



*Humboldt University Berlin
Centre for British Studies
Master Class 2013-15*

***Searching for a Coherent Legal Approach to 'Honour Killings' in the UK:
Cultural Considerations at Court and the Potential of the Loss of Self-Control
Defence***

*Master Thesis
by
Nadine Strümpel*

Supervisor: Ali El-Haj

June 2015

Statutory Declaration

I hereby declare the following:

(1) that this work has never been submitted, in whole or in part, for any other degree, examination, or thesis; (2) that it is my own work; (3) that all the sources, including online sources, cited, reproduced, or referred to herein – especially the sources of quotations, images, and tables – have been acknowledged as such. With my signature, I acknowledge that any violation of these declarations will lead to an investigation for cheating or attempted cheating.

This thesis contains 33.956 words.



Nadine Strümpel, Berlin, 30th June 2015

1. Introduction	1
2. Honour, Honour Related Violence and Honour Killings	
2. 1. The General Phenomenon	4
2. 2. Honour Killings in the UK Context	7
2. 3. Honour Related Domestic Violence = 'Ordinary' Domestic Violence?	9
2. 4. Base Motives? The German Criminal Law Approach to Honour Killings	11
3. Principles of English Criminal Law	
3. 1. Aims and Functions of the Criminal Law	15
3. 2. Purposes of Punishment	19
3. 3. How Does the Criminal Law Mitigate its own Severity?	21
4. Who is the Reasonable (Ordinary) Person? The Piecemeal Development of the Provocation Defence and the Person's Characteristics	
4. 1. 'Honour' Roots of the Provocation Defence	23
4. 2. All of the Defendant's Characteristics Are Relevant: R v Smith	27
4. 3. The Call for a More Objective Standard: AG for Jersey v Holley	29
4. 4. Statutory Determination of the Ordinary Person's Characteristics- What about Culture?	33
5. Culture as a Mitigating Factor? The Culture Defence Debate	
5. 1. What is a Culture Defence?	39
5. 2. Cultural Dictates and Responsibility: The Relation between Culture and Behaviour	42
5. 3. 'The Paradox of Multicultural Vulnerability'	48
5. 4. Human Rights, Group Rights and Liberalism	53
5. 5. The Search for the Right Approach to Difference	56
5. 6. Interim Resume for the Culture Defence Debate	58
6. Sex, Age and Culture: Proposal to Include Culture as Relevant Characteristic in the Loss of Self-Control Defence	
6. 1. Provocation as Majority Culture Defence: R v Suratan; R v Humes; R v Wilkinson	61
6. 2. A 'Provoked' Honour Killing? R v Mohammed	65
6. 3. Culturally Shaped Symptoms of the Same Phenomenon? Honour and Passion	68
6. 4. The Ordinary Person as a Person of the Defendant's Sex, Age and Culture	69
7. Conclusion	74

1. Introduction

In October 2002, at the family home, 16-year old Heshu Yones from Acton, West London, had been killed in a brutal way, having been stabbed 11 times and finally having her throat slit. The person who had done this was her own father. He tried to kill himself directly after, but did not succeed. Shortly before the killing, the Kurdish Abdalla Yones had received a letter, written in Kurdish, in which his daughter had been described as a prostitute who was regularly sleeping with her boyfriend, a Lebanese Christian student (see *The Guardian* 'Kurd who slit daughter's throat in 'honour killing' is jailed for life'; *The Guardian* 'Ending the silence on honour killing'). Mr Yones, who "had never adapted to life in Britain" (*The Guardian* 'Kurd who slit daughter's throat in 'honour killing' is jailed for life') and who "wanted his daughter to observe his interpretation of strict tradition" (Ibid.) had despised their relationship and had been afraid of Heshu becoming too westernised. Thus, Judge Neil Denison commented on this case, which ended in a murder conviction: "This is, on any view, a tragic story arising out of irreconcilable cultural differences between traditional Kurdish values and the values of western society." (qtd. in *The Guardian* 'Kurd who slit daughter's throat in 'honour killing' is jailed for life') Was this really a 'tragic story'? The judge's comment seems to reveal a certain sympathy for the defendant, in that it implies that the story was not the result of Mr Abdalla's viciousness but rather the result of those 'irreconcilable cultural differences' and the difficult situation the defendant had to face.

The present paper therefore examines the issue of these so called 'honour killings' in the UK and the search for a coherent way to approach them with the criminal law of England and Wales. The issue is a very complex one and in order to provide an understanding for why this examination is necessary in the first place, it will be considered in chapter one what the term 'honour killing' denotes and why these crimes might require a special legal, as well as socio-political, approach. The general phenomenon of honour killings will be described, followed by an examination of the issue in the UK context and a demonstration of the peculiarities of honour-based violence among immigrants in the UK which make them differ from 'ordinary' domestic violence. Because the debate on honour killings under the German criminal law illustrates very well the underlying problems and difficulties of the whole issue, the first chapter concludes with a

short overview on the German criminal law approach to these crimes.

In the second chapter, the aims and functions of the English criminal law, as well as its development will be outlined. It shall be shown that differing theories and tendencies have influenced the approaches to individual culpability, which has led to a few contradictions within the English criminal law. However, in order to find a coherent way to approach honour killings, it is a crucial question how capable the law is of considering a defendant's individual cultural background. This will be looked at at the end of chapter two. One way of mitigating criminal culpability in homicide cases is the partial defence of provocation, now loss of self-control, which has frequently been mentioned in connection with honour killing cases, as well as with the culture defence debate. This is why the present paper focusses on this defence, too.

It will be shown in chapter three how it has its very roots in a form of honour killings and how it has developed since and how contemporary sentiments as to what constitutes provocation have influenced its applicability. The reasonable person against which a defendant is being measured, as the central element of the defence will be considered and shown how this concept has developed during the cases of *R v Smith* [1999] 4 All ER 387 (QB) and *AG for Jersey v Holley* [2005] 2 AC 581(UKPC) and finally how it has been statutorily fixed in a 2009 Act of Parliament. It shall be argued that a more objective reasonable person concept that limits the applicability of the loss of self-control defence disadvantages defendants from minority cultures, such as defendants in honour killing cases and that therefore, culture should be added as a characteristic of this person.

In order to reveal arguments in favour of this approach, in chapter four, the consideration of culture at court generally will be looked at with the help of the culture defence debate. It will be necessary to determine the relation between culture and behaviour generally, as well as the relation between the state, minority culture groups and minorities within those groups, touching the question of how to approach multiculturalism and difference appropriately. Issues of ethnocentricity, cultural relativism, human rights and liberalism are of central importance here.

Having looked at arguments promoting, as well as opposing the culture defence, the proposal to add culture to the reasonable person shall finally be considered. This includes analysis of a few majority culture wife killing cases, as well as minority culture honour killings. A conclusion will sum up the findings of

this paper.

Unfortunately, due to space and time, there are a few things that could not be considered properly, or not at all, in the scope of this paper: For instance, the roots of the phenomenon of honour killings within Islamic, as well as other cultures could not be profoundly examined. As to Islamic cultures, the question whether this phenomenon has religious or indeed cultural roots would especially need consideration, which would require exegesis of the Quran. Moreover, the author has focussed on the defence of provocation. However, there are other defences or partial defences such as diminished responsibility that could be considered, too. Furthermore, it could be discussed how culture is or can be taken into account at sentencing stage. Also, provocation is a partial defence to murder only. Cases of honour-based non-fatal violence have thus not been considered. Moreover, as to the provocation defence, there are no existing statistics. Therefore, the paper lacks any statistical evidence. Furthermore, none of the cases discussed is from after 2009. The effect of the Coroners and Justice Act 2009 could thus not definitely be examined but remains somewhat speculative. Most importantly, the paper presents only one way to only one sort of crime to legally satisfy cultural diversity.

Often, the phenomenon of honour killings and honour based violence has been dealt with in the framework of the culture defence debate.¹ The author of this paper has opted for an approach that relies on an existing legal defence and its potential to consider culture because the culture defence is a very broad and also merely hypothetical concept. Moreover, once having focussed on honour killings, one necessarily comes across provocation as a partial defence to murder. Having been concerned with provocation, now loss of self-control, the potential of this defence to take into account cultural considerations has been discovered and at the same time it has been realised how the reasonable person can serve to advantage majority culture defendants. So, the question is, how could these cultural considerations in the loss of self-control defence contribute to a more coherent approach to honour killings under English criminal law?

When answering this question, the author tries to achieve, among other things, an awareness of the own ethnocentricity, the awareness that the own culture is just a culture, too, instead of a universal truth. It is easy to condemn other cultures' practices, while not regarding crimes of the own culture as cultural symptoms but

¹ See Frick's text on 'The Cultural Defense and women's rights' for instance.

rather as acts of separate individuals, without trying to get to the bottom of violence against women, for instance. A look into the own history, if not the present age, can relativise many assumptions about the own culture's superiority. The whole issue of honour related violence reveals a need of stepping back, reflecting upon the own culture and thinking about issues of difference and sameness more profoundly. One might come to the conclusion that seemingly disparate phenomena have more in common than one would think at first sight. However, it is just as wrong to equalise all cultures: Differences do exist. Another issue of this paper is the question of how to accommodate difference legally: Accepting relativism, one must also accept the non-universality of the law and how it is just as culturally shaped by the culture of its makers. Yet, the more one thinks about it, the more complicated does this issue get. Cultural relativism, as valid as it might be, does not necessarily help: A state and its legal system must be justified on some determined values. The whole debate is packed with dilemmas, it seems. It shall be discussed in the following.

2. Honour, Honour Related Violence and Honour Killings

2. 1. The General Phenomenon

The phenomenon of so called honour killings is the gravest manifestation of honour based violence (Brandon & Hafez 37). It is debatable whether honour based domestic violence can and should be seen as a form of 'ordinary' domestic violence: A classification of the former already carries significant policy implications. It must be confessed beforehand, that this issue cannot profoundly be examined in this paper. Its complexity would require a detailed historic and cultural overview of violence against women in all cultures, as well as the development of the same in Islamic cultures. However, for the present purpose it must suffice to understand what the terms 'honour based violence' and 'honour killings' denote. Another problem, which will re-occur frequently, must be identified in advance: What makes any differentiation between 'ordinary' domestic violence and honour based violence so difficult is the danger of being ethnocentric. By labelling honour related violence and honour killings in communities of South-Asian and Middle Eastern origin as a cultural issue, one takes for granted exactly the point that is an issue for discussion in this paper, namely that violence against women in the majority Western culture is not a

cultural phenomenon. Walking on thin ice, one is tempted to making no definite statements at all. However, a similar approach to the one Alison Dundes Renteln describes shall be opted for: The awareness of one's viewpoint being naturally ethnocentric to a degree exists- but this is not to render criticism against other cultures futile (Poulter, 'Ethnicity, Law and Human Rights' 114). It must merely be admitted and understood that all statements are being made from a culturally shaped perspective, too.

To begin with, the central idea with honour related violence is that the "honour of an individual or a group is determined by the behaviour of women" (Brandon & Hafez 37). In traditional Muslim societies in the Middle East and South Asia, women are mainly being seen as possessions (Abbas 24). This idea is by no means confined to Asian and Middle Eastern countries. However, for the present context the focus is on immigrants in the UK, with origins in these countries,² so the terms 'honour related violence' and 'honour killings', if not explicitly stated otherwise, will refer to Muslim communities. Later in this paper, the implications of not classifying similar killings committed by white people from the majority community as 'honour killings' are going to be discussed further.³ Aisha Gill provides a useful definition of honour based violence: According to her it is a

highly gendered form of violence, it is an expression of patriarchal power, with women as its victims. HBV is thus considered to constitute any form of violence perpetrated against females within the framework of patriarchal family structures, communities and/or societies where the main justification for the perpetration of violence is the protection of a social construction of honour as a values system, norm or tradition. (Gill 219)

As the family's honour is perceived as resting with the female members, it is their conduct that can potentially bring this shame on the family. This might be the case if women adapt to western lifestyle, defy the parental authority, including resistance of arranged marriages, have relationships before marriage, let alone sexual relationships, use drugs or alcohol, or even if there is only gossip about them, which needs not be true (Brandon & Hafez 6). Mohammad Mazher Idriss defines honour related violence as "acts of violence predominantly against women who are perceived to have transgressed a religious-cultural divide, particularly in matters relating to sexuality." (Idriss 1) There are instances of women having been

2 "In particular, usually only honour-killings by those of immigrant descent are classified as honour-killings. Workers in women's groups say that many murders of partners and family members committed by white Britons are also based in ideas of honour." (Brandon & Hafez 38)

3 See Abu-Odeh, 'Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"' for further information.

killed for even more minor reasons (Brandon & Hafez 52). Men perceive it as a degradation and deep insult to have their property touched by another man and for fathers trying to marry off their daughters, the girl's chasteness, virginity and reputation are most significant (Abbas 24). In any case, the basis for the violence, including killings, is that "a woman's spouse, relatives or in-laws think that their family's social status is more important than the woman's individual welfare." (Brandon & Hafez 27) Idriss also identifies men as "main perpetrators and young, vulnerable women who are the most likely victims." (Idriss 2) In their report for the Centre for Social Cohesion, *Honour-based violence in the UK*, James Brandon and Salam Hafez quote an outreach worker from a Sheffield women's group, pointing out that "to them the community comes first. It is living for others and not living for yourself and it is more important than the life of the daughter." (Brandon & Hafez 28) Another outreach worker speaks of a "moral code in to which you live your life." (Brandon & Hafez 31) Although, under those strict family and community regimes, it is women who suffer the most, male community members have to act within the scope of their traditional roles, too. They often do not have a real opportunity to opt out of these roles. Men might be "coerced to kill their own sisters, and many men commit crimes under fear or threat of violence. They often dare not say 'no' because of cultural pressures, (...)." (Thapar-Björkert 189) As Brandon and Hafez point out for the Kurdish community in the UK, men are seen as "guardians of cultural norms and values" (Brandon & Hafez 28). So whenever there is a threat of a family member breaking those rules, men are obliged to act.

As Joanne Payton has put it, "'honour'-based communities are regulated by gossip" (Payton 73). When families fail to control their female members, whispers and gossip will flourish in the community, social ostracism being the potential consequence. Given the importance that is attached to the community, in order to avoid this ostracism, even parents can be driven to "use violence against their own children." (Brandon & Hafez 32) Dishonour can so totally undermine a family's economic status by ruining the husband's reputation or the marital prospects of sons that mothers sometimes do not interfere with the abuse or murder of their daughters (Meeto & Mirza 46).

However, regardless of how the values are sometimes being footed on religious foundations, according to the predominant view in Western scholarly research,

they only serve to keep women as objects of male power and dominance. Women who try to break out of the system are perceived as a threat to masculinity and male power. It is a patriarchal power system of male control and punishment that is at work (Abbas 24). Tahir Abbas points out that these are “traditional and rural values” (Ibid. 25) and if these occur in a Western immigration context, they are “sometimes imbued with religious justification, although it is known that this is not religious but indeed cultural.” (Ibid.)

