

Should the partial defence of provocation to murder be reformed?

If so, why and how? If not, why not?

The partial defence of provocation to murder (hereafter referred to as “provocation defence” or “defence”) originally emerged in common law as a concession to human frailty.¹ It is based on sympathy aroused in jury, that a defendant claims leniency² in cases where a conviction of murder with mandatory sentence (formerly capital punishment, and subsequently life imprisonment) may be considered as unsafe and unsatisfactory. Where the defence is successfully pleaded, the conviction is reduced from murder to manslaughter, a reduction which has meaningful sentencing consequences.

Unfortunately, the provocation defence has long attracted controversies, ranging from its inherent gender biased nature and misuse by defendants in response to sexual infidelity and relationship separation; to misapplication of the objective test by juries, and contradicting court judgments.

Since Section 4 of the Homicide Ordinance (HK) is a reproduction of the Section 3 of the Homicide Act 1957 (UK), with the latter being repealed in 2010, it is submitted that a re-examination of the provocation defence is necessary, in order to ensure a more accurate and feasible mechanism is in place to capture those who should have claimed a partial defence, and to deny to those who should not.

This paper seeks to first provide an overview of provocation defence; secondly address the underlying problems attached to the current law; thirdly discuss how other jurisdictions reform the provocation defence; fourthly provides reasons for

¹ R v Camplin [1978]AC 705, pp.713, 717, 719, 722, 725.

² Jean Nicol, A valid excuse for murder? *SCMP*(2005) <<https://www.scmp.com/article/515656/valid-excuse-murder>>accessed 15 January 2019.

retaining the defence; and lastly proposes how Hong Kong should reform the provocation defence.

1. Overview of the Defence of Provocation

Provocation operates as a partial defence, lowering the offence of murder for which carries a mandatory sentence of life imprisonment,³ to the lesser offence of manslaughter for which the penalty is at the discretion of the sentencing judge.

The provocation defence is codified under Section 4 of the Homicide Ordinance:

“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.”

In order to succeed in a plea of provocation, the two-limb test stipulates that the jury must find that the defendant was deprived of his/her self-control at the time of the killing – *subjective test*; and that it was the result of words/conduct significant enough to provoke a reasonable person – *objective test*.⁴

³ S.2 OAPO.

⁴ George Mousourakis, Reason, Passion and Self-Control: Understanding the Moral Basis of the Provocation Defence.(2007) 38R.D.U.S p.215.

2. Underlying Problems

2.1. Gender-Biased Nature & Injustice that stem from Operation

Increasing reliance by men on the provocation defence in domestic context; and sexual infidelity-related evidence influencing perceptions of a defendant's culpability – both are long-held concerns aroused from the provocation defence.

Examples of sexual infidelity-related cases include: *Melentin*,⁵ where the Appeal Court commented of the victim's provocation, "to taunt a man about his lack of sexual inclination or prowess [by comparing against another man] does involve striking at his character and personality at its most vulnerable";⁶ as well as the three classic combined appeals – *Suratan, Humes and Wilinon*,⁷ concerning three men who killed their female partners based on "faithless conduct or disenchantment", of which *Humes and Wilinon* successfully pleaded provocation, resulting in 7 years and 4 years imprisonment respectively. Burton contended that, such ruling "implicitly approved the mitigation afforded to jealous man who kill".⁸

As shown, the current form of the provocation defence promotes a culture of "victim blaming". It wrongly privileges men's outrageous responses to conflict,⁹ and unfairly functions as a "licence" for men to kill their female partners who choose to exercise autonomy by leaving her partner.¹⁰ When dealing with such

⁵ [1985]7 Cr App R(S) 9.

⁶ Ibid para.10.

⁷ Attorney General's Reference (Nos.74,95,118 of 2002)[2002]E.W.C.A.2982.

⁸ Mandy Burton, Sentencing Domestic Homicide Upon Provocation: Still 'Getting Away with Murder' (2003)11 Feminist Legal Studies 279.

⁹ Thomas Crofts & Arlie Loughnan, Provocation: The good, the bad and the ugly. *Criminal Law Journal* (2013), 37(1), p.23-27.

