Should the partial defence of provocation to murder be reformed?

1. Introduction
This essay proposes that Hong Kong should reform the partial defence of provocation to murder (‘the defence of provocation’). The essay is divided into five parts. The first part is an overview of the historical development of the defence of provocation. Hong Kong’s current law on the defence of provocation will be outlined in the second part. The third part discusses the criticisms concerning the defence of provocation. In the fourth part, provocation models in Canada, England, New Zealand and Australia. Finally, the essay would offer suggestions on how the defence of provocation should be reformed in Hong Kong.

2. Historical Development of the defence of Provocation
The defence of provocation has a long-standing history under the common law. Originated in the 16th century in the United Kingdom, the defence has been used in scenarios where a defendant kills another person due to a temporary loss of self-control. Provocation serves as a partial defence to murder, which reduces a murder conviction to one of manslaughter. The defence of provocation was evolved to mitigate the harshness of the death penalty, which was a mandatory sentence for murder back then.

In R v Mawgridge¹, the court set out four scenarios where the defence is applicable:

i) to free a person who was unlawfully deprived of their liberty;
ii) in response to a grossly indecent assault;
iii) in defence of another; or
iv) killing a man who has committed adultery with one’s wife.

In the 19th century, the rationale of having the defence of provocation no longer based on the idea that anger was a justified response. In R v Welsh² (Welsh), the court introduced the ‘reasonable man’ test in relation to the defence of provocation. According to Welsh³, there must be a triggering event which would cause an

¹ (1707) Keil. 119
² (1869) 11 Cox C.C. 336
³ Ibid.
ordinary and reasonably minded man to lose his self-control. The defence of provococation is justified on the basis that under certain circumstances, the accused would be unable to control his or her behaviour, and that a reasonable man would react similarly in such situations.

3. The Current Law in Hong Kong
Under the current legal regime, Hong Kong retains the defence of provocation as one of the three partial defences to murder. Section 4 of the Homicide Ordinance\(^4\) (Cap.339) lists out three requirements in raising the provocation defence:

i) on a charge of murder there is evidence, whether by things done or by things said or by both together, that constitutes a provocation;

ii) the person charged must have lost one’s self-control due to the provocation; [the subjective limb] and

iii) the provocation was enough to make a reasonable man do what the charged person did. [the objective limb]

The defence of provocation in Hong Kong law contains both the subjective and objective test. The jury must first determine whether the accused was provoked into losing self-control, before considering whether a reasonable man would react similarly as the accused did. The defence of provocation, if successfully raised, reduces a murder conviction to one of voluntary manslaughter. This has a significant impact on the sentencing. While the court has no discretion but to give a mandatory life sentence\(^5\) for persons convicted of murder, the court may impose a discretionary life imprisonment\(^6\) for persons convicted of manslaughter. Since the enactment of the Homicide Ordinance (Cap. 339) in 1963, Hong Kong’s law on the defence of provocation remains unchanged.

4. Criticisms of the Defence of Provocation
The defence of provocation has been one of the areas in criminal law which received wide criticisms. Several major criticisms received by the defence will be outlined below.

\(^4\) Laws of Hong Kong, Cap. 339
\(^5\) Section 2 of the Offences Against Persons Ordinance (OAPO) (Cap 212)
\(^6\) Section 7 of the OAPO (Cap 212)
4.1 The test for provocation is complex

The defence of provocation is difficult for jury to understand and apply. The test has two limbs. The first limb requires the jury to consider the gravity of the victim’s provocation while the second limb requires the jury to determine whether provocation of such gravity could cause an ordinary person to lose self-control and act similarly as the accused. The jury can take into account the accused’s personal characteristics when assessing the gravity of the provocation, but not when assessing the accused’s power to exercise self-control in relation to that provocation.

When applying the test, the jury is required to distinguish between the accused’s personal characteristics for determining the gravity of the provocation and that for determining powers of self-control. Therefore, Honourable Justice Jerrard described provocation as requiring jurors to perform ‘mental gymnastics’. Also, legal scholar Jennifer Yule noted that there is a potential for injustice where the jury is being told to take certain characteristics into consideration in one part but not the other part of the test.