2. 2. Honour Killings in the UK Context

Having shortly outlined the ideas in which honour based violence has its roots, the manifestation of its gravest form is now going to be considered: The problem of honour killings has only relatively recently appeared on the UK agenda (Walker 3). Some commentators suggest that they are on the increase in the UK (Idriss 2). Worldwide, it has been estimated that around 5.000 women die in honour killings each year (Brandon & Hafez 37; Meeto & Mirza 42). It has been estimated, although official numbers are lacking, that for Pakistan alone the number is about one thousand, the same seems to be true for India; in Bangladesh there is an estimated number of several hundred.⁴

However, these are not the only countries in which these killings occur (Meeto & Mirza 42). For the UK, the police and Crown Prosecution Service have said that 10-12 women die in honour killings each year (Brandon & Hafez 37). Most of these killings are being committed by people of South Asian origin, predominantly Muslims from Pakistan and Bangladesh. It is appealing that, as Brandon and Hafez point out, seemingly well-integrated, educated immigrants from these communities have frequently been involved in honour killings, which demonstrates that level of education or economic status are not necessarily relevant (Ibid. 39). As expressed above, it is the degree to which a family’s honour is attached to its reputation in the community. As long as a woman’s conceived failing is not known to the community, there is no need to kill her. If, however, there is gossip about her, even if untrue, the family might feel compelled to restore their reputation and honour (Brandon & Hafez 42), as well as warn off other women (Payton 74). Most often, close family members or spouses carry out the

⁴ The Centre for Social Cohesion in its report on Honour Based Violence in the UK relies on numbers including those collected by the Human Right Commission of Pakistan, Oxfam and Amnesty International. (Brandon & Hafez 40)

killing, sometimes professional killers are being hired (Brandon & Hafez 57-58). It seems troubling that female family members, can be involved in the killings, too. A high-profile one of these cases in the UK has been the murder of Rukhsana Naz: She had been “held down by her mother while her brother strangled her.” (Ibid. 45) Brandon and Hafez make a differentiation between honour killings in the South Asian community, the Kurdish community, high-profile cases being the killings of Heshu Yones and Banaz Mahmud, which often have a ritualistic element in it, and Arab honour killings, which are common in the Arab world, but of which there is no record in the UK, the same is true for the Turkish community (Brandon & Hafez 54-61).

There is not enough space here to explain the nature of “South-Asian patriarchy” (Abbas 24). However in the UK context, the perceived need to protect women’s chastity from threats of permissiveness, alcoholism, decadence and sexual transgressions has become greater for Muslim men (Abbas 24; Meeto & Mirza 49). Especially, the main threat of sexual permissiveness has increased: “Muslims in Britain live in a society that has witnessed the highest rate of teenage pregnancies in Western Europe for over two decades.” (Abbas 25) ‘Islamophobia’ is another factor contributing to a rising sense of a need to protect their community from the wider society (Ibid.). Sebastian Poulter also has identified the problem that

faced with continued prejudice, discrimination, and even violent attacks from sections of the minority community, many members of the ethnic minority communities are responding by emphasizing their distinctive religious and cultural identities, sometimes even by means of deliberate separation from the mainstream of British life. (Poulter, ‘Ethnicity, Law and Human Rights’ 10)

The immigration context should thus not be underestimated: Idriss suggests that in the UK, it is the potential conflict between first and second generation immigrants, provoking the second generation to take action in order to restore and protect their traditional value system (Idriss 3). On the one hand, the younger are directly confronted with the potential temptation of Western lifestyle, on the other hand the rules imposed might be even stricter and traditional values even more promoted, in order to protect them from exactly those Western influences.

Brandon and Hafez have indeed found out, that

in some small, highly segregated towns in the North and the Midlands, South-Asian women may be less likely to suffer honour killings precisely because they are less exposed to non-traditional lifestyles and are therefore likely tempted to transgress their community’s cultural boundaries. (Brandon & Hafez 41)

Generally, there is what Abbas calls a ‘heritage bubble’: As public space is

concerned, Muslims in the UK mostly live highly concentrated, in many places there is almost no integration and thus, in these rather closed communities, traditional practices have remained intact (Abbas 25). The traditional notion of honour is still highly important in these communities, and the consequences of tainting this honour are potentially grave. As Abbas has encapsulated:

A particular combination of patriarchy, declining masculinity and the liberalising of sexuality in wider society is negatively impacting on the Muslim male psyche, which feels under threat in the context of wider social and cultural pressures on this community in Britain. (Ibid. 27)

2.3. *Honour Related Domestic Violence = 'Ordinary' Domestic Violence?*

Referring back to the very beginning of this chapter, what is the difference between honour based domestic violence among South Asian and Middle Eastern immigrants and 'ordinary' domestic violence? Honour killings have become ethnicised within the British context and it is only in relation to cultural and ethnic minority communities that the concept of honour is being invoked as motivation for domestic violence (Meetoo & Mirza, 43-44). As already mentioned above, this is a sensitive issue. As Moira Dustin and Anne Phillips rightly point out:

There is a danger that this differentiation will encourage a false dichotomy between minority and majority communities, with crime in the former explained by reference to culture, and those on the latter understood as individual aberration. (Dustin & Phillips 405-424)

Stressing differences can be taken to reinforce stereotypes about the 'naturally violent other', while ignoring potential differences can have negative impacts on the victims.⁵ On the one hand there is the risk of re-encouraging stereotypes and on the other hand, there is a risk of ignoring actual differences and labelling different phenomena alike, for the sake of avoiding stereotypes and at the expense of potential and actual victims. It is unquestionably important to be reminded that violence against women is nothing that is unknown to Western societies and that is intrinsic to Islamic cultures. Honour based violence, if perceived as violent crimes against women resulting from a society's perception of honour exists in Western society, too (see Dustin & Phillips, 'Whose agenda is it?'). The labelling of these offences shall not serve to absolve the majority community from this violence, it is rather for policy reasons that it is necessary: History of honour-based violence in the UK reveals that it has long been treated as

5 A tragic case that shows how authorities can misperceive the danger in which potential victims of honour killings in these communities can find themselves is the case of Bahnaz Mahmood. She had asked for help a couple of times, but was not taken seriously, and finally was killed by her family (Brandon & Hafez 114; Payton, 'Collective crimes, collective victims')

ordinary violence and almost been ignored by policy makers. As Samantha Walker has found out, currently, honour based violence is dealt with under the broad framework of domestic abuse (Walker 7). As it has been made clear by many commentators, especially by those working with honour crime victims, there are crucial aspects that make honour killings committed in Muslim communities outstanding, though (see Brandon & Hafez, 'Crimes of the Community'). Thus, policy makers, in order to combat this honour based violence, should assess the issue as a single problem that requires a special approach.

A crucial difference that has been identified by most commentators is the involvement of the community in the violence and the killings (see Brandon & Hafez 'Crimes of the Community'; Payton 'Collective crimes, collective victims'; Walker 'How is 'Honour' Based Violence Managed in England and Wales?'). Honour killings are often collectively decided and planned, they are often premeditated and committed for the perceived benefit of the family (Payton 73). The community and family is most often not only unwilling to help victims of domestic violence, they also encourage and appreciate the violent conduct towards women. Moreover, once a murder has been committed, the offenders can often rely on the community's or at least the family's support in order to hide the killing (Ibid. 77). Also, the notion of honour can prevent abused women from seeking help outside: They may fear punishment for disclosing family matters to the public sphere and thus, bringing more shame on the family. Moreover, as Brandon and Hafez have found out, the community involvement can be so encompassing that victims simply find no way out: They report about local taxi drivers refusing to transport victims fleeing home and "South Asians working in local government and the police service abus[ing] their positions to defend traditional practices and [...] block[ing] attempts to halt honour-based violence." (Brandon & Hafez 104) This is particularly troubling because of its implications for multiculturalism and integration.⁶ As mentioned above, the general immigration context can make it more difficult for these women to seek help. Apart from their community they can face various barriers such as isolation, language issues or financial dependence on

6 Brandon and Hafez quote John Laton, manager of Lancashire Family Mediation Service: "It's extremely difficult for an Asian woman to go to a community worker or an agency where she knows that there are potentially people there who will report back to her family what she has said. This goes on to the extent that there is a solicitor's in Blackburn that has no Asians working there and as a result of this it receives a very disproportionate amount of business from Asian women." (Brandon & Hafez 105)

their abusive family, that often deter them from escaping their situation (see Adelman, Erez & Gregory, 'Intersections of Immigration & Domestic Violence'; Erez & Hartley, 'Battered Immigrant Women and the Legal System'; Raj & Silverman, 'Violence Against Immigrant Women'; Menjivar & Salcido, 'Immigrant Women and Domestic Violence'). Without carefully considering these aspects, it will not be possible to effectively help the actual and protect the potential victims. Some researchers have identified more differences distinguishing honour-based domestic violence from ordinary domestic violence.⁷ Arguments have also been made to abolish the term honour based violence, though, in order to avoid notions of treating cultural values as justification of these crimes (Gill 219). This argument connects well with the main focus of this paper: the appropriate legal approach to honour killings in the UK. Indeed, in some cases of honour killings defendants have tried to push for a defence based on honour and cultural values, as will be discussed later (CIMEL/ Interights 4).

Another point that needs to be mentioned in the context of peculiarities of honour killings and honour-based violence is the motive for the violent acts. In assessing the issue of honour killings from a sociologic or ethnologic point of view the motive is relevant. However, from a legal perspective, it is not, since English law considers no motive but only intent. As Norrie points out:

Motive is crucial, in terms of our evaluation of the goodness or badness of a person, but motive must be irrelevant to the law's evaluation, for once motive rears its head, substantive issues of right and wrong enter the courtroom. (Norrie 45)

This will be of importance later in this paper. For now, as an introduction to the issue of honour killings at court, the approach to the connection between honour killings and motive taken by a legal system that does consider motive, is going to be regarded.

2. 4. Base Motives? The German Criminal Law Approach to Honour Killings

The term 'honour' (*Ehre*) has its own standing in German jurisprudence, it is being seen as a 'person-related legal good' (*persönliches Rechtsgut*) (Maier 239). The law recognises that honour can be violated, it does not establish, though, what constitutes such a violation of honour. Family honour as such is not protected as the family is not taken as a single unit with uniform will (Ibid.). Now, murder in

⁷ For instance, Payton points to the hiring of killers, which is untypical for 'ordinary' spousal killings (Payton 77). Brandon and Hafez also refer to ritualistic elements in Kurdish honour killings (Brandon & Hafez 59).

German criminal law, denotes the killing of a person under specific conditions. As in English criminal law, too, murder differs from manslaughter. In German criminal law, the differentiation is made on the ground of motives:

Motives such as lust to kill, killing for sexual gratification, greed and other 'low' or 'base' motives (*niedrige Beweggründe*), to conceal another crime, or the mode of killing (...) serve to classify a crime as murder rather than manslaughter. (Maier 240)

The question in the context of honour killings is: Does killing an individual to restore a family's honour qualify as murder for low motives? As Sylvia Maier points out, there has been no unequivocal, consistent jurisprudence on either state or federal level in Germany (Ibid.). The German Supreme Court (*Bundesgerichtshof/ BGH*) classifies as crimes with base motives those where the motive of the act would be condemned by community standards and where it constitutes the 'lowest level of morality' (Ibid.). As it will become clear later, community standards in this context have an English equivalent, the ordinary or reasonable person. Both concepts raise similar questions as to what constitutes them.

Maier points out that in deciding about base motive, the cultural background and alleged motive of the accused are normally being considered (Ibid.). So, defence attorneys have consistently argued that the motive to restore one's honour is not a base motive in many regions, in some it might even be required. Many defendants have been successful and been convicted of manslaughter instead of murder (Ibid. 240). Maier makes out three reasons for this: Prosecutors and judges have been willing to accept that a crime was culturally determined and so could see no base motive. Also, in German law, the accused has a right against self-incrimination and the closest relatives also have a right to refuse to testify. Furthermore, victims of planned honour killings often refuse to testify in court because this would bring additional shame on the family (Ibid. 241). The last point correlates with what has been said earlier about the peculiarities of honour based violence and the victims' refusal to seek help from outside. Maier mentions a few examples of cases in which judges have given lenient sentences: In a case of three Kurdish men who had murdered a young Kurdish couple, the judge held that a manslaughter conviction was more appropriate because

the accused, as a result of the strongly internalised value system of their home country, were not aware that their motives would be viewed, from an objective perspective, as particularly morally offensive. (Louis qtd. in Maier 241)

In another case of an attempted honour killing by an Afghan man who had

repeatedly raped and beaten his wife, the judge said that the accused “as a result of his culture and his tradition only had to overcome a low level of self-restraint” (Louis qtd. in Maier 241). However, as Maier points out, the judicial attitude has changed by now and in recent years judges have become more willing to set firm limits: They have rejected

claims that the particularly low status of women in the accused’s society excused their killing, or that in some communities the head of the family, as the ultimate judge of the norm conformity of individual behaviour, has absolute power over the life and death of family members. (Maier 242)

Some decisions of lower courts have been overturned by the BGH: For instance, in 2000, they overturned the decision of the *Landgericht Frankfurt* to accept the argument by two defendants who had claimed that they did not meet the base motive requirement for murder because their cultural values demanded that the rapist of a woman had to be killed in order to restore the husband’s and wife’s honour (Ibid. 242). Most importantly, in what has been called a landmark decision, in 2004, the BGH upheld a decision by the *Landgericht Frankfurt* in an honour killing case where a Turkish husband had killed his German-Turkish wife with 48 stab wounds because she had wished for a divorce. The defendant had argued that “in his culture, killing his wife was his right and duty and demanded that the standards for determining his culpability be those of his home country and not those of Germany”. (Ibid. 243) The BGH hereafter declared:

Bei der Gesamtwürdigung ob ein Tötungsmotiv objektiv als niedrig einzuschätzen ist, kommt es nicht auf den kulturellen Hintergrund des Täters an. Zwar umfasst die Gesamtwürdigung, ob ein Tötungsmotiv objektiv niedrig ist, neben den Umständen der Tat auch die Lebensverhältnisse des Täters. Der Maßstab für die objective Bewertung eines Beweggrunds als niedrig ist jedoch den Vorstellungen der Rechtsgemeinschaft der Bundesrepublik Deutschland zu entnehmen, in der der Angeklagte lebt und vor deren Gericht er sich zu verantworten hat, und nicht den Vorstellungen einer Volksgruppe, die sich den sittlichen und rechtlichen Werten dieser Rechtsgemeinschaft nicht in vollem Umfang verbunden fühlt. (BGH 2 StR 452/03- Urteil vom 28. Januar 2004 (LG Frankfurt))

This judgement made clear that honour killings can generally be classified as murder for low motives since the killing of another person for the restoration of one’s honour is to be judged as morally very low. In the following, Maier states, judgements have become rather strict in Germany (Maier 243). Referring to Saliger, Dr Luis Greco calls this recent development the third phase of jurisdiction in this area, the first having been classified by great uncertainty and the second by leniency (Greco 311). However, he also mentions a back door which the BGH has implemented, namely that the offender must be aware of the circumstances which make his motive a low one. Moreover, the offender needs to be able to

consciously control the emotions and feelings which lead to the fatal action. So, a defendant might be guilty of manslaughter only if at the time of the act he still was highly attached to his foreign value system so that he was not aware of the condemnation of his act in the German legal system.⁸ As a consequence of this exception rule, as empirical research by Oberwittler/ Kasselt has shown, *Tatgerichte* do not necessarily follow the BGH decisions and in most cases have not given a verdict of murder for low motives (Greco 312).⁹ Thus, the German jurisdiction does not seem to have found a coherent and appropriate way to deal with those crimes.