¹⁰ Rebecca Bradfield, Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife (2000) UTasLawRw 2, p.35.

morally dubious case, Lord Hoffman once stated in *Smith*,¹¹ that “male possessiveness and sexual jealousy should [no longer] be an acceptable reason for loss of self-control leading to homicide”.¹²

Furthermore, the diverse contexts between genders in which the defence is raised are disturbing – men who kill out of anger and jealousy can plead that they were triggered to lose their self-control by something said or done by the deceased; on the contrary, woman who kill out of fear of serious violence were excluded from the same defence.¹³ Hence, it is submitted that the provocation defence is developed stereotypically based on men’s perspectives and experiences that is inherently biased against women.

2.2. The Objective Test

The objective limb of the provocation defence intends to represent the standard of self-control that can be expected from the society, i.e. “a reasonable man”. However, since Section 4 is silent on the defendant’s characteristics that could be taken into consideration; the problem is to identify what characteristics could be attributed to the reasonable person, such that jury could take them in consideration when determining the defendant’s culpability.¹⁴

Over the years, courts have come up with two approaches with regard to the judicial interpretation of the objective test. Despite provisions vary among jurisdictions, for example, Section 3 of the Homicide Act 1957 (UK; repealed) and Section 169(2)(a) of the Crimes Act 1961 (NZ; repealed); the fundamental problems arise from the objective tests are of the same kind.

¹¹ R v Smith (Morgan)[2001] 1Cr App R 5.

¹² Ibid para.78.

¹³ Vera Baird, Bringing homicide law up to date, *Guardian*(2018)

<<https://www.theguardian.com/commentisfree/2008/aug/05/ukcrime.law>>accessed 8 February 2019.

¹⁴ Ibid(n9)

The **first** approach is that relevance of the defendant's characteristics is confined to their effect on the gravity of the provocation¹⁵ – that is for the jury to first take into account the defendant's characteristics for the purpose of weighing the gravity of the provocation (first inquiry); then determine whether a person with ordinary self-control would have lost that self-control in the face of provocation of such gravity (second inquiry).¹⁶ This approach was supported by the NZ leading case, *Rongonui*.¹⁷

On the contrary, the **second** approach is that the defendant's characteristics are treated as relevant in all circumstances (for both stages of inquiries), thus, the difference between the two approaches lies in the second inquiry. In other words, the second inquiry of the second approach is that – the jury should consider whether a hypothetical person sharing the defendant's particular characteristics would have lost that self-control in the face of provocation of such gravity.

In *Smith*,¹⁸ the House of Lords (majority) favoured the second approach, suggesting that the jury could legitimately “give weight to factors personal to the prisoner in considering a plea of provocation”.¹⁹

Only a few years later, the Privy Council (6:3) in *Holley*²⁰ took the first approach, stating that the only characteristics of the defendant that were relevant

¹⁵ NZ Parliament, Crimes (Abolition of Defence of Provocation) Amendment Bill 2009 (Members Bill - Lianne Dalziel), Digest no.1702<<https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/49PLLawBD17021/crimes-abolition-of-defence-of-provocation-amendment>>accessed 1 February 2019.

¹⁶ Ibid.

¹⁷ [2000]2 NZLR 385(2000).

¹⁸ Ibid(n11)

¹⁹ Ibid para.26.

²⁰ Attorney-General for Jersey v Holley[2005]2 AC 580.

to the objective test are limited to his/her age and gender.²¹ Apart from these two characteristics, the provocation defence should be judged by one standard, “not a standard which varies from defendant to defendant”.²² The PC further clarified that it is for the jury to determine “whether the provocative act or words and the defendant’s response met the ordinary person standard prescribed by the statute [...] not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable”.²³ It should be noted that *Holley*’s approach (i.e. minority position in *Smith* was subsequently endorsed in the HK case, *Liang Yaoqiang*.²⁴

In any event, leaving aside the dichotomy between the two approaches, Lord Nicholls writing for the majority judgment in *Holley*, found the law of provocation as flawed to an extent beyond rescue by the courts.²⁵

2.3.Roles of Judges and Juries

In addition to the difficulty in relation to the objective test as provided in [part 2.2], the test itself may be far too complex and unrealistic for a jury to comprehend and apply to the facts of the case.²⁶ The *Holley*’s approach requires the jury to first take into consideration the defendant’s characteristics in weighing the gravity of the provocation, but then to neglect those characteristics when determining the ordinary person’s self-control.²⁷ Despite a direction is given, jury may still not appreciate the subtle distinction between the first and

²¹ Ibid para.13.