In *R v Mankotia* (Mankotia), Smart AJ observed the following:

‘In practice the gravity of provocation and self-control distinction has proved hard to explain to a jury in terms which are intelligible to them… Members of the jury struggle with the distinction and find it hard to grasp... Other trial judges have had similar experiences.’

The test for provocation also fails to distinguish between values and beliefs the law should and should not tolerate. If all of the accused’s values and beliefs is to be taken into account, prejudiced views of the accused would be accepted as an excuse for one’s wrongdoings. For example, can the defence of provocation be

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10 Mankotia (n.9) 495
successfully raised if a homophobic defendant killed a man after making homosexual advances to him? If the answer is affirmative, the jury would be delivering the message that homosexuality is a culpable behavior and that gay man does not deserve the respect and protection of the criminal justice system.\textsuperscript{11} This hypothetic scenario shows that the underlying sexist, racist or even homophobic factors that the accused may put forward with regards to provocation would lead to manifestly unjust results.

4.2 Gender discriminatory
The law of provocation has been criticised of being discriminatory against female defendants. Created in a time where patriarchal ideology prevailed, the defence operated to ameliorate the criminal responsibility of men when their sense of male dignity or honour was deeply compromised.

This gender discrimination remains in the modern law of provocation. In \textit{R v Duffy},\textsuperscript{12} (Duffy), the court held that the loss of self-control must be ‘sudden and temporary’. This was criticized for being biased towards 'male' excuses for murder as men were said to be more likely to have a ‘sudden and temporary’ loss of self-control than women. As evident in domestic homicide cases, women do not kill their spouse right after being battered or having a heated argument. Having time to calm down after the provocation, they often find it difficult to satisfy the requirement of a ‘sudden or temporary’ loss of self-control\textsuperscript{13}. Although courts have been willing to admit evidence of cumulative provocation since \textit{R v Kiranjit Ahluwalia},\textsuperscript{14} the ‘sudden and temporary’ requirement has remained to be good law. As a result, accused suffering from battered women syndrome may still be forced to plead diminished responsibility instead of provocation to secure a manslaughter conviction.

\textsuperscript{11} Robert B. Mison, Comment, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CAL. L. REV. 133 (1992).
\textsuperscript{12} [1949] 1 All ER 932
\textsuperscript{14} [1993] Crim LR 728.
4.3 Anomaly of the defence
One of the forceful criticisms is that the defence of provocation is an anomaly. While provocation is a partial defence to a murder charge, it is never a defence to any other offences in Hong Kong law. In offences other than that of murder, provocation is a factor the judge would take into account during sentencing. The rationale of the defence is also being criticised to be flawed and dubious. While an angry response to a provocation might have been excusable in medieval times, people are expected to control their behaviour in spite of emotional upsets in the modern society.15 The Justice Minister of the New Zealand, Mr. Simon Power, criticized the defence of provocation for ‘effectively provid[ing] a defence for lashing out violent, homicidal rage and rewards lack of self-control by enabling an intentional killing to be categorised as something other than murder.’16 As a matter of public policy, the idea that an angry person might be partly excused in killing someone is unacceptable.17 Academic studies also show that the notion where a person would lose self-control under certain condition lacks scientific basis.18

4.4 Blaming the victim
Another criticism is that the defence of provocation develops a culture of blaming the victim. The defendant, in raising the defence of provocation, attempts to make one’s conduct less morally culpable as one is provoked to losing self-control. According to Dr. Fitz- Gibbon, the actions of the victim are used as excuses for the accused’s perpetration of lethal violence.19 The issue of provocation would undoubtedly shift the focus of the murder trial away from the accused and onto the deceased.20 This defence of provocation to murder is just as implausible as the

17 Andrew Hemming, ‘Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime’ (2010) 14 University of Western Sydney Law Review 1, 42
19 Fitz-Gibbon, Homicide Law Reform, Gender and the Provocation Defence: A Comparative Analysis (Palgrave Macmillan, 2014) 56
argument put forward by sexual offenders that victims provoke sexual assaults when they dress provocatively or act in a promiscuous manner. The effect of blaming the victim also causes serious distress on the families and friends of the victim. It would be really hard for them to accept that the accused’s conviction of murder being reduced to manslaughter in spite of the fact that all the elements for a murder conviction are present. A verdict of manslaughter would give the victim’s families the perception that justice was not served.  

