKLY 268
3 *DPP v Camplin* [1978] A.C. 705
4 *Luc Thiet Thuan v The Queen* [1996] 2 HKCLR 45
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

affect the gravity of the provocation but not in the assessment of whether a reasonable man would have reacted in the same way as the defendant.\(^5\)

This essay is divided into four sections: (1) Three Theories Underlying Provocation; (2) Issues of Provocation as a Partial Defence in Hong Kong; (3) Reforming Provocation in Other Jurisdictions; and (4) To Reform or Not to Reform. Here, the ultimate issue to determine the reform of provocation is that whether the current partial defence of provocation is able to achieve justice.

1. Three Theories Underlying Provocation

By explaining the three competing theories to justify provocation, this section aims to explore the issues with provocation and how a legal system should treat provocation to achieve justice.

1.1 The “Impaired Volition” Theory

This theory suggests a person has reduced culpability when the defendant’s capacity for self-control was influenced by another’s misconduct.\(^6\) According to the aforementioned two-limb test, killing due to sudden and temporary loss of self-control shortly after the victim’s provocative behaviour, arguably, is less volitional (and therefore less blameworthy) than killing with necessary intention \(^7\) and obvious deliberation. Here, the purpose of the “reasonable man” test could justify in situations

\(^{5}\) Ibid.
\(^{6}\) n 1.
\(^{7}\) In R v Woollin [1999] 1 A.C. 82, Lord Steyn held that the jury should be directed that they are not entitled the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty as a result of the defendant’s actions and that the defendant appreciated that such was a case.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

where the provocation is so significant that even an ordinarily self-controlled person would lose control, rendering the defendant less culpable for his action.

Having said that, this theory is flawed for two reasons. First, it does not focus on the misconduct of the victim. According to Uma Narayanan and Andrew Von Hirsch, “being provoked to violence, as that is understood in everyday life, involves the actor’s having been wronged and responding out of a sense of outrage”. Provocation should be a partially and legally excusable ground only if the victim wrongs the defendant. However, the impaired volition theory disregards this and permits provocation as a partial defence as long as the defendant lose self-control suddenly and temporarily and a reasonable man with the same age and physical characteristics as the defendant would be affected by the gravity of provocation. For instance, in R v Doughty, the defendant killed his 17-day old baby because the baby cried constantly. The Court of Appeal held that the baby’s crying could amount to a provocative act within the meaning of s.3 of the Homicide Act 1957 and the father’s murder conviction was substituted for manslaughter and his life sentence reduced to 5 years. Here, the baby did not wrong the father as crying is a natural expression of a newborn baby. Yet, the father was acquitted of murder under the Homicide Act 1957.

Also in HKSAR v Leung Yuk Ping, the defendant started a quarrel claiming some money went missing in his premises and stab the victim at the heart. The defendant “had a tendency to resort to aggressive behaviour and knives when agitated

---

8 n 1.
9 (1986) 83 Cr App R 319
10 Ibid.
11 [2019] HKCA 77
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

or annoyed" and was convicted of manslaughter by the reason of provocation. It is possible that the victim did not steal the money or wrong the defendant. Even if the victim stole the money, the defendant’s response was considered disproportionate. Yet, the defendant was able to obtain a discount for imprisonment. This is likely to be unfair for the victim. The victim’s death was unnecessary given that he probably did not wrong the defendant. Therefore, by failing to take the victim’s misconduct into account, the impaired volition theory and the defence of provocation are more likely to be flawed and unfair to the victims.

Second, the scope of the theory and the two-limb test is too broad as it covers other emotions that causes the defendant to lose self-control. According to Oxford Dictionary, provocation is generally understood as an “action or speech that makes someone angry, especially deliberately”. This means that if a person uses provocation as a partial defence, his violent act should be a response out of anger. However, the scope of this theory and the test allow other emotions as a mitigation factor as long as the emotions impair the defendant’s volition and self-control. For instance, in Doughty, the father was distressed and annoyed by the crying of his baby, provoking the father to kill his baby. If other emotions could be considered as provocation, would not the partial defence be too broad in application?