²² Ibid para.22.

²³ Ibid.

²⁴ [2017]2 HKC 123.

²⁵ Ibid para.27.

²⁶ NSW Law Reform Commission, Report 83 (1997) – Partial Defences to Murder: Provocation and Infanticide Contents, para.2.56.

²⁷ Ibid(n20).

second inquiries, as a result, they may choose to neglect the requirements and decide as they think what is fair and just.²⁸

Furthermore, the unexpected number of appeals and the lack of consensus in them demonstrates the defective nature of the defence. For example, in the recent 2017 HK case, *Liang Yaoqiang*,²⁹ the CFA found that the trial judge failed to direct the jury that – the words “do as he did” in Section 4 of the Homicide Ordinance means “the forming by the defendant of the intent to kill or cause serious bodily harm, rather than the precise form of the physical reaction” (i.e. 213 cut wounds).³⁰ Such misdirection may impose a risk of which the jury falling for the latter, which was an impermissible line of reasoning that would inevitably decide that “no ordinary person would have reacted as the appellant did”.³¹ As a consequence, a re-trial was ordered despite the CFA noted that “this is not a case in which it would be appropriate to substitute a conviction of manslaughter”.³²

From a practical perspective, contradicting court judgments and the inherent flaws of the objective test may lead to increasing number of appeals and retrials, resulting in considerable delay and waste of legal resources, for example, shortly after the decision in *Liang*, a third and second retrial was ordered in *Tam Ho Nam*³³ and *Wong Fung*³⁴ respectively.

3. Overseas Jurisdictions

²⁸ Ibid(n26)

²⁹ Ibid(n24).

³⁰ Ibid para.27.

³¹ Ibid.

³² Ibid para.127.

³³ [2017]HKCU 2400.

³⁴ [2017]HKEC 2556.

3.1. *England & Wales (“E&W”)*

In 2010, Coroners and Justice Act 2009 replaced the partial defence of provocation with a new partial defence of “Loss of Control”. Unlike the repealed law which dealt only with proven anger at something already said or done, Section 55(3) goes beyond the ambit of the old law, by including “fear of serious violence from the victim” as a “qualifying trigger” of provocation. Such express inclusion seeks to cater situations in which a battered woman kills a violent partner, by appreciating, “the close connection between the emotions of anger and fear and thus between provocation and self-defence”.³⁵

A major restriction of the loss of control defence is codified under 55(6)(c), which provides that when determining whether a loss of self-control had a “qualifying trigger”, words or conducts constituting sexual infidelity is to be excluded.³⁶ The Ministry of Justice further explained that it is the Government’s position that sexual infidelity should never provide the basis for a partial defence to murder.³⁷

3.2. *New South Wales (“NSW”), Australia*

In 2012, the NSW Legislative Council Partial Defence of Provocation inquiry was launched after the high-profile case of *Singh*,³⁸ in which the defendant was sentenced to just 6 years in prison for manslaughter after killing his wife. Subsequently, the Crimes Amendment (Provocation) Bill 2014 replaced the

³⁵ Jeremy Horder & Kate Fitz-Gibbon, When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing. *Cambridge Law Journal* (2015).ISSN 0008-1973.

³⁶ Ibid.

³⁷ Ministry of Justice, Murder, manslaughter and infanticide: proposals for reform of the law – Summary of Responses and Government Position (2009), para.55.

³⁸ [2012]NSWSC 637.

partial defence of provocation with a new partial defence of “Extreme Provocation”.

While the new defence under Section 23 of Crimes Act 1900 (NSW) retains several key features of the repealed law, such as the concept of loss of control and the ordinary person test,³⁹ it also incorporates certain provisions that drastically restrict its application. For example, the provocative conduct on the part of the deceased must have been a serious indictable offence, as stipulated under Section 23(2)(b).