5. Approach in Other Jurisdictions
In response to the criticisms, jurisdictions such as New Zealand and some Australian states have abolished the defence of provocation. For jurisdictions that retain the defence of provocation, reforms have been carried out in different fashion.

5.1 United Kingdom
In response to United Kingdom Law Reform Commission’s recommendation, the partial defence of provocation to murder under section 3 of the Homicide Act 1957 was replaced by the partial defence of ‘loss of control’ under section 54 of the Coroners and Justice Act 2009. Several major changes have been made to restrict the use of the loss of control defence.

First of all, the ‘sudden and temporary’ loss of control requirement in R v Duffy was abolished. Whether the accused’s loss of self-control was sudden after the qualifying trigger was immaterial. Men and women who kill after suffering a ‘slow burn’ of domestic violence over a period of time could use the partial defence under the new law.

Secondly, the reform gives a narrower definition of what amounts to a ‘qualifying trigger’. The accused would be able to succeed in raising the partial defence if one acted in response to:

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21 VLRC Final Report (n.13) 32
22 2009 c.25
23 Duffy (n.12)
24 Section 54(2) of Coroners and Justice Act 2009 (CJA 2009)
i) fear of serious violence from the victim against the defendant or another identified person; and/or

ii) a thing or things done or said (or both) which—
   (a) constituted circumstances of an extremely grave character, and
   (b) caused the defendant to have a justifiable sense of being seriously wronged.

Thirdly, the issue of sexual infidelity should be disregarded when determining whether there is a qualifying trigger resulting the accused’s loss of self-control. The old law was criticized to be incoherent and illogical: While men can claim they kill their wives as being provoked by the victim's infidelity, the old law restricted the use of partial defences by women with abusive partners. This reform responded to the criticisms by delivering fair treatment to both gender.

5.2 New Zealand
Since R v Clayton Weatherston, there were calls in New Zealand for abolishing the defence of provocation. The defendant, who stabbed the victim 216 times to death, claimed that he was provoked by the victim. His defence of provocation was rejected and he was convicted of murder by the jury. In response to the public outcry, the New Zealand Parliament enacted the Crimes (Provocation Repeal) Amendment Act in 2009 to abolish the defence of provocation in New Zealand. To prevent the possibility of defence counsel relying on the defence as a principle of the common law, the common law defence of provocation was expressly abolished in New Zealand law.

In abolishing the defence of provocation, the Justice and Electoral Committee of New Zealand (‘the Justice Committee’) proposed to consider provocation as a relevant factor for sentencing. Under section 102 of the Sentencing Act 2002,

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25 Section 55(3) of the CJA 2009
26 Section 55(4)(a) of the CJA 2009
27 Section 55(4) (b) of the CJA 2009
28 Section 55 (6)(c) of the CJA 2009
29 [2011] NZSC 105
30 Section 5 of the Crimes (Provocation Repeal) Amendment Act 2009 (NZ)
offenders convicted of murder must be sentenced to life imprisonment unless the sentence would be manifestly unjust. The judge, taking into account the existence and degree of provocation-related considerations, may impose a sentence less than life imprisonment for a murder conviction in ‘manifestly unjust’ circumstances. The Justice Committee preferred leaving to matter to the judiciary in developing case laws as to what circumstances a life imprisonment sentence for murder conviction would be ‘manifestly unjust’.\(^\text{32}\)

5.3 Canada
The defence of provocation is codified the Criminal Code of Canada.\(^\text{33}\) In 2015, the Zero Tolerance for Barbaric Cultural Practices Act was enacted to lift the threshold for raising the defence of provocation. The reform restricted the use of the defence of provocation by requiring that the ‘trigger’ leading to the accused’s loss of self-control must be an indictable offense that is punishable by five or more years of imprisonment as opposed to a ‘wrongful act or insult’ prior to the amendment.\(^\text{34}\)

However, the Canadian reform was not as progressive as other jurisdictions. The immediacy requirement was retained after the amendment, where the accused’s loss of self-control must be sudden and before there was time for their passion to cool.\(^\text{35}\)

5.4 Australia
There are different approaches among states on the partial defence of provocation to murder in Australia. While South Australia has yet to decide its approach, other states either abolish the partial defence or carry out reforms to restrict the defence’s application.