12 Ibid. para 12.
13 Ibid. para 12.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

This theory might be widely accepted as the foundation of provocation as a partial defence of murder, yet it seemingly fails to address the wrongdoing of the victim and the scope of the theory is probably too broad.

1.2 The Proportionality Response Theory

Jeremy Horder suggests that, given the defendant have been wronged, “the retaliation inflicted as a result of a loss of self-control can and ought to be proportionable to the judgment of wrongdoing made”\(^\text{16}\) in order to be partially justifiable. Based on this logic, an ordinary person who is wronged is justified to express anger through a proportionate act of retaliation. Here, Horder believes that the defence of provocation is an excuse that requires significant elements of moral justification, which focuses on the fact that the defendant only did what he did in anger, outrage, or a loss of self control.\(^\text{17}\) He asserts that the justisfactory element rests on the conduct that “the ethically well-disposed agents regard as having understandably taken an urgent but temporary moral precedence over the obligation to refrain from inflicting harm”\(^\text{18}\). In this sense, the justification of provocation as a partial defence of murder would be that the defendant was in outrage, suspending his moral conditions, and has overreacted to the victim’s provocative act.

However, this is possibly flawed because an ordinary person has autonomous capacity to make appropriate and proportionate responses and refrain himself from

---


\(^{17}\) Ibid. Ch. 8.

\(^{18}\) Ibid. Ch. 8.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

For instance in *Leung Yuk Ping*, when the defendant believed the victim had stolen his money, the defendant had a wide range of choices to express anger, such as calling the police to handle the matter or bringing a suit, instead of killing the victim with a knife. Out of all available choices, the defendant possibly chose the gravest and the most disproportionate act. Even if the defendant could be easily triggered, he still had the free will to decide what to do at the time of attacking the victim. Therefore, such kind of retaliation is extremely unlikely to be a justifiable moral response even if the defendant has been wronged.

Horder also recognises this weakness in his argument and concludes that provocation as a partial defence should be abolished. Narayan and Von Hirsch disagree with such conclusion because legally excusable conduct does not have to be morally justified. For instance, it is legally justifiable of a doctor to vaccinate a child against his parents’ wishes because childhood vaccinations are supported by responsible medical opinion and are likely to be in a child’s best interests.

Nevertheless, abolishing provocation as a partial defence is favoured by several jurisdictions in New Zealand and Australia, including Tasmania, Victoria, and Western Australia. According to the explanatory notes of the Crimes (Provocation Repeal) Amendment Bill, The New Zealand Parliament has identified the fundamental flaw of the partial defence is that “it assumes ordinary, reasonable people, when

---

20 [2019] HKCA 77
22 Crimes (Provocation Repeal) Amendment Act 2009
23 Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas)
24 Crimes (Homicide) Act 2005 (Vic) s 3
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

Confronted with severe provocation, will act with homicidal loss of control, when in fact only extraordinary people do". The justifications behind the abolition of provocation will be further discussed in section 3 of this essay.

1.3 The Moral Conflict Model

As Von Hirsch suggests, this model asks whether the defendant can be fully blamed in response to the victim's wrongdoing. This differs from Horder's model which asks whether the act is morally justifiable. Von Hirsch believes that when the defendant is wronged, he ought to feel anger and take appropriate remedial steps. Here, the conflict is of moral emotions between “a sense of legitimate grievance driving the person forward to act” and “a sense of the appropriate type of response counselling restraint in the choice of expressive means”. Coinciding with Horder's theory, this model believes that killing is not morally justifiable. However, this model holds that the defendant is less to blame due to the victim's misconduct, warranting moral sympathy.