In addition, Section 23(3) provides that the conduct of the deceased cannot constitute extreme provocation if it was a “non-violent sexual advance” or if the defendant was the one who incited the conduct to provide an excuse to use violence; Section 23(4) provides that the “provocative conduct does not need to occur immediately before the act causing death”; and Section 23(5) excludes any “evidence of induced intoxication”.

3.3. New Zealand (“NZ”)

Over the years, courts in New Zealand faces similar underlying problem as illustrated in [part 3.2]. In relation to the objective test of sufficiency, the leading authority in NZ – *Rongonui*,⁴⁰ preferred the first approach. Nonetheless, Tipping J for the majority, expressed sympathy and understanding for the minority view (second approach), and repeatedly indicated dissatisfaction with the then-current law.⁴¹

³⁹ Kate Fitz-Gibbon, Homicide Law Reform in NSW: Examining the Merits of the Partial Defence of 'Extreme' Provocation' [2017] MelbULawRw10.

⁴⁰ Ibid(n17).

⁴¹ Ibid.

Given that the sentence of life imprisonment for murder is no longer mandatory under the Sentencing Act 2003, the Law Commission is of the view that it would be more appropriate for judges to handle provocative conducts at sentencing, aided by sentencing guidelines.⁴² Accordingly, the provocation defence provided under Section 169 of the Crimes Act 1961 was repealed in 2009.

4. Reasons for Retaining the Defence

(i.e. repeal Section 4 of the Homicide Ordinance and replace it with the new partial defence as illustrated in [part 5])

4.1. Offence Labelling

In addition to the lenient sentencing, the more meaningful role of the provocation defence is to moderate the “stigma and condemnation”⁴³ through appropriate recognition of the defendant’s lesser culpability. Ashworth stated that the label, “murderer” should be “reserved only for the most heinous of killings,” and most people would accept that provoked killing/manslaughter do not belong in this group.⁴⁴ Hence fair labelling is imperative to ensure offences are accurately differentiated and are reflected according to their proportionate wrongfulness.⁴⁵

4.2. Jury Participation

⁴² Ibid(n15).

⁴³ Ibid(n9).

⁴⁴ Andrew Ashworth, *Principles of Criminal Law*. Oxford University Press (2009)6thedn.

⁴⁵ Ibid.

Shifting the determination of provocation from juries to sentencing judges who can consider it in sentencing, not only withdraws transparency but also usurp the jury's fact-finding role.⁴⁶ As Terracini suggested, the concept of believing that “a single judge possessing the collective and wide ranging bank of commonsense and social values of [12] ordinary members of that society is flawed”.⁴⁷ Hence the issue of provocation should be left in the hands of juries in order to enhance public confidence towards the criminal justice system.

4.3. Appropriate Option for Battered Defendants

While there may be cases that are deemed to be undeserving of a provocation defence, there may still be cases where provocation defence is appropriately pleaded and it is the only defence applicable to the particular facts of the case,⁴⁸ for example, battered women who kill in response to prolonged family violence.

Although Section 3 of the Homicide Ordinance provides a partial defence of diminished responsibility, in which its critical requirement of “abnormality in mind” has been held to cover “battered woman syndrome” in *Ahluwalia*,⁴⁹ it should be emphasized that it was an exceptional case – Ahluwalia suffered ten years of physical, psychological and sexual abuse. Most importantly, psychiatric evidence in proving the defendant's mental responsibility being substantially impaired is critical for the defence; however such requirement inevitably excludes battered women who display no signs of PTSD and appears to live without fear of violence.⁵⁰ For these reasons, the provocation defence serves as a desirable alternative to murder for battered defendants who are

⁴⁶ Ibid(n9).

⁴⁷ NSW parliamentary Select Committee on the Partial Defence of Provocation (2013),para.1.22.

⁴⁸ Ibid(n9).

⁴⁹ [1992]4 All ER 889.

⁵⁰ Keerthana Medarametla, Battered women: gendered notion of defences available, (2017)*National Law School of India University*, vol.13(2),p.108.

unable to meet the stringent requirements of the partial defence of diminished responsibility.