As for England, some have argued that honour killing defendants have frequently applied an honour based culture defence (CIMEL/ Interights 4; Meeto & Mirza 44). Others argue that in English criminal law, there is no defence for honour killing defendants, at all: Gordon R. Woodman for instance argues that possibilities of a culture defence in England are very limited and that honour killings and honour based violence generally should by no means be excused by such a defence, for instance for reasons of deterrence (Woodman 18). This accords with what Government and the Law Commission have issued (see chapter 4.4 of this paper) In the absence of any statistics on the whole of partial defences having successfully been used to reduce murder to manslaughter, it is difficult to identify a current legal trend.¹⁰ Anne Phillips, in 2003, has stated that “[t]he English courts have not been particularly receptive to provocation pleas based on intensely held religious beliefs (...) or cultural understandings of honour and shame.” (‘When culture means gender’ 32) However, she reveals some uncertainty stating that there have been “troubling exceptions” (Ibid.).

By considering the general principles of English criminal law, as well as the latest developments in the law of homicide in England, it shall be discussed in the following, whether an appropriate and coherent way of dealing with those crimes in England can be found. Thereby, one specific existing partial defence, which has

8 Lorenz & Schneider refer to Urteil vom 20.02.2002, Az. 5 StR 538/01

9 Only 36,8 % of offenders who had planned or committed an honour killing have been convicted of murder. However, those who had only planned it, have been convicted for causing bodily harm. (Lorenz & Schneider, ‘Erstaunliche Zahlen’)

10 As Mackay points out, although for the partial defence of diminished responsibility, there are, “there are no official statistics kept on the successful use of provocation as a partial defence. Rather, such pleas are contained within the total number of cases of ‘other manslaughter’ recorded by the Home Office in its annual compilation of Homicide Statistics. This makes the identification of provocation cases difficult.” (Mackay 110)

frequently been mentioned in connection with honour killings, as Phillips' comment demonstrates, as well as with cultural evidence at court, will be focussed on: The loss of self-control, then provocation defence.

3. Principles of English Criminal Law

3. 1. Aims and Functions of the Criminal Law

Assessing how English criminal law could appropriately approach honour killing cases also means to assess how capable it is of considering the cultural background of a defendant. One must first of all look at general principles of the criminal law in order to then identify how the criminal law approaches individual culpability in general.

According to Jonathan Herring, the criminal law is in many ways a significant branch of law (Herring 4). The criminal law plays a distinctive role in the functioning of society: It acts as deterrence from legally prohibited conduct, it sets the conditions under which people who have harmed society are to be punished and it thus provides guidance on the kinds of behaviour that are acceptable in society (Ibid.). As Neal A. Gordon has demonstrated with the theory of memetics (Gordon 2001), through determining legally acceptable behaviour the criminal law also has the power to give direction to what is morally acceptable. The criminal law is the "established state response to crime" (Herring 4), which is also why prosecutions are brought in the name of the crown (Ibid.).

Generally, the criminal law assumes that a defendant is responsible for her actions as well as the consequences, not accepting that conduct is simply a result of circumstances, like socio-economic, or cultural background. As Herring argues, it would be far too complex to determine in every case to what extent a defendant was responsible for his personality and thus, his conduct (Herring 6). The law assumes everyone to be a free autonomous and responsible agent (Ibid. 6). This assumption has historic roots: It has evolved during the Enlightenment period of the late 18th century, in which the social world was perceived to be "founded upon individual self-interest and right" (Norrie 19), the idea of the free individual being at the heart of it. Enlightenment theory imagined humans as free and calculating individuals planning their actions or omissions according to consequences and the pain/ pleasure principle as described by Bentham (Ibid. 21-23).¹¹ Alan Norrie

¹¹ As a utilitarian reformer, Bentham argued that humans were controlled by two simple

argues that

[L]iberal theory wishes to portray the criminal law as existing within a consensual world in which all individuals qua individuals come together under the law. This is central to the theory and practice of the criminal law, as well as to the philosophical legitimation of the criminal justice system as a whole. But in a society based upon deep social and political conflicts, this representation can only be maintained if the conflicts can, so far as possible, be excluded from the court of law. Harmony between state and society in the context of the criminal process can only be maintained if social conflicts are filtered out in advance. (Ibid. 222-223)

The idea of free, reasonable and calculating individuals, which underlies English criminal law is deeply rooted in liberal theory: Within liberal theory, Norrie argues, it is the Hobbesian heritage that gave the law this abstract conception of voluntary individual agency (Ibid. 122). The assumption that “there exists a ‘responsible individual’, or rather a universe of equally responsible individuals” (Ibid. 31), who can be “regarded in isolation from the real world of which they are a part” (Ibid.) is at once central for “Western liberal modernity” (Ibid.), as well as for what Norrie calls the contradicting principles of the English criminal law (Ibid. 9). This contradiction is rooted in the fact that the real world with its real individuals is highly different from abstract metaphysical theory: “[I]ndividuals commit crimes under the direct influence of social circumstances and not as the product of rational choices made in abstraction from such circumstances.” (Ibid. 25) The difficulties that the assumption of a society being constituted by like-minded, rational individuals cause, are numerous. They can be well perceived when it comes to setting standards: In a society of like-minded individuals agreement about the term ‘reasonableness’ would be easy to achieve and would simply be based on their common sense. However, instead of like-minded people and consensus society consists of differing minds, dissensus and conflicting ideas (Ibid. 43). Thus, the difficult question arises: Whose consensus sets these standards then? It is an issue that questions the power structures upon which society is founded since it indicates that the law is not universal at all, but it is made by a certain set of people and applied on all others then, regardless how different these others might be. Norrie argues that historically this has been so with regard to classes (Ibid. 31) but it can also be said for the relation of majority and minority culture: The law is being made by the majority culture and imposed and applied on the minorities. That is why this issue is relevant for the topic of this paper.

principles: pain and pleasure, always striving to seek the latter and avoid the former, punishment clearly falling under the avoidable event of pain.

As it has been mentioned in chapter 2.4, in assessing criminal culpability, in English criminal law, motive is irrelevant. This principle has “deep roots within common law tradition” (Ibid. 39). The society of the period in which the law has developed was as crime-free as it is today: Social conflicts and poverty were reality and the law making authorities had their reasons to assess crime grown out of poverty, by the motive to survive, equally to crime grown out of less grave motives. One law was to be applied universally, regardless of the fact that it was harder for some to adhere to it. As it has been stated by Anatole France: “The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” (Anatole France, qtd. in Donovan & Wildman 468) One can see how the criminal law has evolved with a philosophic idealistic theory behind it and how it has developed in the interests of a certain set of people (Norrie 9; 31). The law not only reflects the academic schools of thought but also the social and political relations that have shaped it. According to Norrie, a broad concept that takes motive into account had been denied because it would generally “challenge the idea of individual responsibility” (Ibid. 115). In a real world in which defences for most crimes could be made on the basis of motive or moral involuntariness,¹² founded upon social environment or background, consideration of the same would certainly undermine the system based on fault to individuals (Ibid. 116). If social, economic, and as it is being argued here, cultural, factors enter the criminal process in that they are being taken into account for assessing the voluntariness or motive of an act, true fault could be found rather infrequently (Ibid.). Again, Norrie has aptly stated:

Yet motive remains central to human agency and to broader moral and political claims about the nature of fault. The reason why this ‘much more advanced level of ethical criticism’ (Hall 1960, 83) is ignored is that motive introduces the questions of social need and right that would directly challenge the allocation of fault. The focus on intention excludes the motives of those living at the margins of society and those whose political values the existing order wishes to marginalise. (Ibid. 225)

The contradictions in English criminal law also result from the fact that theories explained above were not the only theories that had influenced it. From late 19th century on, groups of criminals, beginning with “the mad” (Ibid. 214), were decided to need treatment rather than punishment. In the following, a broad range of “psychologically or socially ‘disturbed’ criminals were identified.”

¹² Norrie draws a “close parallel between the way that voluntariness is constructed in the law of acts and the way that motive and intention are divided in the law of intention.” (Norrie 111)
Moral involuntariness could make an excuse based on the same grounds as motive.

(Ibid.) Knowledge of the nature, causes and treatment of criminality and delinquency became a central claim (Ibid.), and the abstract rational calculating individual made some way for reality. A shift from objectivism to subjectivism, from one of the two basic approaches to criminal liability to the other could be observed. Subjectivist theory promotes the view that a person should only be responsible for the intended consequences of their actions (Herring 9). It is only about the criminal's intention and state of mind, whereas objectivists are only interested in consequences. An argument of objectivists has been to clarify the law: It is important to know exactly what conduct is legal and what is illegal. An objectivist approach aims to avoid what Bentham has called 'dog law' (Norrie 21).¹³ Clarity would be rather hard to uphold, if diversity and the specific circumstances of respective defendants were taken into account, and thus, for the sake of clarity, cultural aspects could not be considered under an objective approach. However, the trend towards subjectivism has continued over the 20th century and it has been observed "that over the past few years, the House of Lords has been preferring a subjective to an objective approach to criminal liability." (Herring 10) Similarly, Lord Nicholls in *B v DPP* (2000) 2 AC 428 has declared that "the common law supports the subjectivist school of thought, although Parliament can pass a statute which creates an offence which is objectivist." (Ibid. 9) The rational individual has not ceased to exist in English criminal law, though. It still sets standards, which will be demonstrated later in this paper with the loss of self-control, then provocation defence to murder.

Anyway, one implication of the subjective trend has been that the conception of imprisonment based on individual deterrence theory has been revised and has cleared the way for a theory of rehabilitation of the offender based on understanding his character and circumstances (Norrie 214). A shift from abstract individualism promoting the idea of imprisonment that fits the crime, as a harsh means of deterrence, to concrete individuality with interest in personality of the single criminal and punishment that fits the individual has been observed (Ibid. 215).

¹³ 'Dog law' refers to the notion of dogs only learning after having been punished for what they have done wrong.

3. 2. Purposes of Punishment

Many theories of why the state should punish exist. At all times, there has been one dominant theory, inseparably connected with the current overall approach to criminal culpability. The main theories include rehabilitation, focussing on reforming and rehabilitating the criminal; deterrence, focussing on deterring the criminal himself, as well as potential criminals from future crimes; incapacitation, focussing on deterring only the criminal from committing future crimes by means of imprisonment; and retribution, also known as 'just deserts', with a main interest in blameworthiness (Herring 33).

The deterrent model is interrelated with the classic enlightenment idea that crime is rational, self-interested and freely chosen behaviour (Muncie 4): The calculating individual can be deterred from committing crime if being faced with the prospect of harsh punishment, as explained with Bentham's pain/pleasure principle. Therefore, it must be easy to calculate which punishment exists for which crime and thus, the punishment for a certain crime should be equal for all people (Ibid. 5). The theory focusses not on doing justice to the single criminal but on the effect on larger society and on protecting the community through deterring future crime (Ibid.). That is why the individual defendant and respective background are irrelevant under this approach.

The incapacitation and retribution theories also take individuals as capable of choosing their actions. However, they also consider external factors such as socio-economic background and moral decline (Ibid. 6). According to a neo-conservative view, crime cannot be eliminated from society because of these factors, but offenders can be eliminated and punished in order to at least reduce crime (Ibid. 7). Thus, defendants' diversity is being recognised but not taken into account, since protecting the community takes precedence over the offender's personal circumstances.

Theories which are based on a thorough understanding of crime and its various causes, do not actually focus on punishment but on treatment and prevention (Ibid. 8). All those theories can be condensed under two umbrella terms: Utilitarianism and retributivism. The former is called a forward looking approach since it does not look back to the crime but focuses on the prevention of future crime by means of the deterrent effect of punishment for present offenders (Hucklesby 207). Utilitarianism comprises above mentioned ideas of deterrence, incapacitation and

rehabilitation (Ibid.). Retributivism on the other hand is said to be a backward looking theory (Ibid. 211). It focuses on the offence and promotes the idea that punishment is a “natural and appropriate response to crime.” (Ibid.) The very recent notion of ‘just deserts’, which is prevalent in English criminal law now, is based on this idea. One could say that with retributivism, the universal balance and justice, which has been unsettled by the offence, is being restored with the help of punishment. Since this theory looks back to the crime committed and not to future effects, it focusses more on the actual offender and his just and proportionate punishment, rather than on future crimes. Norrie argues that historically, retributivism has not always been well understood in Anglo-American criminal law, since it often has been associated with giving punishment for the sake of punishment (Norrie 205). However, he makes an argument for ‘just deserts’ by quoting Kant in that punishment can not be used simply in order to promote another good either for the criminal or general society but it must be justified on the crime he has committed (Ibid. 207).

Moreover, Norrie criticises the theory of utilitarianism and deterrence for its questionable success in a real society (Ibid.198-205). His argument that “[t]hose who are most likely to be deterred are those in society who ‘have more to lose than to gain by being caught’, those who still have a ‘conscience’” (Ibid. 201), can well be understood when it is being transferred to cases of honour killings: The perceived benefit of not committing the crime, that is not murdering a ‘disreputable’ female, must be greater than the perceived benefit of killing her, in order for a deterrent effect to exist in the first place. Because of the ‘honour’ notion, this is difficult to achieve and multiple factors have to be taken into account: Firstly, if one assumes, that as explained above, the dishonour that is understood to be brought on the family by a woman’s unappreciated conduct can be so encompassing that for the family nothing could be worse than living with it and that the ostracism from the outstandingly important community is the worst consequence anyway, then there is nothing that can be done to prevent potential offenders from committing those crimes, since there would be no perceived benefit of not committing them, at all. It is not relevant here how inappropriate or misogynistic the notion of honour is from a ‘Western’ feminist point of view. It must be accepted that for both men and women the honour concept *can* serve as a basis of identity in that it works as a sense of security, provides stability in a new

or changing environment and increases social status (Brandon & Hafez 5). Last but not least it can also serve as a sense of superiority in an environment with “low career prospects” (Ibid.). Especially regarding the last point, it can be said that secondly, experiences of deprivation, economic disadvantage, social exclusion and discrimination experienced from the majority community can contribute to the offenders feeling that there is not much to appreciate in their life and thus, there might be nothing that they would in every case prefer to a harsh legal punishment, that is long-term imprisonment. If only their or their family’s honour is such an appreciated asset, then the chance is low to deter them from ‘restoring’ exactly the same by means of a killing. These arguments can be supported by the findings of Maier who reports about honour killers being admired and praised by their family for what they have done. Maier refers to Lau who has found out that in Turkish, as well as in German prisons, honour killers are being celebrated by their families, who treat them like heroes having “‘sacrificed’ themselves for their family’s honour.” (Lau qtd. in Maier 235)

3. 3. How Does the Criminal Law Mitigate its own Severity?