This approach is probably less problematic in comparison to the other two because it addresses the misconduct of the victim and solves the issue of morally and legally excusable justification. Adopting this approach, the court might ask whether the victim's misconduct is “substantially wrongful” or “seriously wrongful”. If so, the

---

26 Crimes (Provocation Repeal) Amendment Bill. Explanatory Notes. p.2
27 n 1.
28 n 1.
29 n 1.
30 n 1.
31 n 1.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

defendant could potentially be less to blame and therefore allowing provocation as a partial defence.

2. Issues of Provocation as a Partial Defence in Hong Kong

As aforementioned above, the issues of provocation as a partial defence in Hong Kong are:

(1) this partial defence does not address the wrongdoing of the victim;

(2) this partial defence does not concern with the blameworthiness of the defendant;

(3) the scope of this partial defence is probably too wide; and

(4) this partial defence presumes ordinary, reasonable people, when confronted with severe provocation, will act with homicidal loss of control.

Other problems include (but not limited to): (5) the confusion caused by the mixture of judge-made law and legislative provision; and (6) the risk of abusing provocation as a partial defence.

3. Reforming Provocation in Other Jurisdictions

In this section, this essay will compare how different jurisdictions deal with these issues.

3.1 Sweden

In regards to the first two issues, Sweden may possibly provide a clear framework to address the wrongdoing of the victim and the blameworthiness of the
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

defendant. According to section 3(1) Chapter 29 of the Penal Code, special consideration may be given if the crime “was occasioned by the grossly offensive behaviour of some other person”.\(^{32}\) This means that if the offence is a result of seriously wrongful behaviour by the victim, it could potentially provide a ground for mitigation as the defendant is less to blame.

This approach may favour family abuse cases. One example would be cases involving battered woman syndrome. Here, due to repetitive violence and trauma, this could heighten the defendant’s fear and eventually lose self-control to kill the abuser.\(^{33}\) This does not mean that the defendant’s act is morally justifiable but that it is less to blame due to the victim’s seriously wrongful conduct. In this sense, provocation as a partial defence is likely to be better than the current one. This approach is also adopted by England, New South Wales, and Northern Ireland.\(^ {34}\)

3.2 New South Wales and Queensland

Regarding issue (3) and (6), New South Wales and Queensland may offer some insights on restricting the use of provocation.

In New South Wales, the Crimes Amendment (Provocation) Act 2014 repealed section 23 Crimes Act 1900 and substituted it with “extreme provocation”.\(^ {35}\) Under section 23(2), extreme provocation may be applicable if and only if:

---

\(^{32}\) Ch.29, The Penal Code

\(^{33}\) For instance, see Ahluwalia [1992] 4 All ER 889.

\(^{34}\) See s.55(4)(b) and (6)(b) Coroners and Justice Act 2009.

\(^{35}\) This reform is mainly due to the case of Singh v The Queen [2012] NSWSC 637, in which the applicant slit his wife’s throat out of anger that his wife possibly cheated on him, and out of stress and fear that he had financial difficulties, and be deported back to India. He was acquitted of murder and was convicted with manslaughter by the reason of provocation.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

“(a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
(b) the conduct of the deceased was a serious indictable offence, and
(c) the conduct of the deceased caused the accused to lose self-control, and
(d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.”

By significantly restricting the use of this partial defence, “it could not be used in cases where the provocation claimed was infidelity, leaving a relationship or a non-violent sexual advance”.36

Besides, the provision further restricts the use of extreme provocation by prohibiting the conduct that is: (a) only a non-violent sexual advance to the accused, or (b) incited by the accused in order to provide an excuse to use violence against the deceased.37

The provision also states that “conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death”38, allowing cases involving battered woman syndrome to use extreme provocation as a partial defence.