Some scholars also claimed that, abolishing the provocation defence may create an “unjustifiable risk” that battered women may be convicted of murder⁵¹ and subject to mandatory life sentence. Therefore, the provocation defence should be preserved as a “halfway house” between murder and self-defence to ensure battered defendants are protected by law.⁵²

4.4. “Transferring Provocation to Sentencing” may leave us Worse Off

Instead of retaining/amending/replacing the provocation defence, many scholars have proposed an alternative model of reform – transfer provocation to sentencing (i.e. abolishing the provocation defence; and for the sentencing judge to take into account provocative evidences as mitigating factors in sentencing), coupled with sentencing guidelines. Classic examples of jurisdiction that have adopted the “sentencing reform” include the three Australian jurisdictions: Tasmania, Victoria and Western Australia. It should be emphasized that sentencing provocation must be accompanied by the removal of mandatory life sentence for murder (in HK).

The High Court of Australia in *Wong*⁵³ provided an explanation of an ideal sentencing guidelines – they are drafted by appellate courts for the purpose of providing guidance to lower courts in relation to the exercise of judicial discretion.⁵⁴ “Guidelines range from general principle, to more specific directions of particular [mitigating factors] to be taken into consideration or

⁵¹ Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, Battered Women Charged with Homicide in Australia, Canada and NZ: How Do They Fare? (2012)45 Aus&NZ Journal of Criminology 383.

⁵² Ibid(n39).

⁵³ [2001] HCA 64.

⁵⁴ Ibid para.5.

given particular weight, and even to directions of the kind of outcome that might be expected in a certain [scenarios], other than in exceptional circumstances”;⁵⁵ for the purpose to reduce the likelihood of unnecessary and inappropriate inconsistency.

On the face of it, it appears that sentencing provocation may be an ideal and quick-fix option; yet, the guidelines that are attached alongside may further complicate the law of homicide.

First, depending on how clear the guidelines are drafted, Stewart and Frieberg identified that sentencing provocation may result in “an upward departure from previous sentencing practices for manslaughter cases”; or vice versa, that the previous sentencing practices for “murder may experience a downward departure to reflect the inclusion of “provoked murderers””.⁵⁶ Likewise, the Law Reform of Western Australia also suggested that an adverse effect in murder sentences may be foreseeable.⁵⁷ Thus, it is submitted that a flexible sentencing practice may, in reality, render the system uncertain and imprecise, which may be disadvantageous and unjust to the defendant.

Second, based on Fitz-Gibbon’s preliminary formulation of the six scenarios⁵⁸ for which sentencing guidelines ought to include for murder in NSW, these scenarios could be achieved through incorporating express provisions to the provocation defence.

For example, scenario one concerns “intimate partner homicide perpetrated in response to actual/alleged sexual infidelity, relationship separation, threat of a

⁵⁵ Ibid.

⁵⁶ Felicity Stewart & Arie Freiberg, *Provocation in Sentencing: A Culpability-Based Framework* (2008)19 *Current Issues in Crim. Just.*283.

⁵⁷ Law Reform Commission of WA, *Review of the Law of Homicide*, Project No.97(2007)221.

⁵⁸ Ibid(n39).

change in the nature of the relationship or verbal taunt”, the proposed directive is that such provocative conducts should not be considered mitigating at sentencing for murder.⁵⁹ Scenario two went beyond the ambit of intimate relationships to cover lethal violence committed towards a third party that is or is engaged in a relationship with the deceased. The proposed directive is that such killings no longer receive mitigation, bringing the law align with today’s society expectations,⁶⁰ such that in cases like *Won*, *Goundar* and *Lovett*,⁶¹ where the “sexual rival” was killed out of anger and jealousy, the defendant will not be able to receive mitigation in the future.

It is submitted that, by inserting a similar exclusion provision like Section 55(6)(c) of the Coroners and Justice Act 2009 (UK) which expressly disregards words and conduct that constitute sexual infidelity in determining the defendant’s culpability, will suffice. [refer to part 5.1.2 for more details]

Third, HK already has an existing tariff sentencing guideline in place, that is laid down by the Court of Appeal for certain offences. They are not a formal scale of tariff and do not take away sentencing discretion, but an accepted starting point for a particular kind of offence,⁶² in particular to cases/offences where disparate sentencing occurs among lower courts. If HK is to adopt sentencing provocation, incorporating the sentencing guidelines in relation to various provocative scenarios to the existing tariff sentencing guideline may lead to confusion, as the former deals with provocative conducts and mitigating factors (qualitative); while the latter deals with tariffs (quantitative).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ [2012]NSWSC 855; [2010]NSWSC 1170; [2009]NSWSC 1427.