\(^{32}\) Justice and Electoral Committee, Commentary of the Crimes (Provocation Repeal) Amendment Bill (NZ) <https://www.parliament.nz/resource/en-NZ/49DBSCH_SCR4507_1/b9657217b13b0f5f15a69ba6f124dc4aa84ac214>

\(^{33}\) R.S.C. 1985, c. C-46

\(^{34}\) Section 232 of the Criminal Code of Canada

\(^{35}\) Ibid.
5.4.1 States that abolish the Partial Defence
Tasmania\textsuperscript{36}, Western Australia\textsuperscript{37} and Victoria\textsuperscript{38} abolished the partial defence of provocation to murder. The then Minister for Justice of Tasmania stated that the defence of provocation was ‘gender biased and unjust’.\textsuperscript{39} Instead of reform attempts to accommodate the gender-behavioural differences, it is better to abolish the defence.\textsuperscript{40} In states that abolish the partial defence of provocation, a murder conviction does not lead to a mandatory life imprisonment.

5.4.2 States that Reform the Defence
The Australia Capital Territory (ACT), New South Wales, Northern Territory and Queensland has amended the law on the partial defence of provocation to different extent. The amendments can be seen in the following three aspects.

a. Excluding Non-Violent Sexual Advance as Provocation
The ACT\textsuperscript{41}, New South Wales\textsuperscript{42} and the Northern Territory\textsuperscript{43} amended the law to exclude non-violent sexual advance alone as a sufficient basis for a defence of provocation. However, it can be taken into account with other conduct of the victim to determine whether the defence has been established. Similar amendment was made in Queensland\textsuperscript{44}, where an ‘unwanted sexual advance’ cannot amount to provocation other than in ‘exceptional circumstances’.

b. Abolish the Immediacy Requirement
Except for Queensland\textsuperscript{45}, the common law requirement of ‘sudden and temporary’ loss of self-control was abolished in other Australian states that retain the defence of provocation. The conduct of the victim may constitute provocation (or extreme

\textsuperscript{36} Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (TAS)
\textsuperscript{37} Criminal Law Amendment (Homicide) Act 2008 (WA)
\textsuperscript{38} Crimes (Homicide) Act 2005 (VIC)
\textsuperscript{39} Hon J Jackson MHA, Minister for Justice and Industrial Relations, Second Reading Speech, Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (TAS), Parliamentary Debates, Tasmanian House of Assembly, 20 March 2003, 60. (Hon J Jackson MHA, Second Reading Speech)
\textsuperscript{40} Ibid.
\textsuperscript{41} The Sexual Discrimination Amendment Act 2003 (ACT)
\textsuperscript{42} Crimes Amendment (Provocation) Act 2014 No 13 (NSW)
\textsuperscript{43} Criminal Reform Amendment Bill (No.2) 2006 (NT)
\textsuperscript{44} Criminal Law Amendment Bill 2016 (QLD)
\textsuperscript{45} Section 304 of the Criminal Code 1899 (QLD)
provocation in New South Wales) regardless of whether it occurred immediately before the accused’s act or omission causing the victim’s death due to loss of self-control.46

c. Different Definitions of Provocative Conduct
The New South Wales model introduced the concept of ‘extreme provocation’. Similar to the Canadian model, the provocative conduct of the victim must constitute a serious indictable offence that carries more than five years’ imprisonment47. The Queensland model provided that other than in exceptional circumstances, victim’s conduct based on words alone48 or seeking to change or end the domestic relationship49 does not qualify as provocation.