However, a large portion of people in New South Wales are in favour of abolishing the partial defence completely. According to Kate Fitz-Gibbon, abolishing

---

36 Second Reading Speech, Hansard, Legislative Council, 5 March 2014, p 27034.
37 See s.23(3) Crimes Act 1900.
38 s.23(4) Crimes Act 1900.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

The partial defence in New South Wales is necessary because: (1) the operation of provocation legitimises male violence against female; (2) it denies and minimises the harm caused by lethal domestic violence; and (3) it is unable to respond appropriately to women who kill in the context of prolonged family violence.\(^{39}\)

In Queensland, the partial defence of provocation in section 304 Criminal Code 1899 was amended in 2011 to "reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy".\(^{40}\) Here, the amended Criminal Code 1899 clarifies that the use of provocation is prohibited if:

- (a) a domestic relationship exists between 2 persons; and
- (b) one person unlawfully kills the other person (the deceased); and
- (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
  1. to end the relationship; or
  2. to change the nature of the relationship; or
  3. to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship."\(^{41}\)

Although these two provisions are likely to provide better protection for women in domestic violence, they do not address child abuse, which could be quite problematic in the light of Doughty.\(^{39}\)

---

\(^{39}\) Kate Fitz-Gibbon, 'Provocation In New South Wales: The Need For Abolition' (2012) 45 Australian & New Zealand Journal of Criminology.

\(^{40}\) Criminal Code and Other Legislation Amendment Act 2011 (Qld). per C Dick, Queensland Parliamentary Debates, 24 November 2010, p4251.

\(^{41}\) s.304(3), Criminal Code Act 1899.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

3.3 New Zealand, Tasmania, Victoria, Western Australia

Regarding issue (4), as aforementioned above, New Zealand has identified the issue as a fundamental flaw in provocation and abolished the defence in 2009 as a result. According to the New Zealand Parliament, there are four justifications for the abolition.\(^42\)

First, the Parliament is in the view that by abolishing provocation, the sentencing judge will be able to use his or her discretion under the Sentencing Act 2009 to consider whether life imprisonment is unjust on a case-by-case basis.\(^43\) By doing so, provocation is not acknowledged as an express mitigating factor at sentencing.\(^44\)

Second, abolishing the partial defence would make factors such as the alleged sexual behaviour of the victim and the nature of the relationship with the defendant less relevant at the trial.\(^45\) By emphasising such factors in evidence, it could possibly result in a significant amount of distress for families and friends of the victim, which is not preferred.

Third, the Parliament believes that the partial defence of provocation enables an accused to tarnish a victim’s character, without the victim being able to respond to the accused’s allegations or version of events.\(^46\) This indicates that provocation is potentially unfair for the victim as the victim could no longer defend for himself.

\(^{43}\) Ibid. P. 5.
\(^{44}\) Ibid. P. 5.
\(^{45}\) Ibid. P. 5.
\(^{46}\) Ibid. P. 2.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

Fourth, the Parliament holds that it is considerably upsetting that a successful claim of provocation effectively rewards a lack of self-control for those who intentionally take another's life.\textsuperscript{47}

Other justifications of abolishing provocation include (but not limited to): (1) an intention to kill is murder and that the provoked person who loses his self-control to kill intentionally makes no difference to murder\textsuperscript{48}; (2) factors reducing a person's culpability for an intentional killing should be considered at sentencing instead of forming the basis of a separate partial defence\textsuperscript{49}; (3) the partial defence is inconsistent with contemporary community values on what is excusable behaviour;\textsuperscript{50} and (4) reducing the risk of exploiting provocation as a partial defence since some may take advantage of their tendency to lose self-control to intentionally kill other people.

The major weakness of the abolition is that it fails to address family abuses in which the defendant was wronged (in terms of domestic violence) and retaliated in an inappropriate way. In such circumstance, the defendant should be less to blame. If there are other provisions that could compensate the shortcoming (eg. allowing self-defence as a ground for domestic violence cases), it seems that complete abolition of provocation may effectively reduce chances of exploitation, cause less distress to the victim's families and friends, and achieve a fairer trial and outcome.