As it has just been stated, the ‘just deserts’ theory focusses on the single offender and the deserved punishment and thus, it takes into account differences between different offenders and is more open to arguments of individual culpability than the deterrence approach, which focusses on the well-being of general society. The former approach is coherent with the observation that English criminal law is based on liberal philosophy and thus, tries to be just, fair and reasonable in giving every individual the punishment it deserves and punishing no individual where no fault is found and not punishing extensively for any other purpose. However, as with the dilemma of objective and subjective approach, the theory of sentencing is also caught between abstract and concrete, individual and social (Norrie 218). The reason is again the deep conflict inherent in English criminal law, with principles based on the assumption of a society consisting of equally free, rational and calculating people, to which one universal law can justly be applied, on the one hand and the recognition that reality is different, on the other hand. If all people were equally free, rational and calculating one wonders whether crime would exist in the first place and whether this society for whom the criminal law has been made would need to apply it, at all.

However, it has been recognised that people are different from the abstract and that diversity is reality, which has been incorporated in the criminal law, too. To an extent, the respective conditions of the individual can be taken into account: The stage of the court process, in which an appropriate and just punishment is being determined is the sentencing stage. At this stage, finally, motive is being considered (Norrie 218; Herring 6). Moreover, at conviction stage, there are four ways of recognising that a defendant may not be fully or not at all to blame for his actions: Firstly, there is 'exemption from liability', indicating that some people have not had the chance to develop fully moral characters, children for instance (Herring 6). Secondly, 'lack of capacity' refers to a defendant not being responsible for the action at the time because he did not have the capacity and no chance to control his actions (Ibid.). Thirdly, a 'lack of required mental state' indicates that the defendant might be able to exercise rational thought but lacks necessary intention or foresight required for the crime (Ibid. 7), and fourthly, there are special defences that consider the circumstances of the defendant which might lessen or remove any blame (Ibid.). As such special defences, especially the partial defences to murder have developed in order to lessen the homicide law's harshness.¹⁴ Norrie argues that special defences threaten to undermine the law's logic, in that they

challenge the law's psychological individualism and the social control functions which underlie it, by opening up the legal sphere in which matters of social and political context can be contested. At worst they threaten to be a contextual Pandora's Box, the opening of which generates a social and political counter-logic to that of the law. (Norrie 229)

The conflict just described above becomes very clear with the provocation, now loss of self-control defence: The defence considers the circumstances and to an extent the characteristics of the individual defendant but in the end, the defendant is being measured against an abstract 'reasonable' person, a person who actually does not exist. However, it is this partial defence that has been applied by some honour killing defendants and in the following it is going to be regarded as one means to ease the law's harshness and to consider the individual circumstances of the respective defendant.

The loss of self-control, then provocation defence is a partial defence to reduce murder to manslaughter. Understanding how it works requires a quick

14 "The partial defences of provocation and diminished responsibility have as their origin and main purpose the protection of the defendant from the mandatory death/life sentence for murder." (Law Commission, *Partial Defences to Murder: Final Report* (2004), para 2.59)

introduction to the law of homicide.

Unlawfully causing the death of another person is “the most serious of criminal offences” (Herring 149). English criminal law does not treat all killings equally: Manslaughter can be seen as the basic homicide offence and murder as an “aggravated crime of killing” (Ibid.). The latter requires “an intention to kill or cause grievous bodily harm” (Ibid.). Unfortunately, the House of Lords has so far refused to give a definition of ‘intention’ (Ibid. 153). Manslaughter lacks the ‘mens rea’ for murder.¹⁵ Even if the relevant mens rea does exist, there can be factors that reduce murder to manslaughter (Ibid. 149). These factors can become relevant by means of a partial defence. Murder requires a mandatory sentence of life imprisonment¹⁶ whereas the maximum for manslaughter is life imprisonment, too, but a shorter or even no term of imprisonment can also be imposed (Ibid. 150). This distinction between murder and manslaughter, which is a result of the harsh mandatory life sentence (Ibid. 154), has been subject to criticism not only recently. The Law Commission had therefore proposed a reform of the overall law of homicide instead of just a piecemeal fashion reform of the partial defences (see (Law Commission, *Partial Defences to Murder. Final Report* (2004)).

However, Government has only implemented part of the Commission’s proposals and refused the rest, including the idea to introduce a new stage system of First-Degree and Second- Degree Murder in order to more accurately recognize the defendant’s intent. This refusal has been broadly criticised (see Fitz-Gibbon, ‘Replacing Provocation in England and Wales’).

Herring points out that what makes an offence murder or manslaughter is “a reflection of a certain set of values” (Ibid. 150) and hence, it changes over time. Therefore, the development of the provocation defence shall now be regarded.

4. Who is the Reasonable (Ordinary) Person? The Piecemeal Development of the Provocation Defence and the Person’s Characteristics

4. 1. ‘Honour’ Roots of the Provocation Defence

The old provocation defence as stated in the Homicide Act 1957 Section 3 reads:

¹⁵ Mens rea can be defined as “specific state of mind on the part of the accused” (Herring 67). Mens rea of murder is known as ‘malice aforethought’, but Herring calls this misleading, stating that it rather is an “intention to kill or cause grievous bodily harm to the victim.” (Herring 152)

¹⁶ The trial judge can only recommend a minimum number of years in prison before a potential release on license (Herring 150).

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 early history of the provocation doctrine dates back to the 13th century (Mackay 288). Then, as now, provocation was inextricably linked to the nature of culpable homicide offences, applicable punishments and contemporary sentiments and sensibilities, that is, broader social environment (Ibid.).¹⁷ The main driver in the provocation doctrine development can be seen in the discrepancy between the actual law as legislated by parliament and the judiciary's unwillingness to apply the law in its entire severity (Ibid.). Especially, up to the 16th century, the jury used their power to manipulate and fit the facts into cases that would allow the outcome they desired (Ibid. 293). The jury have been quite willing to use this especially to excuse men who killed in a rage, often over their wives' infidelity and so they were "setting de facto standards of what was excusable in homicide" (Ibid.). When the jury's power had been reduced in the course of the 16th century, the official legal structure had to develop in order to produce fair outcomes. As a consequence, the distinction between murder and manslaughter had to be defined more precisely (Ibid. 294). Despite parliament's attempts in 18th and early 19th century to restore social order by means of increasing the number of capital offences, with the provocation defence, "the social will appears to have found legal form through common law precedents" (Ibid. 297). Thus, the defence of provocation, or rather its limits, can be regarded as a reflector of the social order at the respective time in that it mirrored not necessarily what was legally acceptable but what was socially seen as acceptable behaviour. As Mackay had put it: When "the common social order changed, the common law followed." (Ibid. 301) Especially the provocation defence used to be a tool to consider contemporary societal development.

It is interesting to look at what Lord Holt CJ stated as to conduct capable of constituting provocation in early 18th century:

First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter ...

Secondly, if a man's friend be assaulted by another, or engaged in a quarrel that comes

¹⁷ As a matter of scope, an extensive historical overview as to changing social environments cannot be given within this paper. Prof Mackay has given such an overview in the Law Commission's Appendix to their 2004 Report.

to blows, and he in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter ...

Thirdly, if a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter ...

Fourthly, when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property ... ([1707] *Kel J* 119; 84 ER 1107 pp. 135-137, 1114 – 1115 qtd. in Mackay 302)

As Mackay rightly identifies, the described offences “can be drawn together under the banner of defending honour.” (Mackay 303) It used to be well accepted that men could be provoked to kill for the sake of honour. A man defending his honour, was not taken to act with malice but rather with a “purity of will” (Ibid.). It has also been argued that the “fourth category was widely regarded as the most serious provocation.” (Sing 1868) This seriousness was based on the notion of women being a man's property (Ibid.) Moreover, Mackay points out that not having defended one's honour would have been a “social disgrace” (Ibid.) even and this “social disgrace is often a class specific concept.” (Ibid.) So, the idea to excuse men having killed for honour, is not unknown to English criminal law, at all. The doctrine of provocation is historically deeply bound with this idea and as it will be demonstrated, it still has not cut off the connections today. One of the reasons for recent reforms had been the concern that provocation still offers predominantly men who in a rage kill their wives an excuse (see Fitz-Gibbon 388; Edwards 231; Law Commission, *Partial Defences to Murder. Final Report* (2004)). The rage in that context often is the consequence of a perceived offence against the honour.

So, there are parallels, between the killings for the sake of honour in early 18th century English society, wife killings in English society today and Muslim honour killings: The general idea that the behaviour of a woman, be it that she is unfaithful, be it that she dresses untraditionally or be it that she falls in love with another person, is capable of causing men to fear for their own honour and that this fear can cause in them such a rage that they kill the respective woman is inherent in all those femicides (see Phillips 'When culture means gender' 34). That is why the provocation defence is linked with those killings: It also makes the victim's behaviour central (Burton 280). Veena Meeto and Heidi Safia Mirza point out that “femicide is not particular to one culture or community, but [that] there is a worldwide patriarchal phenomenon of violence, which cuts across race, class,

religion, age [...]” (Meeto & Mirza 45) Because this ‘patriarchal phenomenon of violence’ is a worldwide one that takes different shapes in different cultures the provocation defence in England has frequently served to mitigate sentences of male wife killers from the majority culture (see chapter 6.1 of this paper.)

Historically, English law has furthermore been willing to excuse honour motivated killings committed by members of a partial class, who were taken to usually act with pure will: the gentry, men of honour (Mackay 303). Thus, what they perceived as social disgrace, as dishonour, was taken to be the standard for social disgrace. Social disgrace is not only a class specific concept, though, it is also a culture specific concept, as the notions of honour discussed in chapter 2 have shown. As the provocation defence used to serve as a class specific defence, there are indications that it today serves as a culture specific defence, namely one that can mainly be applied by the majority culture in a multicultural society, as it will be argued in chapter 6.

The element in the provocation, now loss of self-control defence that can be said to frequently re-establish the values and norms of the dominant group is the ‘reasonable person’, against whom the respective defendant must be measured. James J. Sing accordingly asks, “who is the descendant of the “man of honour” but the modern reasonable man?” (Sing 1870)

The reasonable person, then reasonable man, and the corresponding test, whether the provocation was enough to make a reasonable man do as the defendant did and which effect would things said and done have had on a reasonable man, first emerged in *Welsh* (1869) XI Cox CC 336, 338, has dramatically limited the scope of the provocation defence (Mackay 304). There have been ongoing disputes on how abstract the reasonable person should be and whether the person should share some characteristics of the respective defendant and if so, which of them, as the following cases demonstrate. This issue lies at the heart of the question whether honour killing defendants from minority cultures could potentially have a defence in provocation. Because of their relevance the two cases that have developed the reasonable person and the question which characteristics should be added most significantly must be discussed here.¹⁸

¹⁸ As to the historical development of provocation also see Sing ‘Culture as Sameness’ 1867-1870.

4. 2. All of the Defendant's Characteristics Are Relevant: *R v Smith*¹⁹

In the cases of *DPP v Camplin* [1978] 2 WLR 679 (HL) and *R v Newell* [1980] 71 Cr App R 331 (CA) for instance the question had already arisen which characteristics of a defendant were relevant and also, whether characteristics were only important in assessing the gravity of the provocation or “whether any characteristic which affects D’s ability to exercise self-control should be considered.” (Padfield 195) The issue seemed solved with the House of Lords’ ruling in *Smith* that not only in assessing the gravity of the provocation but also in deciding whether a reasonable person could have been expected to exercise self-control the jury should take into account all relevant characteristics, including mental state, history and the circumstances the defendant was in.

In the *Smith* case the defendant had, during the course of an argument, stabbed to death another man with a kitchen knife. At the time of the killing the defendant had suffered from severe depression. The judge directed the jury that such a depression was capable of being a characteristic of the reasonable man; however, it was only relevant to the gravity of the provocation and not the reaction to it. The jury consequentially convicted the defendant of murder. He appealed, raising among others the issue whether the judge was right to so direct the jury. In the appeal case, most significantly JJ Potts referred to Lord Diplock in *Camplin*:

[F]or the purposes of the law of provocation the "reasonable man" has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today. A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day.¹ It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts and insults when applied to the person to whom they are addressed. So to this extent at any rate the unqualified proposition accepted by this House in *Bedder v DPP* [1954] 2 All ER 801, [1954] 1 WLR 1119 that for the purposes of the "reasonable man" test any unusual physical characteristics of the accused must be ignored requires revision as a result of the passing of the 1957 Act. That he was only 15 years of age at the time of the killing is the relevant characteristic of the accused in the instant case. It is a characteristic which may have its effects on temperament as well as physique. If the jury think that the same power of self-control is not to be expected in an ordinary, average or normal boy of 15 as in an older person, are they to treat the lesser powers of self-control possessed by an ordinary, average or normal boy of 15 as the standard of self-control with which the conduct of the accused is to be compared? It may be conceded that in strict logic there is a transition between treating age as a characteristic that may be taken into account in assessing the gravity of the provocation addressed to the accused and treating it as a characteristic to be

¹⁹ *R v Smith* [1999] 4 All ER 387 (QB)

taken into account in determining what is the degree of self-control to be expected of the ordinary person with whom the accused's conduct is to be compared. But to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity . . . (*DPP v Camplin* [1978] 2 All ER 168 (HL), 174 (Diplock L))

Lord Diplock makes the point that not taking into account all relevant factors would obstruct the mitigation of the law's severity that is actually intended with the provocation defence. He also rightly points to the connection between age, in *Camplin*, as characteristic that is to be taken into account in assessing the gravity of the provocation and in determining the degree of self-control that is to be expected of the reasonable person. Furthermore, he points out that it would be unfair to expect 'old heads on young shoulders'. This is a statement that would actually be valid in numerous variations: It would also be unfair to expect female heads on male shoulders, it would be unfair to expect a wealthy head on impoverished shoulders, a learned head on illiterate shoulders, or maybe an English culturally shaped head on a conservative Muslim's shoulders.