The ACT model provides guidance of what amounts to provocative conduct. Under section 13 of the Crimes Act 1900 (ACT), the accused's loss of self-control must be induced by any conduct of the victim towards or affecting the accused, which includes grossly insulting words or gestures. The Northern Territory model is similar to that of the ACT. Section 158 of the Criminal Code Act (NT) expressly states that grossly insulting words or gestures can be a kind of conduct that induces the accused’s loss of self-control.

6. Should Hong Kong Reform or Abolish the Defence
It is argued that Hong Kong should not abolish the defence of provocation for the following two reasons. First of all, the approach of dealing provocation in sentencing fails to recognize the importance of offence labels. The test for provocation also fails to distinguish between values and beliefs the law should and should not tolerate. If all of the accused’s values and beliefs is to be taken into account, prejudiced views of the accused would be accepted as an excuse for one’s wrongdoings. Offenders who commit manslaughter as opposed to murder have different levels of culpability.50 According to Professor Crofts, offence labels are

46 Section 23 (4) of Crimes Act 1900 (NSW); Section 13 (2) of Crimes Act 1900 (ACT); Section 158 (4) of the Criminal Code Act (NT)
47 Section 4 of the Crimes Act 1900 (NSW)
48 Section 304(2) of the Criminal Code 1899 (QLD)
49 Section 304 (3) of the Criminal Code 1899 (QLD)
of great importance as criminal law is stigmatising in nature. If offenders deserve a more lenient sentence because they are less culpable, that should be reflected in what they are called.\(^{51}\) The Law Society of South Australia also stated that there is an ‘infinite’ number of situations where the culpability of offenders who acted under provocation is viewed as less than murder.\(^{52}\)

More importantly, abolishing the defence of provocation would be a drastic change to the sentencing regime in Hong Kong. Mandatory sentence for murder has close ties with the defence of provocation. Jurisdictions that abolish the defence does not impose mandatory sentence for murder.\(^{53}\) These jurisdictions treat provocation is a factor considered by the judge during sentencing. The Model Criminal Code Officers Committee, in recommending the abolition of the defence, stated that the sentencing process offers a flexible means of accommodating differences in culpability between offenders.\(^{54}\) Given the availability of sentencing options to the judiciary, the defence of provocation is deemed unnecessary in those jurisdictions.\(^{55}\) While Hong Kong has long abolished the death penalty, there is a mandatory life imprisonment sentence for murder.\(^{56}\) To date, there has been no common law system which abolishes the defence of provocation to murder but retains a mandatory sentence of life imprisonment. It is undesirable that Hong Kong’s abolishing of the defence should come in conjunction with abolishing the mandatory life imprisonment sentence to murder.

### 7. Reform Proposal

In retaining the defence of provocation, this essay proposes that the Homicide Ordinance (Cap. 339) should expressly exclude the immediacy requirement. As for the definition of provocative conduct, it is argued that status quo should be

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\(^{51}\) Thomas Crofts, University of Sydney Law School, Evidence, 29 August 2012, 80  
\(^{52}\) Parliament of South Australia, Report of the Legislative Review Committee into the Partial Defence of Provocation (December 2014)37  
\(^{53}\) New Zealand (Sentencing Act 2002 (NZ) s. 102)Western Australia (Criminal Code (WA) s 279(4)), Victoria (Crimes Act 1958 (Vic) s 3) and Tasmania (Criminal Code (Tas) s 158) abolished the mandatory sentence of life imprisonment  
\(^{55}\) Hon J Jackson MHA, Second Reading Speech (n.39) 60  
\(^{56}\) Section 2 of the OAPO (Cap 212)
preserved until an effective legal mechanism can be found in other jurisdiction’s provocation models.