\textsuperscript{47} Ibid. P. 2.
\textsuperscript{48} Per Minister of Justice Judy Jackson, Tasmania Parliamentary Debates, 20 March 2003, p. 59.
\textsuperscript{50} Ibid. P. 55. Also see Law Reform Commission of Western Australia, Review of the law of homicide, Final Report, September 2007, p. 217.
Should the partial defence of provocation to murder be reformed?  
If so, why and how? If not, why not?

3.4 England, Wales, and Northern Ireland


According to s.54(1) Coroners and Justice Act 2009, a person is not convicted of murder if the defendant act is resulted from loss of self-control with a qualifying trigger and that a normal person of the defendant’s sex and age might have reacted in the same or similar way.\textsuperscript{51} Under this provision, there are three elements to be satisfied in order to qualify for loss of control defence.

First, the act and omission has to be a result of loss of self-control.\textsuperscript{52} In contrast to the old provision, the loss of self-control does not have to be sudden and the loss of self-control is not sudden if the defendant acted in “considered desire” for revenge.\textsuperscript{53}

Having said that, the meaning of loss of control remains ambiguous. In \textit{Dawes}, the court held that loss of control is a subjective question relating to the defendant’s state of mind and that the loss of control need not be sudden but can be cumulative.\textsuperscript{54} On the contrary, the court in \textit{Jewell} held that loss of control means a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning,\textsuperscript{55} lowering the threshold than that in \textit{Dawes}. Such confusion is

\textsuperscript{51} s.54(1) Coroners and Justice Act 2009.
\textsuperscript{52} Ibid. s.54(1)(a).
\textsuperscript{53} Ibid. s.54(2),(4).
\textsuperscript{54} [2013] EWCA Crim 322. para. 54.
\textsuperscript{55} [2014] EWCA Crim 414. para. 23.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

unsatisfactory as the reform aims to provide a clearer guidance on determining the applicability of the partial defence.

Second, there has to be a qualifying trigger. This includes: a fear of serious violence from the victim against the defendant or another identified person\(^\text{56}\); a thing or things done or said (or both), “constituting circumstances of an extremely grave character”\(^\text{57}\) and causing the defendant to have a “justifiable sense of being seriously wronged”\(^\text{58}\) (both triggers may apply simultaneously). This does not include self-induced ones\(^\text{59}\) and sexual infidelity\(^\text{60}\). Here, the test of what constitutes to an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged is judged objectively.\(^\text{61}\)

This element significantly improves the use of partial defence. As seen in *Hatter*, the Court of Appeal held that “the break-up of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged”\(^\text{62}\). This clarifies what does not constitute a qualifying trigger, and the bar is raised significantly in comparison to the previous partial defence, where baby crying could be a provocative act.\(^\text{63}\)

---

\(^{56}\) n 51. s.55(3).  
\(^{57}\) n 51. s.55(4)(a).  
\(^{58}\) n 51. s.55(4)(b)  
\(^{59}\) n 51. s.55(6)(a),(b).  
\(^{60}\) n 51. s.55(6)(c). However, in *R v Clinton* [2012] EWCA Crim 2, the Court of Appeal held that where other factors count as a qualifying trigger, sexual infidelity may be taken into account in assessing whether things done or said amounted to circumstance of an extremely grave character and gave D a justifiable sense of being wronged under s.55(4).  
\(^{61}\) *R v Hatter* [2013] WLR(D) 130  
\(^{62}\) Ibid. para. 65.  
\(^{63}\) n 15. *Doughty*. Also see the effect of the new law in *Zebedee* [2012] EWCA Crim 1428.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

Third, the “normal person” test must be satisfied. This means that 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 reacted in the same or in a similar way to the defendant. This indicates that all of defendant’s circumstances are relevant in consideration of the partial defence. In Asmelash, the judge misdirected the jury in a way that voluntary intoxication should have been taken into account in the objective standard. The appeal was dismissed as Lord Judge held that voluntary intoxication cannot be taken into account for the test since voluntary intoxication is only relevant to the capacity for tolerance and self-restraint, which is expressly excluded under section 54(3). Such interpretation establishes a high threshold for the defendant because “a sober individual, with normal capacity of self-restraint and tolerance, does not often cross the threshold into loss of control.”