⁶² *Mo Kwong-sang v R* [1981]HKCLR 610.

Moreover, the tariff sentencing guideline is not an exhaustive list, new guidelines could be put forward by the COA, for example, the 1/3 sentencing discount on a guilty plea was introduced in 2016. Likewise, if new provocative scenarios could be incorporated to the sentencing guidelines whenever a “popular” or “common” provocative scenario appears, this may shake the public confidence due to the uncertainty as to what exactly amount to a provocative act that could be mitigated.

5. Hong Kong – The Way Forward: Partial Defence of “Utmost Provocation”

It is submitted that a replacement of the provocation defence is necessary, and that it be given a new name – the partial defence of “Utmost Provocation”. The rename would signify a new defence against its predecessor, thus “fostering a fresh jurisprudence on the defence”,⁶³ besides, the word “utmost” would indicate that the new defence only accommodates grievous cases of provocation.

It should be noted that the reform is based on UK’s partial defence of “Loss of Control”. It is proposed that the **first** requirement of the provocation defence is that the defendant acted in response to “utmost provocation” – *the trigger*. The **second** requirement is that a person of ordinary temperament of the defendant’s sex and age, in the circumstances of the defendant might have reacted to the retaliation by forming the intent to kill or cause really serious bodily harm to the victim – *the objective test*.

5.1. The Trigger – Utmost Provocation

⁶³ Ibid(n9).

It is proposed that a set of provisions in relation to what types of conduct could or could not amount to provocation should be codified in the statute as gatekeepers, such that the provocation defence will only go to the jury in appropriate circumstances.

*5.1.1. Words alone **may not** amount to provocation*

In *Conway*, Teague J noted that despite words may be “scornful, derisive or of a taunting kind”, killing a person would have fallen below “minimum limits of the range of powers of self-control that must be attributed to the ordinary person”.⁶⁴ An appeal against the decision not to allow the defence be left to the jury was successful, and a retrial was ordered. Subsequently, the appellant was given the same verdict,⁶⁵ regardless whether provocation defence was raised or not. If we follow the Holley’s approach [part 2.2], that is the provocation defence should be judged by one standard – a person with ordinary self-control taking into account age and gender; accordingly, it is of common sense that words alone would not be able to satisfy the objective test in any event.

Murdock, representing NSW Police Force, also emphasized that words alone should never be able to constitute provocation, irrespective of the “intensity, veracity, or malice of the words”; “it needs to be something more than that”.⁶⁶ Hence, in order to reduce the redundancy in passing the legal test of provocation defence to the jury that would obviously fail, it is proposed that –

- (i) Only words that are violently provocative⁶⁷ in nature that cause the defendant to be in fear of serious violence; and

⁶⁴ R v Conway [2002]VSC 383.

⁶⁵ R v Conway [2005]VSC 205.

⁶⁶ Ibid(n47) para.6.74.

⁶⁷ R v Holmes [1946]1 All ER 524,526.

- (ii) Conduct, or a combination of words and conduct that cause the defendant to have loss control; may amount to “utmost provocation”.

*5.1.2. Anything said or done to end or change a domestic relationship **should not** amount to provocation*

This proposed defence further restricts provocation for the purpose to tackle issues resulting from the reliance on provocation defence by men in domestic context. This is to ensure the law of provocation can distance itself from the “jealous defendants” that has been heavily criticized. Examples of HK cases where men have raised a provocation defence based on sexual infidelity and/or relationship separation include: *Liang Yaoqing, Tam Ho Nam* and *Wong Fung*.