7.1 Express Exclusion of the Immediacy Requirement
In *HKSAR v Singh*[^57], Hon Stock JA stated that the ‘loss of control’ contemplated by section 4 of the Homicide Ordinance (Cap. 339) is the formula taken from *R v Duffy*[^58], which requires is a sudden loss of control rendering the accused momentarily not the master of one’s mind. However, the law has moved on. Except for Canada and Queensland of Australia, all aforementioned jurisdictions reforming the defence of provocation addresses the gender bias criticism (as mentioned in part 4.2) by excluding the ‘sudden and temporary’ requirement under the common law. Express exclusion of the immediacy requirement in the Homicide Ordinance (Cap. 339) not only keeps Hong Kong in line with the international trend, but it also better accommodate cases involving battered women or victims of long-term abuse.[^59]

7.2 Retain the Current Definition of Provocative Conduct
Under section 4 of the Homicide Ordinance (Cap. 339), the provocative conduct is merely defined as things done or said or both by the victim. The general wording in Hong Kong’s current law is based on the Homicide Act 1957 of the United Kingdom. While Hong Kong’s law remains unchanged since its enactment, the definition of provocative conduct has been much more restrictive in other provocation models. For example, provocation models in Australia excluded non-violent sexual advance as a factor considering the defence of provocation. Although the exclusionary approach would remedy the discriminatory aspect of the current law, it is unlikely to be workable and effective in practice.

The defence of provocation is often founded on a number of factors, in which sexual advance is just one of the many. According to the South Australian Attorney-General, it is almost impossible to have a murder case where the presence of sexual advance will be the only matter that is relevant in assessing whether

[^57]: [2001] HKCA 97
[^58]: Duffy (n.12)
provocation should be a consideration at trial.\textsuperscript{60} In \textit{R v Lindsay}\textsuperscript{61} and \textit{R v Green}\textsuperscript{62}, the accused argued that a number of circumstances, other than the unwanted sexual advance, should be considered in combination when assessing the nature of the ‘provocative’ conduct. If the law expressly excluded non-violent sexual advance as a relevant factor for considering provocation, the jury will have great difficulty, no matter how well-crafted the judge’s direction is, in ignoring the victim’s sexual advance and focus on other conducts of the victim the accused claimed to be provocative.

The United Kingdom’s provocation model, which excluded sexual infidelity from being considered as provocative, was criticized by the Court of Appeal in \textit{R v Clinton}\textsuperscript{63}(\textit{Clinton}) for its ineffectiveness. Lord Judge CJ in \textit{Clinton}\textsuperscript{64} noted that the legislation’s intention to compartmentalise sexual infidelity and exclude it when it is integral to the case not only makes things more difficult, but is ‘unrealistic and has the potential for injustice’. Based on the United Kingdom’s experience of reform, it is foreseeable that provocation models adopting exclusionary approaches would also encounter similar difficulties as well.

As can be seen, the approach of isolating certain factor from the bigger picture is artificial and non-viable. It is therefore suggested that Hong Kong should retain its current definition of provocative conduct. All in all, the context of the case will be crucial and the law should not set inflexible restraints as to what the jury can consider.

\textbf{8. Conclusion}

The law on the defence of provocation is never perfect, and it will never be. While abolishing the defence might be an alternative, it would mean a drastic change to Hong Kong’s sentencing regime and pose labelling problems. Despite the inherent flaws highlighted by the criticisms, it is beneficial for Hong Kong to reform rather than abolish the defence of provocation. While provocation models of other

\begin{footnotes}
\item[60] Parliament of South Australia, Report of the Legislative Review Committee into the Partial Defence of Provocation (December 2014) (‘SA Legislative Review Committee’) 34 [6.2.2].
\item[61] (2015) 255 CLR 272
\item[62] (1997) 191 CLR 334
\item[63] [2012] 3 WLR 515
\item[64] Ibid.
\end{footnotes}
jurisdictions may be appealing, Hong Kong’s provocation model should be tailored to its legal context and not a mere replication of other models.

In accommodating offenders suffering from battered women syndrome or domestic violence, it is suggested that Hong Kong should expressly exclude the common law immediacy requirement in the Homicide Ordinance. The ineffectiveness of exclusionary approach in other provocation models suggests that Hong Kong should retain the current definition of provocative conduct until a viable mechanism can be found. While the law must be non-discriminatory and reflect modern values, it must also be workable in practice. The purpose of law reform is not to build castles in the air. No matter how ideal the reform is, its aim cannot be achieved if it is not feasible at all. Compromise is inevitable between balancing the ideal and the reality. Although the proposed reform does not answer all the criticisms and concerns, it is a vital step towards shaping an ideal mechanism.