The purpose of the provocation defence can be obscured if characteristics of the defendant are not being taken into account in assessing the gravity of the provocation as well as the reaction to it. As Lord Bingham has encapsulated in *Campbell*:

If the concept of the reasonable man expressed in section 3 were accepted without any qualification, successful pleas of provocation would be rare indeed, since it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation. (*R v Campbell* [1997] 1 Cr App R 199 (CA), 207- 208 (Bingham L))

However, considering these variations, there is also the risk of what Lord Taylor CJ, also referred to by JJ Potts, said in *R v Dryden* [1995] 4 All ER 987 (CA): "If one adds all the characteristics of the appellant to the notional reasonable man, there is a danger that the reasonable man becomes reincarnated as the appellant." The search for the appropriate degree to which the defendant's characteristics should be added to the reasonable person can well be called a dilemma. Lord Diplock tried to formulate an appropriate direction to the jury in *Camplin*: The Judge should

explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him' and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did. (*DPP v Camplin* [1978] 2 All ER 168 (HL), 175 (Bingham L))

It seems to be an encompassing direction. However, Lord Diplock also does not escape the logic of self-reference when he describes the reasonable man as an

ordinary person. Referring to legal logic, Lord Steyn argued that “even more important than the promptings of legal logic is the dictates of justice.” (*Luc Thiet Thuan v R* [1996] 2 All ER 1033, 1055 (Steyn L)) He held the consideration of the characteristics of the defendant in deciding about the reasonable person’s reaction, was necessary in order to achieve a just outcome. The ‘dictates of justice’, though, is not a seizable concept, since justice is a rather vague notion. However, Potts CC comes to the conclusion that Lord Steyn with his dissenting statement in *Luc Thiet Thuan v R* accurately stated the law of England, referring to cases following *Camplin*, such as *R v Raven* [1982] Crim LR 51 (CCC), *R v Ahulawalia* [1992] 4 All ER 889 (CA) and *R v Thornton (No 2)* [1996] 2 All ER 1023 (CA). Pott CC’s concluding statement as to provocation in *Smith* reads:

In our judgment, Lord Taylor CJ in *R v Thornton (No 2)* did no more than adapt Lord Diplock's formulation in *Camplin's* case to the facts of the case then under appeal. In our opinion, the decisions of the Court of Appeal cited are in accordance with, and are a logical extension of, the decision in *DPP v Camplin*. They are binding on this court. In origin, the defence of provocation saved from the gallows those who would otherwise have been guilty of murder. Its incremental development over the years has been marked not by logic but by a slowly changing sense of what is fair. Words have been added to conduct as a possible trigger and the number of characteristics with which a reasonable man is deemed to be endowed, when having his theoretical response assessed by a jury, have been increased. The essential question raised by this appeal is whether, on the authorities binding on this court, any distinction can now properly be drawn, when attributing such characteristics for the purposes of the objective part of the test imposed by s 3 of the Homicide Act 1957, between their relevance to the gravity of the provocation to a reasonable man and his reaction to it. It seems to us that in *Camplin's* case Lord Diplock drew no such distinction, nor did other divisions of this court in the cases to which reference has been made. In our judgment the minority advice of Lord Steyn in *Luc Thiet Thuan v R* accurately states the law of England. (*R v Smith* [1999] 4 All ER 387 (QB), 45)

Under the approach developed in *Smith* it would have been very well possible if not required to consider the cultural background of a defendant and add it as a characteristic of the reasonable person.²⁰

4. 3. *The Call for a More Objective Standard: AG for Jersey v Holley*²¹

However, the decision in *Smith* had been overruled by the Privy Council in *AG for Jersey v Holley (2005)*²² and the minority view in *Smith*, whose approach accorded

²⁰ See Gardner & Macklem ‘Provocation and Pluralism’: They demonstrate the approach to pluralism under the *Smith* approach but criticise it arguing that it is enough to consider culture in determining whether there was provocation and whether it had a qualifying trigger.

²¹ *AG for Jersey v Holley* [2005] 2 AC 581(UKPC): In this case, the defendant, a chronic alcoholic, was charged with the murder of his long-standing girlfriend. He admitted killing her with an axe while under the influence of alcohol and the sole issue at his trial was provocation.

²² The reason for the Privy Council being able to overrule the House of Lords in this case was that actually 9 of the 12 Law Lords were sitting in the Privy Council. It was decided in *R v James; Karimi* [2006] 2 WLR 887 (EWCA) on the ground of “three exceptional features (...): (I) All nine of the Law Lords in *Holley* agreed that the result reached by the majority clarified definitively English law on the issue in question. (ii) The majority in *Holley* constituted half the

with that in *Luc Thiet Thuan*, became effective law (Padfield 199). It was held that

[f]or the purposes of the defence of provocation, a defendant was to be judged by the standard of a person having ordinary powers of control. The standard was a constant, objective standard in all cases. The jury had to assess the gravity of the provocation to the defendant and, in that respect, the jury had to take the defendant as they found him. But having assessed the gravity of the provocation to the defendant, the standard of self-control by which his conduct was to be evaluated for the purpose of the defence of provocation was the external standard of a person having and exercising ordinary powers of self-control. A more flexible standard, where the jury applied the standard of control to be expected of the particular defendant, departed from the law as declared in s 3 of the 1957 Act and involved a significant relaxation of the uniform, objective standard adopted by Parliament. The 1957 Act did not leave each jury free to set whatever standard they considered appropriate in the circumstances by which to judge whether a defendant's conduct was excusable. (*AG for Jersey v Holley* [2005] 2 AC 581 (UKPC))

Lord Nicholls in his judgement in *AG for Jersey v Holley* admits that the legal issue is a complicated one and therefore, he gives a rather profound introduction to the defence of provocation as a 'concession to human frailty' generally. He goes on to outline how the 1957 Act has altered a few aspects of the defence in that it divides it into two parts, the first, subjective one being the question whether the defendant has actually been provoked to lose his self-control. All relevant evidence is admissible here. The second, objective question is the tricky part in which opinions differ: Whether the provocation was enough to make a reasonable person react as the defendant did. Lord Nicholls breaks the second question down into two parts again: The first one considers the gravity of the provocation and the second one whether this was enough to make a reasonable man do as the defendant did. The latter consideration he calls an external standard and argues that it in its objectivity has long been an essential element in the defence (*AG for Jersey v Holley* [5], [6]). Lord Nicholls goes on to weigh out the two objectives that on the one hand the defence is to be a 'concession to human frailty' and on the other hand a certain standard of control over passions must be expected from everyone in society. The allowance for words to be considered as capable of constituting provocation made it more difficult and specific to assess the gravity of the provocation, based on Lord Diplock's words in *Camplin*. When only 'things done' were to be considered, he says, it was easier since it was basically degrees of violence that determined the gravity of the provocation (*AG for Jersey v Holley* [10]). What Lord Nicholls did not take into account is the possibility of neither words nor violence to constitute the provocation. Under the 1957 Act it was taken to be sufficient that there be a causal link between the victim's conduct and the

Law Lords. (iii) In the circumstances, the result of any appeal on the issue to the HL is a foregone conclusion." (Padfield 201)

defendant's act.²³

However, as to the objective test, Lord Nicholls admits that it might result in defendants being measured against standards which they cannot attain. Lord Bingham in *Campbell* said the same in that when being measured against this abstract reasonable being, successful provocation pleas would be rare (*R v Campbell* [1997] 1 Cr App R 199, 207- 208 (Bingham L)) However, both draw different conclusions: Bingham concludes that in order to do justice the standard needs to be more flexible. Nicholls rather fatalistically concludes that this is so with every defendant who relies on provocation and that the “possibility that an individual defendant may be temperamentally unable to achieve this standard” (*AG for Jersey v Holley* [12]) is inherent in the idea of an objective standard. This argument is coherent with Gordon’s words that “everyone is at the mercy of their ideas” (Gordon 1810). However, this approach is rather unsatisfactory. The basis on which the majority in *Holley*, in the words of Lord Nicholls, argues is the 1957 Parliamentary Statute. They are rather unwilling to analyse the statute’s underlying ideas and objectives and so do not ask for the principle of fairness in the standard. It is interesting that the dissenting Lords Bingham and Hoffmann, as well as Lord Carswell in their judgments argue mainly on the basis of justice and not legal logic (*AG for Jersey v Holley* [43]- [76]). Lord Bingham stresses the objective of the provocation defence, that it is to be the “concession to human frailty” (*AG for Jersey v Holley* [44]) and that this very objective would be disparaged by a severe application of an external standard. Bingham, referring to Lord Diplock in *Camplin*, rightly calls the partial defence of provocation an anomaly:

It seems clear that the provocation defence was developed by the judges to mitigate the harshness of the ancient law requiring sentence of death to be passed on every defendant convicted of murder. But for the indiscriminating inflexibility of that rule, it may well be that a provocation defence would not have been recognised. (*R v Camplin* [1978] 2 All ER 168, 170 (Diplock L))

Bingham thus locates the law’s impartiality in its inflexibility. He could have gone further and argue that in order to avoid discrimination, inflexible standards are not the appropriate means but that the opposite is true. This argument is well known from feminist debates on whether equality is achieved by treating all alike or only likes alike. It is going to be considered in chapter 5.5 of this paper.

²³ This had been shown in *R v Doughty* (1986) 83 Cr App R 319 (EWCA Crim) where the defendant felt provoked by the crying of a two-week-old baby, which he killed. On appeal, the judge ruled that the provocation defence should have been left to the jury (Padfield 193).

However, Bingham brings a similar argument when assessing the judgement in *Bedder v DPP* [1954] 2 All ER 801.²⁴ He points out that in this case the objective test was “so interpreted and applied that (it) did not involve a comparison of like with like and did not in any way reflect the merciful considerations which had given rise to the rule.” (*AG for Jersey v Holley* [48]) He further bases his arguments on four significant points in *Camplin* which he calls the leading case on provocation: Firstly, the Lordships considered the very rationale of the provocation defence to be the concession to human frailty; secondly, they criticised the decision in *Bedder v DPP* as too harsh and unjust; thirdly they rejected the idea to measure the defendant against an abstract reasonable person and fourthly, they concluded that for reasons of fairness, the reasonable person should rather share relevant characteristics of the defendant (*AG for Jersey v Holley* [55]-[58]). The argument that a jury is to decide which characteristics to take into account involves an appreciation of how ordinary human beings behave in real life over legal “logical reasoning” (*AG for Jersey v Holley* [58]). Moreover, Lord Bingham quotes Lord Morris on a statement highly relevant as for the topic of this paper:

In my view it would now be unreal to tell a jury that the notional 'reasonable man' is someone without the characteristics of the accused: it would be to intrude into their province. A few examples may be given. If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic origin, or to consider how such a man would have acted or reacted. The question would be whether the accused if he was provoked only reacted as even any reasonable man in his situation would or might have reacted. ([1978] 2 All ER 168, 177 (Morris L))

In this statement Lord Morris directly addresses the issue of defendants of a particular ethnicity and how things can be insulting for one person that are not for someone from a different ethnicity. The statement indicates that under the law as established in *Holley*, it would have been highly unlikely that a Muslim defendant having killed for honour, would have succeeded with a provocation defence, even if he would have proved that his act was not premeditated and that he really was provoked by the conduct of the victim and thus, lost his self-control and killed her. If the reasonable person against whom he is to be measured in the second stage of the objective test, does not share the defendant's characteristics, including his

²⁴ In this case the 18-year old defendant was sexually impotent and stabbed a prostitute who humiliated him both verbally and physically after he had tried, unsuccessfully, to have intercourse with her. The reasonable person against whom he was measured was taken to be not impotent and thus, his provocation plea failed and he was sentenced to death.

history and cultural background, the former would quite certainly not have reacted as the defendant did. To say otherwise would be absurd.

Dissenting judge Carswell, sharing Bingham's and Hoffmann's approach, also added a few interesting thoughts: Drastically, he argues that to accept the provocation law, as the majority in the case has done, fails to meet the criteria which criminal law courts should strive for, in that it is neither logical, nor explainable to a jury, nor does it achieve justice (*AG for Jersey v Holley* [71]). He elaborates on all three points: Firstly, he argues that there is no logical ground for the distinction between characteristics bearing on the gravity of the provocation and those bearing on the level of self-control to be expected (*AG for Jersey v Holley* [72]-[76]). This is a highly valid argument since a logical connection cannot be found in the argumentation of the majority in *Holley*, nor in the minority view in *Smith*. Arguments made concerning this distinction are normative but never descriptive and logical, as has been criticised above on Lord Nicholls' argumentation, who simply stated that the objective standard is prescribed by the 1957 Statute (*AG for Jersey v Holley* [22]). Moreover, Lord Carswell argues that this distinction is very difficult for the jury to make. Finally, he also calls for that giving justice in the particular case should take precedence over legal rules:

The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of him and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it. (*AG for Jersey v Holley* [75])

An important point that has been stressed by the majority, as well as the minority in *Holley* is that the whole law of homicide is in a very urgent need for reform (*AG for Jersey v Holley* [27], [44], [77]).

4. 4. Statutory Determination of the Ordinary Person's Characteristics- What about Culture?

In 2003, the Home Secretary had asked the Law Commission to consider provocation and diminished responsibility as partial defences to murder, provocation being the part at the heart of the project.²⁵ Subsequently, some but by

²⁵ The partial defence of diminished responsibility and the respective proposals for reform of this defence are not being discussed here, for reasons of space. The other partial defence of suicide pact is not relevant in the context of this paper.

far not all of their proposals had been implemented by means of section (52) and (54)-(56) of the Coroners and Justice Act 2009. In accordance with the judges' view in *Holley*, the Law Commission had made clear repeatedly, in their Final Report on Partial Defences to Murder,²⁶ that it has been their view that a review of the whole law of homicide is necessary in order for a coherent law on partial defences to murder to develop. As already mentioned above, though, Government had refused to implement these Law Commission proposals. This refusal has caused much criticism (see Fitz-Gibbon, 'Replacing Provocation in England and Wales'; Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control'; Morgan, 'Loss of Self-control'; Clough, 'Loss of Self-control as a Defence'). However, what is interesting is that the reason for the Home Secretary to ask the Law Commission to reconsider the partial defences to murder was the idea to develop a more appropriate and just approach to cases of domestic violence, i.e. domestic homicide (Law Commission, *Partial Defences to Murder. Final Report* (2004), para 1.2), so that violent men would be less likely to have a successful partial defence in loss of self-control, and battered women, who kill their abusers in a what has been called 'slow-burn' response (Ministry of Justice, *Murder, manslaughter and infanticide: proposals for the reform of the law*, Consultation Paper CP19/08, 2008) para 19), could more easily rely on the partial defence. Section (54) of the Coroners and Justice Act 2009 reads:

- (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—
 - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
 - (b) the loss of self-control had a qualifying trigger, and
 - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

²⁶ Beforehand, they had published Consultation Paper No 173, in October 2003, which gave rise to 146 written responses from NGOs, academics, members of the judiciary, etc.. These have been considered and included in the Final Report 2004 (Law Commission, *Partial Defences to Murder. Final Report* (2004), para 1.5)

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it. (Coroners and Justice Act 2009, s (54))

Subsection (1) is a re-formulation of the previously applied two-stage test: (1) (a) replaces the subjective test whether the defendant was provoked to act as he did, (1)(b) replaces assessment of the gravity of the provocation and (1)(c) replaces the contested question whether the reasonable person would have acted in the same way as the defendant. The reasonable person is now defined as 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D'. Thus, in considering if the reasonable person would have reacted in the same or similar way as the defendant it is now statutory fixed that the only characteristics of the defendant that should be added to this person are sex and age. Thus, the minority view from *Smith* and majority view from *Holley* have been enshrined in the 2009 Act (Edwards 235).