While the Coroners and Justice Act 2009 (UK) has a similar exclusion, which provides that “the fact that a thing done or said constituted sexual infidelity is to be disregarded”, there may also be cases in which men have successfully pleaded provocation beyond allegations of infidelity, such as a divorce. Hence it is proposed that the preferred exclusion should be – in considering whether there is a triggering act for the loss of self-control, “anything said or done to end or change a domestic relationship should be disregarded”, which covers –⁶⁸

- (i) Infidelity of the victim which is discovered by the defendant;
- (ii) Confessions of infidelity by the victim;
- (iii) Taunts by the victim about the defendant’s sexual inadequacy; and or
- (iv) Threats by the victim to leave a relationship with the accused, or actual separation.

⁶⁸ Ibid(n47) para.6.59 – with reference to Select Committee’s recommendations.

The rationale behind, is that a person exercising his/her equality rights in a civilized society, such as the “right to personal autonomy that includes conduct associated with leaving an intimate relationship and choosing a new partner, should not serve to reduce the defendant’s culpability”,⁶⁹ as suggested by Stewart and Frieberg. In this regard, we should be committed to make this clear in the statute, to ensure these evidences will be strike out at the very first place.

5.1.3. Conduct that did not occur immediately before the act causing death may constitute provocation

The provocation defence has long been criticized to be biased against women, as it is “too lenient on those who kill out of anger and too harsh on those who kill out of fear of violence”,⁷⁰ besides, Lord Hoffmann in *Smith* also concurred that provocation under the then-current law is not confined to anger, but may include fear and despair.⁷¹

Consider the case where a woman who suffers prolonged domestic violence, she may have felt that she could not defend herself during the physical abuse, but felt constantly endangered, thus out of fear and despair resorted to delayed and disproportionate force of killing.⁷² Such behavior is common among battered women, yet she may not be able to claim under the provocation defence due to the cooling-off period and was unable to meet the high threshold of diminished responsibility and self-defence as mentioned in [part 4.3].

Therefore, referencing to Section 23(4) of Crimes Act 1990 (NSW), it is proposed that conduct of the deceased may still amount to “utmost provocation”

⁶⁹ Ibid(n56), 294.

⁷⁰ Ibid(n13).

⁷¹ Ibid(n11) para.75.

⁷² Ibid(n2).

even if the conduct did not occur immediately before the act causing death, in order to cater battered defendants who are in fear of serious violence towards him/herself or another.

5.2. The Objective Test

The proposed reform goes further towards dealing with the difficulties created by the objective limb of the current defence, which was outlined above in [part 2.2 & 2.3]. It is proposed that the “utmost provocation” defence should only be available if “a person of ordinary temperament” of the defendant’s sex and age, in the circumstances of the defendant “might have reacted to the retaliation by forming the intent to kill or cause really serious bodily harm to the victim.”

First, the objective test makes reference to the words “a person of ordinary temperament”⁷³ (i.e. ordinary tolerance and self-restraint) proposed by the Law Commission for E&W, as it is unequivocal and less vague than words like, “ordinary person” and “reasonable man”. Furthermore, the defendant’s age should also be taken in consideration when applying the objective test, because capacity of “ordinary tolerance and self-restraint” is dependent on one person’s maturity. In this regard, the position in *Holley* is endorsed.

Second, while Section 54 of Coroners and Justice Act 2009 (UK) uses the words “might have reacted in the same or in a similar way to D” as substitution of “do so as he did” from the old law, both phrases are inherently ambiguous, according to *Liang Yaoqiang*. Without the proper construction of the words, there may be a risk that the jury may engage towards an impermissible line of reasoning that was illustrated above in [part.2.3]. Therefore, it is proposed that

⁷³ Law Commission, *Partial Defences to Murder* (2004) <http://www.lawcom.gov.uk/app/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf>accessed 5 February 2019.

the words “might have reacted to the retaliation by forming the intent to kill or cause really serious bodily harm to the victim” should be codified instead to avoid misdirection by trial judges. In any event, a proper direction should still be provided to the jury to ensure they fully understand the requirements of the objective test.

6. Conclusion

Overall, based on the above analysis, the provocation defence still proves its value in the criminal justice system, thus it may be preferable to work towards circumscribing the boundaries of the defence rather than to abolish it to its entirety. The proposed partial defence of “utmost provocation” strives to rebalance the law in response to the gendered nature of homicide, such that battered women will not be excluded from the defence; while ensuring a defendant who kills out of anger will only be able to rely on the proposed defence in grievous circumstances.

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