These changes seem to raise the bar for the use of the partial defence to murder in England, Wales, and Northern Ireland. However, some aspects of the reform remain obscure, which should be addressed if we are to adopt their reform.

4. To Reform or Not to Reform?

Based on the aforementioned theories and justifications, this essay would like to urge the need to reform provocation as a partial defence of murder because it is likely that the current partial defence no longer reflects expectation of justice in today’s modern society. Here, the remaining question is how it should be reformed, and I

---

64 n 51. s.54(1)(c).
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

would like to suggest three proposals for the reform based on the need and expectation from our legal system.

4.1 From Provocation to Loss of Control

This proposal is probably widely suggested and favoured because it adopts the loss of control approach under the Coroners and Justice Act 2009. As suggested above, these provisions raise the bar of the partial defence to murder and address the wrongdoing on the part of the victim, which overcome the major weaknesses brought by provocation (and the impaired volition theory).

However, the current loss of control provision remains unsatisfactory. As suggested by Dawes\(^{67}\) and Jewell\(^{68}\), the definition and the test for loss of control remain ambiguous. Therefore, if we are to adopt this approach, we probably need to modify the definition given by section 54 of the Coroner and Justice Act 2009, and to clarify the test used for the determination of loss of control through statute provision or judge-made law.

4.2 From Provocation to Extreme Provocation

Instead of raising the bar for partial defence to murder, this approach is similar to that in New South Wales and Queensland which immensely limits the use of provocation by excluding or restricting certain circumstances from pleading provocation. This means that provocation would remain in operation with some

---

\(^{67}\) [2013] EWCA Crim 322. para. 54.

\(^{68}\) [2014] EWCA Crim 414. para. 23.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?

amendments to provide better protection for the victims (spouses and children) of domestic violence.

One potential problem here is that this approach is rather inflexible. Although this could provide a clearer guideline on the application of provocation, it is possible to render unjust results in exceptional circumstances due to its rigidity. For instance, in *HKSAR v Wong Kok-man*, the 80-year-old defendant killed his 76-year-old wife who suffered from stroke and other chronic diseases.\(^{69}\) Despite the fact that the defendant was convicted of manslaughter on the basis of diminished responsibility, had there been rigid provisions to restrict the use of such partial defence the judge might not be able to provide discretion in such exceptional cases. Therefore, if we are to adopt this approach, we need to be cautious about this drawback.

4.3 From Provocation to None

Here, abolition of provocation merely means that provocation serves as one of the mitigating factors instead of being singled out as a partial defence. In fact, this approach would provide a great degree of freedom for the judge to lower the offence at his or her discretion by taking all relevant mitigating factors into account.

Abolition could be a convenient way to resolve all problems caused by current provocation defence. However, by doing so, the court should still consider whether the defendant was seriously wronged by the victim and whether the defendant should be less to blame. This is because there is a possibility that the defendant experiences moral conflicts when the defendant is seriously wronged although the defendant acts

\(^{69}\) HCCC 94/2018.
Should the partial defence of provocation to murder be reformed? If so, why and how? If not, why not?
inappropriately as a result. This probably deserves some form of moral sympathy where the defendant should be less to blame.

5. Conclusion

This essay urges the need to reform the partial defence of provocation to murder. By assessing different theories, justifications, underlying issues, and approaches by other jurisdictions, three options are proposed: (1) modifying provocation to loss of control; (2) restricting provocation into extreme provocation; and (3) abolishing provocation as a partial defence of murder, depending on the need and expectation from the society. Out of the three proposals, I am in favour of the third option. By abolishing provocation as a partial defence and treating provocation as one of the mitigating factors, the judge could exercise discretion on a case-by-case basis. Judge-made law is an exclusive feature in common law system and I am confident that the Judiciary could make fair and just decisions even if provocation is abolished.