The circumstances the defendant was in must be considered, too. However, subsection (3) clarifies that the circumstances whose 'only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint', are not being considered. Moreover, the defendant's characteristics, apart from sex and age, are mentioned nowhere, it is only the circumstances he was in. One wonders why it is specifically 'sex and age' that are to be added to the ordinary person. Undoubtedly, these are important characteristics of a defendant, in some contexts, but why are they taken to be constantly more relevant than others? That age is relevant had comprehensively been established in *Camplin*. But why is sex, also established in *Camplin*, taken to be crucial? Interestingly, the Law Commission did not favour an inclusion of 'sex' (Carline qtd. in Edwards 236). The decision to include it reveals a weak point in the law making: After all, it refers to the question which characteristics of an individual determine its identity. The inclusion of sex could well be seen as discriminatory, as Susan Edwards points out:

Whilst it is not expressly evident from any of their Lordships judgements in *DPP v Camplin*, it can nevertheless be inferred from the way in which the female sex was regarded at that time that the concession to sex, or to the female sex to be precise, was one that was made because women were regarded as highly strung, emotionally fragile, fickle,

hysterical, and less able to control themselves in the ordinary sense of the word. (Edwards 236)

This view of women should have been overcome by the 21st century, but it has been included in a recent Act. It could certainly be an advantage for women if in a certain context they had a lower level of self-control than men, this would be taken into account.²⁷ However, can levels of self-control really be assigned to gender? What is implied, is that gender is taken to be more determinative of a person's identity than other characteristics. In certain contexts, though, culture, for instance, can be more of an identity-bearer than gender: A person can feel mainly as a woman at home and then mainly as a Muslim on the street, and mainly as an employee at work. The post-modern approach to these issues, as explained by Williams (Williams, 'Dissolving the Sameness/ Difference Debate'), is one that considers people embedded in a matrix of factors that interact in differing contexts (Williams 307). The factor 'sex' can be overshadowed by other factors in certain contexts. The limited approach in the 2009 Act does not take this into account. Certainly, the criminal law is not capable of including all these factors but the approach to take into account gender but not other characteristics, such as culture, is incoherent and incomprehensible. Culture can be a factor just as important as sex and it is well possible that a person mainly identifies via her or his culture rather than sex. This major point is going to be discussed in chapter 5.5.

Back to the provisions of the Coroners and Justice Act 2009, interestingly, subsection (2) provides that "[f]or the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden." (Coroners and Justice Act 2009 s (54)(2)) The Law Commission had proposed to abolish the loss of self-control element completely, but Government had rejected this proposal because of the risk of the defence being misused then, for example in "cold-blooded, gang-related, or 'honour killings'." (Ministry of Justice, *Murder, manslaughter and infanticide: proposals for the reform of the law*, Consultation Paper CP19/08, 2008 para 36) Instead, Government suggested and finally decided to remove the 'sudden' element. If it was the aim to withhold the defence from honour killing defendants, it would have made more sense to keep this element, though: The 'slow-burn' kind of loss of control, which has now been included in the defence, might be easier to prove in some honour killing cases than the sudden

²⁷ This touches upon the question whether equal treatment means special treatment or same treatment, and what sameness and difference actually mean. It is going to be considered in chapter 5.5.

loss of self-control. However, the reason for the 'sudden' element to be removed was, as already stated, to give battered women who kill their abusive spouses, a potential partial defence (Herring 168; Fitz-Gibbon 280). It seems that diverging benefits had to be weighed out and that the potential benefit of giving these women a defence was decided to be greater than the potential risk of giving honour killers a defence. Indeed, these two issues must not necessarily be seen as completely distinct. Since "fear of serious violence" (Coroners and Justice Act 2009 s (55)(3)) amounts to a qualifying trigger under the new Act, too, women killing in fear of becoming an 'honour killing victim', since occasionally these women already suspect what is going to happen,²⁸ might have a successful partial defence in loss of self-control because of fear of serious violence, now. However, this is rather speculation and remains to be seen in practice.

Moreover, another provision that indicates that the loss of self-control defence is not created to be available for honour killing defendants is subsection (4), which provides for that subsection (1) does not apply if the defendant acted out of a "desire for revenge" (Coroners and Justice Act 2009 s (54)(4)). It had been submitted by the Law Commission that this provision also comprises honour killings, although this is not explicitly mentioned in the Act. As Edwards argues, it was probably "anticipated that jurors could be relied upon to exclude such circumstances and/ or judges would not accept such circumstances as qualifying and would withhold a loss of control defence from the jury." (Edwards 230) It would also need to be proven that in honour killings 'desire for revenge' really is what drives the offenders to act as they do. With an understanding from the second chapter, it can be said that the term 'revenge' is much too simplifying.

After all, another trigger that has frequently driven men to feel provoked so as to kill their wives, is being provided for now, too: Section (55) of the new Act specifies what counts as qualifying trigger and section (54) only applies where "D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person" (Coroners and Justice Act 2009 s (55)(3)) or where it was

attributable to a thing or things done or said (or both) which—

1. (a) constituted circumstances of an extremely grave character, and
2. (b) caused D to have a justifiable sense of being seriously wronged. (s (55)(4))

As already indicated above, section (55)(6) then points out:

²⁸ See for instance the case of Bahnaz Mahmud (n 5).

In determining whether a loss of self-control had a qualifying trigger—

1. (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
2. (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
3. (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded. (s (55)(6))

As to (3)(c), this provision had been included because of the perceived risk that juries were too sympathetic with men who killed their unfaithful wives (Herring 169). Interestingly, this has been included, whereas no provision in the final act has been made for honour killings, because for the latter cases it has been perceived that the jury would be less sympathetic, anyway.²⁹ In the Government's 2008 Consultation Paper, it had been clarified that if other additional exceptional factors were present, too, there could still a defence of loss of self-control be run in cases that include sexual infidelity (Ministry of Justice, *Murder, manslaughter and infanticide: proposals for the reform of the law*, Consultation Consultation Paper CP19/08, 2008) para 33). However, this exclusion of sexual infidelity as a trigger indicates power is taken away from the jury. Commentators have criticised the exclusion of a specific situation as bad law making and also indicated that the judge and the jury, representing general society, should be trusted in their decision making (Fitz-Gibbon 293-295). What demonstrates a certain mistrust in the jury, too, is that the defence is now only put to the jury if in the opinion of the trial judge evidence is adduced on which "a jury, properly directed, could reasonably conclude that the defence might apply." (Coroners and Justice Act 2009 (54)(6)) Previously, the judge had to leave it to the jury if there was just a slight possibility that it might apply. This could be a result of the perceived sympathy of juries towards certain kinds of killers, too, just as the exclusion of sexual infidelity.

It is highly insightful reading through the various proposals and reports that had been issued by the Law Commission and Government prior to the final 2009 Act, however discussing them extensively would extend the scope of this paper and the respective reports can be assessed online.³⁰

29 In Mackay's empirical survey on provocation cases and public opinion, a sympathetic attitude towards men killing unfaithful wives could not be confirmed, though. (Mackay, 'Appendix C Brief Empirical Survey of Public Opinion Relating To Partial Defences To Murder' 180-212)

30 See Law Commission, *Partial Defences to Murder. Final Report* (August 2004); Law Commission, *A New Homicide Act for England and Wales? A Consultation Paper* (Consultation Paper No 177, 2005); Law Commission, *Murder, Manslaughter and Infanticide. Project 6 of the Ninth Programme of Law Reform: Homicide* (Law Com No 304, 2006); Ministry of Justice, *Murder, manslaughter and infanticide: proposals for the reform of the law*

It has been stated above that it seems unlikely that defendants in honour killing cases would have a successful defence in loss of self-control, although it remains to be seen which circumstances the jury find relevant to add to the ordinary person, and what they consider to be circumstances in the first place. In assessing how the ordinary person would have reacted, the only characteristics the jury are bound to consider are sex and age. However, this provision can be challenged, asking why it is especially these two determinants that, for the sake of fairness, are to be added to the person. What if the culture element was added to s (54)(1)(c) and the jury had to consider a person of D's sex and age and culture? Would it not be appropriate and fair to the individual to give culture as an important determinant of identity the same standing as sex and age in that it would then be one of the characteristics that the jury definitely had to take into account and that would not be free for them to decide whether it was relevant or not? In order to assess these questions, the debate on the so called 'culture defence' shall be considered since it focusses exactly on the issue of cultural evidence at court. From this debate, arguments in favour of including cultural aspects, as well as arguments promoting the opposite can be identified and finally be applied to the proposal to add 'culture' to the characteristics of the ordinary person.

5. Culture as a Mitigating Factor? The Culture Defence Debate³¹

5. 1. What is a Culture Defence?

The debate on the culture defence has evolved as a result of the emergence, or rather gradual development of pluralistic societies (see Renteln, 'The Cultural Defense') It revolves around the admissibility of cultural evidence in the courtroom. As Renteln, the best known promoter of the culture defence, puts it:

The purpose of a cultural defense is to allow defendants to introduce evidence concerning their culture and its relevance to the totality of circumstances surrounding their case. A successful cultural defense would permit the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment. (Renteln, 'The Cultural Defense' 187)

In that, it is comparable to the thinking that 'culture' might need to be added to the characteristics of the ordinary person in the loss of self-control defence.

Renteln also proposes that "[t]aking a person's cultural background into account is

(Consultation Paper CP19/08, 2008)

31 Following Woodman who comments on the, in this context, grammatically erroneous use of the adjective 'cultural' (Woodman 7), the defence shall here be called culture defence, instead of cultural defence.

fundamentally no different from judges' taking into consideration other social attributes such as gender, age and mental state." (Renteln, 'The Use and Abuse of the Cultural Defense' 62) In order to assess the question whether culture should be invoked as a legal defence, the very meaning of the term 'culture' must be clarified. This is not an easy clarification since culture is so encompassing. A workable definition has been given by Jeroen van Broek: According to him, culture is a

system of symbols which offers the human being an orientation toward the others, the material world, him-or herself and the non-human. This symbolic system has a cognitive as well as an evaluative function. It is handed over from one generation onto a next generation and subject to constant transformation. Even when it never achieves complete harmony, there is a certain logic and structure that binds the system together. (van Broek 8)

This definition already indicates the complicated nature of the concept in that it states that culture is subject to constant transformation. Cultures are neither locally nor temporarily fixed, they have no clear boundaries and are thus, the opposite of static (Poulter, 'Ethnicity, Law and Human Rights' 95). They are dynamic and highly complex.

An official culture defence does not exist, anywhere, it is a hypotheticalal concept. Although, in some cases, it has been claimed by commentators that a culture defence had been applied (CIMEL/ Interights 4; Meeto & Mirza 44), it has never officially been called so. Moreover, this paper is concerned with the English criminal law, but major works of academic research on the culture defence focus on the United States. Furthermore, the culture defence can be applied in various areas of the criminal law, from substance abuse to homicide. Now, since this paper only aims to identify arguments from the culture defence debate that can equally be applied to the discussion whether 'culture' should be added to the ordinary person in the existing partial defence of loss of self-control, not all aspects of the culture defence debate are being considered here. In discussing the benefits and disadvantages of a culture defence, the crime in focus are honour killings.

There are two cases from the US, without which hardly a discussion on the culture defence is being lead: *People v. Chen (1989)* and *People v. Kimura (1985)*. These are two sample cases where commentators have claimed that a culture defence had been in use. They shall shortly be outlined to demonstrate the mitigating potential of cultural evidence. Thereafter, the culture defence shall be regarded under three aspects, which are to be discussed on different levels,

although the boundaries between them are not clearcut: The first aspect is the very basic issue of the relationship between culture and human behaviour. The second aspect, which is to be approached on a rather politic-philosophical level, deals with what shall be called the “paradox of multicultural vulnerability” (Shachar qtd. in Levine 70). The third aspect then, which takes strong arguments from feminism scholarship, and which is highly connected with the two other aspects, is the question of how to deal with difference generally.

The US high-profile *Kimura* case “combines psychological and cultural factors” (Renteln, ‘The Cultural Defense’ 25). Fumiko Kimura, a Japanese American, had killed her two children by drowning them in the Pacific Ocean, after having learned of her husband’s infidelity. She had unsuccessfully attempted to kill herself, too. The old practice of parent-child suicide is occasionally being used in Japan in order to escape the shame that has been brought on the family through the unfaithful conduct of a member (Ibid. 25), but it is illegal there. Kimura was charged with first-degree murder, the gravest of homicide charges in the US. However, she had subsequently been testified temporary insanity by six psychiatrists and through plea bargaining she had then been charged with only voluntary manslaughter instead (Ibid. 25). Many believe this to have been the result of cultural considerations rather than mere psychiatric evidence (Ibid. 25). It is remarkable that this was a case about one of the morally gravest forms of homicide, namely infanticide. Interesting is also that notions of honour drove the defendant to the very fatal act.

In the equally high-profile *Chen* case the defendant Dong Lu Chen had beaten to death his wife, who had confessed adultery (Ibid. 34). Cultural evidence was heavily relied upon: It was submitted that in China “women are sometimes severely punished for adultery” (Ibid. 34) and that it was a serious violation of a man’s honour. However, no evidence had been made that Chen’s conduct would have been lawful under Chinese law. Still, after a non-jury trial he was found guilty only of second-degree manslaughter (Ibid. 34). This case can be seen as a classic provocation defence case in which the defendant had felt so provoked and hurt by his wife’s infidelity that he lost his self-control. In this case, as in the *Kimura* case, notions of honour and dishonour provided a central motive for the killing, as well as a reason for excuse.

5. 2. Cultural Dictates and Responsibility: The Relation between Culture and Behaviour

At the very heart of the proposal to introduce a culture defence lies the idea that culture is capable of overriding the ability to freely and rationally choose one's actions. Kay L. Levine has developed an approach that differentiates between three principal strategies for running a culture defence: These he calls cultural reason, cultural tolerance and cultural requirement (Levine 41). Each strategy has at its core an understanding of the relation between culture and behaviour, with differing degrees of agency or cultural determinism. At the very one end of the 'agency scale' the soft or external theories are promoting the view that culture has little to do with behaviour and that we simply "appropriate culture after the fact to give a particular meaning to an actor's behavior." (Ibid. 43) These theories take individuals as responsible actors with mostly free wills. The theories at the other very end take individuals as being dictated by culture, possessing no free will or agency and thus, less responsibility for their actions. These are the hard or internal theories. Their promoters argue that culture is embedded within individuals and that basically no action is possible without a cultural meaning (Ibid. 44). It is the latter theory which is the premise for the idea of a culture defence generally. Melissa Demian for instance supports the claim that culture shapes all human behaviour: She refuses to ask 'When is culture relevant', pointing out that this question "suggests there is an alternative domain of actions to choose from that are not cultural." (Demian 437) The question would accordingly need to be: When is culture not relevant? As has been shown for instance by Gordon and the memetics approach, the perceived exception of culturally determined behaviour rather is the rule (Gordon 1816). William I. Torry also argues that cultural dictation is coextensive with the very concept of culture (Torry 69). This accords with Gordon's view that everyone is at the mercy of external influences beyond their control (Gordon 1810). At first sight, this awareness seems to support the claim that a culture defence is needed in order to achieve individual justice (Renteln, 'The Cultural Defense' 187) by punishing individuals only for acts for which they are truly responsible.

As it has been stated above, one of Levine's approaches to a culture defence is the strategy of cultural tolerance: It assumes a defendant to have intended committing the very act but if the defendant argues that in his country of origin

such conduct is being tolerated or even appreciated, he could potentially be excused. It seems to be applicable to honour killings: As Levine states,

the defendant makes two assertions about the impact of his culture: first, he claims that infidelity or disrespect causes great shame in his culture; second, he claims that his culture allows him to react violently when shamed. (Levine 57)

As for honour killings, the intent to kill has usually been existent and thus, the necessary mens rea could not be denied so that the defendant could not be acquitted. That is why the strategy that would deny the necessary mens rea and provide a non-criminal reason for the committed act is, namely the cultural reason strategy (Ibid. 49), needs no further mentioning here. However, with the cultural tolerance strategy culture could be invoked as a partial defence in the style of provocation or diminished responsibility. A classic example of this is the mentioned *Chen* case (Ibid. 58-59). The other strategy proposed by Levine that could apply to honour killings, although he does not argue so, is the cultural requirement strategy (Ibid. 62): It is based on cultural imperatives really, promoting the view that culture leaves no choice to the defendant. Levine considers Female Genital Mutilation to fall under this strategy (Ibid. 63). If this was the case, then honour killings could be considered here, too. Both phenomena are practices of honour related violence³² and are notably often mentioned together in one discourse (Brandon & Hafez, 'Crimes of the Community'; Dustin and Phillips 'Whose agenda is it?'). Levine states that in cases of cultural requirement the defendant can argue that a "failure to act in accordance with cultural dictates will cause some great harm to self or family: persecution or ostracism by one's tribe, shame to one's ancestors, or abandonment by one's family." (Levine 66) He points out that the consequences for not committing the criminal act in his community will be just as severe as legal punishment, if not more (Ibid.). This is exactly the point that has been made above in relation to honour killings and the deterrence model of punishment. However, Marie-Luisa Frick makes a valid argument in that culture can also be seen as working as external restriction: "For example, the role that brothers in families with a migratory background have in the honour killing of their sisters is quite a telling illustration of this." (Frick 564) Frick refers to the findings of Brandon and Hafez, that families often coax these

32 Brandon & Hafez argue: "Just as other forms of honour based violence aim to prevent women from damaging a family or community's honour through their sexual activity, in most cases female genital mutilation can be seen as an attempt to prevent female infidelity and sexual independence by reducing a woman's sex drive." (65)

young men to commit the killing, without leaving them a real choice. She also rightly points out that these men might as well just argue for coercion as a mitigating factor, without need to invoke culture.

However, in order for a culture defence to mitigate criminal responsibility,³³ it must be shown that culture actually commanded rather than just explained the act of the defendant (Levine 48). Therefore, a hard or internal viewpoint must be taken in the first place and a degree of cultural determinism is the premise for a culture defence. Levine argues that for a culture defence to be applicable it would first need to be checked whether the defendant was able to operate outside of his cultural schema, that is, how strong his culture has been embedded within him (Ibid. 28). Therefore, several aspects would need be looked at: The defendant's degree of assimilation, the degree of physical segregation, and whether the defendant's behaviour was consistent with existing beliefs in his community (Ibid.). This recalls the "cultural defence test" (Renteln, 'The Cultural Defense' 207) which Renteln has proposed. She suggests that there are three crucial questions for determining whether a culture defence should be available: "1. Is the litigant a member of the ethnic group? 2. Does the group have such a tradition? 3. Was the litigant influenced by the tradition when he or she acted?" (Ibid. 207) One must be reminded that for such a test to be practically applicable, there would be need for clear definitions and clearcut boundaries. As it has been stated above, though, cultures are not static, neither do they have a fixed set of traditions and customs (Frick 562-563; Sacks 534).³⁴ Especially the question whether the group has such a respective tradition is rather critical: Often, certain traditional practices are being officially condemned but still widely practiced (Brandon & Hafez 37-63; Latif 30). As for honour killings, one would need to consider that some Islamic countries officially try to combat the phenomenon but how at the same time the practice has by no means been overcome (see Husseini 154-167). So, who should decide what keeps on counting as a group's tradition and what ceases to do so? How many people of a culture would need to condemn a certain practice in order to make it 'invalid' for culture claims as a defence? This 'cultural defense

33 By purpose it is only being assumed that a culture defence could mitigate and not fully negate criminal responsibility, because the culture defence debate shall be regarded under the light of honour killings, in which the necessary mens rea almost always exists.

34 Poulter for instance mentions how during the 20th century, in many Arab and Islamic states various reforms in Muslim personal law had been made (Poulter 'Ethnicity, Law and Human Rights' 229).

test' is based on the assumption that cultures are definable constructions that are in themselves coherent, stable and limited by clear boundaries. This erroneous assumption denies internal diversity and the capability of cultures to change in space and time. Cultures are not monolith (Levine 76). This thinking is based on binary thought schemes: In focussing on clearcut notions of 'us' and 'them' in terms of culture, one forgets about internal tensions and gender differences for instance within 'us', as well as 'them'. As Valerie L. Sacks puts it:

A too-simplistic use of the cultural defence erases crucial distinctions between the perspectives of those who are differently situated and likens disparate phenomena. (Sacks 536)

Diversity does not only exist at one level but at all levels, and thus, it exists within groups themselves. By ignoring the fact that diversity exists within groups and that cultures are capable of change, the culture defence can serve to promote essentialism, stereotypes and prejudice (Sacks 544; Levine 77). It might thus reinforce "Western notions of a primitive, not quite autonomous "other" who is too culture-bound to make reasoned judgements-(...)." (Sacks 544) It inhibits the idea of non-Western people being the products of their culture, unable to act freely and reasonably, basically denying them individualism, agency and responsibility. The problem is that through the lenses of cultural determinism promoters of the culture defence often tend to lack the very awareness that the own behaviour is just as culturally shaped as the 'other's'. Levine cites Fox mentioning that if one explains behaviour with culture, it "feeds own preconceptions" (Fox qtd. in Levine 45) about certain other societies and why they simply are how they are. The culture defence is problematic if it assumes both, on the one hand that there is a free will and people have responsibility for their actions, and on the other hand that culture determines behaviour and individuals are thus less responsible for what they do. The former is then taken to be true for people from the majority Western culture, whereas the latter is true for people from 'other' non-Western cultures. Modern liberal societies place a high value on notions of individualism, liberty, free choice and the idea that "agency and the ability to make rational choices" (Volpp 1192) make one human. Thus, denying this agency to individuals from minority cultures automatically renders them less human. Under these premises, a culture defence should be rejected.

However, one needs to consider that individuals are not so free "to choose their own lifestyles as easily" (Poulter, 'Ethnicity, Law and Human Rights' 33). They

are parts of “groups or communities in society that are held together by very strong bonds” (Ibid.), which they cannot simply escape. Culture is such a strong bond. Thus, it is important how the majority culture’s behaviour is just as culturally shaped (Levine 67). This is often forgotten. Torry for instance, who is in favour of a culture defence, and who assumes that culture dictations exist, does not question the dictates that compel offenders in the majority culture, at all. Very illustrating of the inability to perceive the own culture as culture is the fact that

incidents of sexual violence in the West are frequently thought to reflect the behaviour of a few deviants- rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations. (Volpp 1187)

In her article about multiculturalism and feminism Leti Volpp reflects on how culture is not being invoked when Western men do violence to their wives, but it is when immigrants do. One accordingly fails to recognise cultural aspects involved in the violence which women from the majority culture suffer (Ibid. 1189).

Paradoxically, this is an error also made by Melissa Spatz in her ‘Comparative Study of Legal Defences for Men Who Kill Their Wives’ when she tries to actually demonstrate that attitudes towards violence against women are comparable in Islamic countries and the US. Her aim is to show that despite differing histories and different cultures, wife killings are being excused in many legal systems all over the world. However, in showing how these killings are being excused, for the US she only mentions cases involving immigrant defendants acting with cultural motives and no cases of white Western men killing their wives and pleading ‘normal’ provocation, for instance. Thus, she fails in her aim and gives her essay a rather ethnocentric notion.

After all, according to Gordon we must accept that we all are not as free in our decisions and actions: Gordon uses a unique approach to the culture defence topic: the theory of memes. Memes he describes as ideas that are similar to genes, as biologist Richard Dawkins put it, they are “units of cultural evolution” (Gordon 1816). Memes are capable of replicating and in order to do so, they “must be capable of being stored and spread.” (Ibid. 1817) They are taken to evolve by natural selection: The fittest meme ‘survives’. Fit memes must be well storable and spreadable. According to the memes theory, every individual is “at the mercy of the ideas he encounters” (Ibid. 1810). If one accepts that “everyone’s actions are the result of factors, both cultural and genetic, beyond his or her control” (Ibid.

1816), it must be admitted that free choice and free will, which actually lie at the heart of the criminal law system, are not a matter of course. By claiming that actions are not freely chosen by culture defendants, and that they should thus be excused, one implies a thinking that the own actions are freely chosen and that is why they would not be excused. As Gordon says: “In order for there to be an exception to free choice, it must be the norm.” (Ibid. 1816) He argues that it is just not the norm and that memetics demonstrate how incorrect it is to assume members of the majority culture had no “cultural influences to overcome” (Ibid. 1825). For this reason, he calls the culture defence “arbitrarily” (Ibid. 1810). If culture generally determines behaviour, as also promoted by the hard or internal theory described by Levine, and actions are not freely chosen, why should one only excuse the behaviour of some with a culture defence? This approach does not seem coherent and lacks logicity. Some commentators have also criticised that the possibilities to extend the culture defence then are “nearly limitless.” (Sacks 550) An example mentioned by Torry supports this claim:

A sexual harassment suit brought by Vivienne Rabidue against male coworkers met defeat before the “blue collar subculture of sexism” thesis thrust at it by the defense. The defendants presented themselves to be the product of a mainstream working-class subculture steeped on macho values and behaviour. (66)

These defendants claimed that their culture made them do it, just as defendants from minority cultures would do with a culture defence. So perceived, a culture defence could be used by every individual. It seems the culture defence is caught between either promoting stereotypes about the culturally determined ‘other’ on the one hand and mere uselessness because of potential universal validity on the other.

Another claim that has often been made in disfavour of the culture defence is that it would undermine the deterrent effect the criminal law is supposed to have (Levine 78; Sacks 532). Although it is questionable, if individuals are generally not as free and calculating as originally assumed by the law makers, whether the criminal law can have a deterrent effect, at all, Gordon’s memetics approach is again helpful: As already stated, memes evolve by natural selection and the fittest memes that spread best ‘survive’. According to Gordon, if memes are made ‘unfit’, they will cease to spread and thus, eventually, cease to exist (Gordon 1825). This is what Gordon calls the “memetic power of the law” (Ibid. 1832): If law is being enforced by means of punishment, it has the power to change individuals’

mental architectures (Ibid. 1825). Simply put: If the meme of honour killings exists in various minds and the host organisms which inhibit the meme are being punished, the meme will lose its fitness and will finally cease to exist, since an unfit meme is less likely to be stored and spread. On the other hand, if the host organisms are treated leniently, the meme will not lose its fitness. From a different perspective, the memetics theory thus reinforces a deterrence approach to punishment.

However, an approach to a culture defence that, for honour killing cases, might not undermine the deterrent power of the law, is the idea to consider cultural evidence at sentencing stage (see Sikora, 'Differing Cultures, Differing Culpabilities?'). This approach would be coherent with the principle that motive is only to be considered at sentencing stage. An honour killing defendant would thus still be convicted of murder. However, in England murder still requires the mandatory life sentence and the trial judges do not have much discretion: In determining the minimum term for the actual number of years to be spent in custody before a potential release on licence, the judge chooses between whole life, 30 years or 15 years, depending on the particular seriousness (Law Commission, *Partial Defences to Murder. Final Report* (August 2004), 27). Culture could then serve to reduce the seriousness. An advantage of this approach is that still the 'right message' would be sent, indicating that an honour killing is murder and not manslaughter. The counter argument, though, is that 'murder' is a strong social label, which could make it more difficult for the respective offender to later re-integrate into general society. Moreover, with this approach, it would only be for the judge to consider cultural evidence, the jury would not be concerned with it.

5. 3. 'The Paradox of Multicultural Vulnerability'³⁵

An argument in favour of the culture defence is that it promotes cultural diversity and the development of a multicultural society and thus, a plurality of values. It could "create more empathy, contextualisation and individualised justice" (Magnarella 77). Frick also states that from the pluralism viewpoint, the culture defence reinforces the aims of a modern liberal society (Frick 561). According to proponents of this argument, it is inconsequential to promote diversity on the one

35 Shachar qtd. in Levine 70

hand and on the other punish people for conduct coherent with their cultural norms. England generally has adopted a pluralistic approach to multiculturalism: Poulter states that following assimilation policies during “the early years of post 1945 immigration” (Poulter, ‘Ethnicity, Law and Human Rights’ 14), with the arrival of larger numbers of Muslims, Sikhs and Hindus including their distinctive religious beliefs and disparate cultural traditions, during the 1960s a new approach had to be developed (Ibid.). Thus, from the 1960s onwards, policy makers moved towards cultural pluralism, promoting “respect to the distinctive cultures and identities of members of the ethnic communities.” (Ibid. 15) This approach had also required the law to accommodate certain needs of minority communities, as it had been done with the Slaughter of Poultry Act 1967 and the Slaughterhouses Act 1974³⁶ or the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976³⁷ (Poulter ‘Cultural Pluralism and its Limits’ 10). As early as 1990, Poulter had stated that in terms of education, employment and also criminal law “English law has accommodated divergent ethnic and religious practices and beliefs in a constructive manner.” (Ibid.)

However, the culture defence not only promotes cultural diversity but also individualism, in that it aims at achieving individualised justice (Torry 60). This is also being mentioned by Doriane Lambelet Coleman who states that the culture defence is consistent with both the “liberal doctrines of individualised justice and strong multiculturalism.” (Coleman 1122) The claim that it supports individualism can be challenged, though: If a defendant in an honour killing case could claim that because of the notions of honour in his culture, it was a cultural imperative for him to kill a dishonourable female family member, considering the role of culture and how the defendant’s conduct has been culturally determined in this case would provide for individualised justice for the defendant. However, would not individualism require to protect the victims’ or potential victims’ right to live as they wish, too? A culture defence would be likely to give cultural groups precedence over individuals and thus, rather deny individual justice for some. Individualism in this context would promote the offenders’ rights over the victims’. Frick refers to this problem when she calls the political motive of pluralism “potentially self-contradicting” (Frick 567): She argues that by oppressing cultural

36 These Acts provide that Jews and Muslims are allowed to slaughter animals according to their traditions.

37 Under this Act Sikhs are excused from wearing a crash helmet if they wear a turban.

diversity people's rights to liberty are being violated, but on the other hand by giving leeway to cultural diversity, the individual's right to liberty and life can equally be violated if the minority groups themselves do not grant each individual member the treatment they demand from the state. The motive is self-contradicting because it ignores the multiple tensions that exist in the complex and multi-faceted relationship between state, minority groups and individual group members, and instead rather one-dimensionally refers to the tensions between state and minority groups. A minority group and its individual members cannot be seen as a single unit, though. Tensions are inherent in this relation, too. Levine, on a political level, refers to a "conflict between the unity required to govern, the need to honour diverse traditions and practices of cultural groups, and the recognition accorded to autonomous individual actors." (Levine 68) Each of these three virtually conflicting needs requires a policy approach that promotes specific values over values promoted by the other policy approaches: The unity required to govern requires an assimilation approach, the need to honour diverse traditions requires pluralism and the recognition of individual actors requires an individualism approach (Levine 68). As a result, whenever the conflict between state and minority group is being eased it happens at the cost of the relation between state and individual members of the group, that is, at the cost of individualism. Vice versa, when the conflict between state and individual members is being eased, it happens at the expense of minority groups as a whole, and thus, at the expense of pluralism. This is exactly what Shachar has aptly called the "paradox of multicultural vulnerability" (Shachar qtd. in Levine 70). As Levine puts it: "[I]n certain circumstances, one cannot simultaneously protect the rights of the group as against the state without harming the rights of the individual as against her group." (Levine 70) Regarding the scheme of the three-dimensional relation between state, minority group and individual members the search for the right approach to multiculturalism can well be called a dilemma. Frick puts it straight by stating that

the enlightened pluralist can subscribe to Gordon's remark that '[it] is difficult for a nation to claim that it is founded upon the ideas of freedom, tolerance, and personal liberty and at the same time not accept the values of other groups' (2001: 1828) and simultaneously insist that 'it is difficult for a nation to claim that it is founded upon the idea of universal human rights and at the same time accept structural human rights violations within certain groups'. (Frick 567)

However, as indicated above, one of the main arguments against a culture

defence is that it could serve to neglect the victims' right to equal protection by the state (Gordon 1829; Frick 568; Levine 68; Sacks 534). Frick is right in differentiating here between actual victims and potential future victims (Frick 568): As to 'completed' honour killings, there is obviously no need to protect the victim, anymore, since the worst case, the death of the victim, has already occurred. However, this is so with all homicide cases. Thus, protecting the victims in this context rather refers to potential future victims. The punishment of the actual offender shall serve to deter potential future offenders. Punishing an offender for promoting the good of protecting potential future victims is not the favoured approach to punishment in the English criminal law system, though, as it has been explained in chapter 3.3. However, leaving out of account the dubiousness of deterrence generally, one can wonder whether a culture defence to be allowed in honour based violence cases would be likely to increase or diminish the law's deterrence factor (Frick 569). Considering the memetics approach, which reinforces the deterrence argument from a different perspective, a culture defence would rather diminish the law's deterrence power: As explained in chapter 5.2, the meme of honour killings is more likely to keep its fitness if host organisms are being treated leniently than if they get a severe punishment. Therefore, the power of the criminal law to indeed alter cultural habits and thus, to either adhere to or change attitudes should not be underestimated (Claes & Vrieling 312).

Frick also mentions Renteln's approach (570): The latter argues that it is not the main purpose of the criminal law to care for the victims' rights and their protection but rather it is to provide for a "just punishment for the defendant" (Renteln 'The Cultural Defense' 196). This statement is highly debatable: The criminal law is concerned with the functioning of society in that it provides guidance on the kinds of behaviour that are acceptable in society, as stated in chapter 3.1 of this paper. Frick also strongly opposes Renteln's view in arguing that punishment, as means of implementing the criminal law rules, is to protect human rights and "denying the relevancy of the victim's perspectives not only is highly unfair, but also contradicts the very rationale of the criminal law itself." (Frick 570) Coleman considers protection of the general public, as well as of victims to be the main function of criminal law (Coleman 1136). Renteln's view represents the "postmodernist, defense-oriented approach of individualising

justice for criminal defendants, and of infusing the analysis of a defendant's behaviour with multicultural sensitivity" (Ibid. 1113), while Frick stresses equal protection. It is helpful in this context to look at the subject of honour killings not only from a theoretic and logic point of view but also from a pragmatic real life perspective: From this perspective a culture defence would be likely to increase potential victims' sense of insecurity and helplessness: As Brandon and Hafez have shown, these women already face various deterrents from escaping their environment, because of economic dependence on their male family members, informal networks within the community, and government employees failing to uphold the law for instance (Brandon & Hafez 78-118). Also, other commentators have argued that due to potential isolation, language barriers, cultural role perceptions and pressures from their community, immigrant women generally are highly vulnerable and especially demand an empowering treatment by the law (see Erez & Copps Hartley 'Battered Immigrant Women and the Legal System'; Raj & Silverman 'Violence Against Immigrant Women'; Menjivar & Salcido 'Immigrant Women and Domestic Violence'). It could be the wrong message to rather make a step towards individualised justice for the offenders instead of towards equal protection for potential victims (Coleman 1137).

Given that most victims of honour related violence are female, because of the perceived denial of the victims' rights, many feminist scholars argue against the culture defence, some even going so far as to ask whether multiculturalism is generally bad for women (Okin 1999). In this regard, feminist and conservative views largely coincide (Coleman 1158). Susan Moller Okin argues that most claims being put forward by minority groups for group rights and special legal treatment have involved gender issues, such as "child marriages, forced marriages, divorce systems biased against women, polygyny, and female genital mutilation." (Okin 669)

Coleman also accepts that pluralism and the aim of individualised justice stand in opposition to the protection of victims (Coleman 1097): In balancing different policy aims, she strikes a blow for choosing female victims' rights over culture. Regarding highly patriarchal cultural norms which are at issue in many cases, she argues that these are "inherently discriminatory in that they incorporate values about the lesser status of women and children; these values are contrary to those the contemporary international progressive agenda embraces." (Ibid. 1096)

5. 4. *Human Rights, Group Rights and Liberalism*

In trying to challenge the motives that underly arguments for a culture defence on the human rights level, Frick again uses the example of honour-based violence, because according to her it best highlights “the whole set of problems contained in the ‘cultural defense vs human rights discourse’.” (Frick 566) In this present context, the human rights dimension thus does not refer to the protection of minorities but rather the protection of minorities within minorities in order to ensure that the former does not become a “cloak for oppression and injustice” (Lester and Bindman qtd. in Poulter, ‘Ethnicity, Law and Human Rights’ 22). If a culture defence existed and if it was applied to honour based violent crimes, such as honour killings, it could excuse serious violations of human rights, such as “the right to life, liberty of person, freedom from torture or cruel, inhuman or degrading treatment.” (Frick 567) Poulter differentiates between group rights as specific rights for minority groups and individual human rights and the potential risks of group rights. He states that there is a potential conflict between group rights and individual rights (Poulter, ‘Ethnicity, Law and Human Rights’ 93).

Group rights are a rather contested concept within liberalism, which is “characterized by a profound attachment to individualism, to the belief that individual persons are the ultimate units of moral worth.” (Ibid.) Poulter cites Kymlicka who has pointed out that within liberalism there is no room for collective rights, since the only relevance of the community is what it can contribute to the individuals’ lives:

Individual and collective rights cannot compete for the same moral space, in liberal theory, since the value of the collective derives from its contribution to the value of individual lives. (Kymlicka qtd. in Poulter, ‘Ethnicity, Law and Human Rights’ 93)

The risk that the liberal fears is that collective rights would undermine personal interests and would submerge the individual with the group (Poulter, ‘Ethnicity, Law and Human Rights’ 94). This fear is not arbitrary as the phenomenon of honour based violence within Muslim communities demonstrates. Being governed by the dictates of a cultural group should require the consent of the individual and not be taken as an unalterable fact (Ibid.). Allowing the culture defence would ignore the fact that most often the victims had never had the chance to give or deny their consent to be governed by the respective cultural group.

The culture defence reveals another contradiction that has to do with liberalism itself: As it has been mentioned above, some commentators have stressed that the

culture defence for providing individual justice, is coherent with liberal ideals. But on the other hand, as just stated, the culture defence would need to rely on a notion of group rights, the latter being contested within liberalism for the fear of it undermining personal rights. The claim to focus on individual rights leaves the question open whether defendant's or victim's rights take precedence. Coleman states that "in this regard, liberal allegiances split, for individualising justice through the use of dispositive cultural evidence in immigrant cases does irreparable harm to the liberty interests of these groups." (Coleman 1127) The liberal agenda promotes both the defendant's right to fairness and the "protection of the liberty interests of women, children, and minorities" (Ibid. 1128). As it should have become clear by now, these aims often are in conflict. However, Coleman argues with Lockean political theory, which promotes that "on its most fundamental level government exists to protect the life, liberty and property interests of the people who have consented to its jurisdiction." (Ibid. 1127) Considering this theory, the culture defence contradicts the philosophical foundations of the law: If those who do not owe allegiance to the government in that they refuse to consent to its jurisdiction and to give up values contradicting the morals of the state they live in, are being protected and those who have not done any harm are denied such protection, the state fails to live up to its objectives.

As to the human rights dimension it is often being argued that cultural pluralism should have its limits where human rights are being violated (Poulter, 'Ethnicity, Law and Human Rights' 107). It can be questioned, though, whether it is a valid approach to take human rights as a universal standard: The notion of human rights could as well be claimed to be a European culture shaped concept and thus, the idea of it being universal could be called Eurocentric. Therefore, Poulter when assessing the issue of human rights and minority rights also considers questions of ethnocentricity and relativism (Ibid.). As Coleman states, the postmodern approach promotes the view that there is "no objective truth in the law, rather the law, as it exists, is the product of the particular minds and "voices" of those who drafted it" (Coleman 1118). Therefore, some promote the idea that "legal discourse and practice should be changed to more accurately reflect the diverse voices of all members of society." (Ibid.) Multiculturalists argue that

the law necessarily emerges from the particular *cultural* milieu and orientation of its

authors and, therefore, that existing American jurisprudence is principally Anglo-American, rather than objective and true in any grander sense. (Ibid.)

In its purest form, Coleman states, multiculturalism promotes equality of cultures in that no culture is superior to another (Ibid. 1119). Thus, being relativistic, it places no cultural values over others: Cultural relativists

argue that most evaluations are relative to the cultural background out of which they arise and that because of the great variety of cultural values there can be no moral absolutes; hence it is important to recognize that the object of criticism may well be considered perfectly moral in terms of its own system. (Poulter, 'Ethnicity, Law and Human Rights' 108)

So, how are we to judge about the morality of honour based violence and honour killings? Would it be appropriate to evaluate them according to human rights standards? Are these rights an "objective international standard against which other cultures may be validly tested?" (Ibid.) Renteln for instance insists that many scholars have identified the philosophical foundations of human rights law to be Eurocentric and that for diverse ethnic groups they might seem to reinforce neocolonial aims (Renteln, 'The Cultural Defense' 215). Admittedly, they have been based on Western values and perceptions (Pollis and Schwab qtd. in Poulter, 'Ethnicity, Law and Human Rights' 109), however, having meanwhile been accepted by a wide range of countries, by no means only by Western countries, they should rightfully be claimed to be at least broadly valid. Limiting the applicability of human rights to only some countries could reveal as much arrogance as imposing them on others. Poulter aptly cites Hatch: "'Although we may do harm by expressing judgments across cultural boundaries, we may do as much or more harm by failing to do so.'" (qtd. in Poulter, 'Ethnicity, Law and Human Rights' 112) This very dilemma has also been mentioned by Dustin & Phillips in regard to honour based violence in that "inaction could be seen as racist, but then so could too inaction." (Dustin & Phillips 6)

Pure cultural relativism is an end in itself in that it leads nowhere and leaves one in the dark, without any values or guidelines. For pragmatic reasons this pure cultural relativism should thus be denied. As Frick's greatest argument demonstrates, a state trying to establish itself purely on objective grounds, will fail: "Hence, any state uniformly excluding any ideal whatsoever simply cannot function, i.e. fulfilling any purpose since it denies itself any possible justification." (Frick 570) Thus, there is no point for the state, and the criminal law, in trying to be completely objective. They are to protect a society's values and in order to do so, the values must be known. They are inherently subjective and culturally

shaped. This does not make them less valid, though.

5. 5. The Search for the Right Approach to Difference

The question of how to deal with difference is in two aspects a complicated one: Firstly, one must identify difference in the first place. Regarding the claim that focussing on perceived obvious differences promotes thinking in binaries, which is in itself problematic, it is rather difficult to identify 'true' difference and sameness. Secondly, if at all possible, having identified any difference, the crucial question is: Can difference best be accommodated by equal or special treatment?

As to the first issue, in her text on gender, difference and multiculturalism, Volpp identifies the need to move beyond "binary oppositions in examining the concerns of women cross-culturally or globally" (Volpp 1185). The feminism versus multiculturalism discourse often resulting in claims that multiculturalism is bad for women, portrays gender and race or ethnicity as oppositions. Both, though, are shapers of identity and as thus, cannot be analysed as isolated phenomena (Ibid. 1202) They interact within the individual. Intersectionalism is a valuable approach to avoid these binary thought schemes:

[I]ntersecting systems of race, class and gender act as 'structuring forces' affecting how people act, the opportunities that are available to them, and the way in which their behaviour is socially defined (Burgess-Proctor 39).

A highly useful contribution to the debate on sameness and difference has been made by Joan C. Williams for instance, who promotes a post-modern approach to the issue. The basic problem with difference is that people can be

disadvantaged by treating them the same as others in contexts where they cannot live up to the accepted norm, as when a person in a wheelchair is treated as if she could walk. But they can also be disadvantaged if they are treated as different in a way that reinforces traditional stereotypes. (Williams 296)

Feminist arguments are again helpful: Of course, treating women who face different realities than men, as the same, can be unfair. It can even "veil the underlying structural conditions that disadvantage women." (Ibid. 302) The same argument can be made in regard to cultural minority group members. An essentialist view on difference can and must be avoided by stressing the multiple viewpoints available to any individual (Ibid. 299). Individuals might well have at the same time, or rather according to different contexts, an ethnic minority perspective, a female perspective, a working class perspective, a youth perspective and many more.

A post-modern approach to difference highlights that each person is embedded in a

matrix of social and psychological factors that interact in different contexts. Essentialism dissolves before the notion of a shifting, constantly reconfigured self. (Ibid. 307)

Accordingly, there are no essential differences and it must rather be considered which difference is relevant in which context. So, the importance of gender for instance can well be overshadowed at times by class, culture, race or various other facets (Ibid. 310). Frick, without naming it, also refers to such a post-modern approach to identity, in that she says that “culture does play a significant role in the shaping of one’s identity, but so do other systems of belonging.” (Frick 565) This rephrases what has been said in chapter 4.4 about sex as a characteristic of the ordinary person and it serves to be a highly valuable argument to challenge the defence of loss of self-control in how it only considers sex and age as relevant characteristics of a defendant.

As to the second issue, the doctrine that people who are alike should be treated alike and people who are not alike should not be treated alike requires a previous assessment of which people are alike and which are not alike (Westen 543-547). Peter Westen challenges the idea of any meaningful equality. He argues that individuals always are alike merely in some respects and that there are no natural categories of ‘like’ people: Individuals can only be like in reference to some external moral rule (Westen 547). Thus, the mere statement that some people are alike involves a moral statement in the first place.

Poulter submits that regarding the meaning of equal treatment of minorities, one approach is to treat everybody uniformly and the other to sometimes grant specific differential treatment in order to achieve more justice (Poulter, ‘Ethnicity, Law and Human Rights’ 59). There is a variety of policy methods to handle difference, such as suppression, invalidity and exclusion or laissez-faire, non-discrimination and differential treatment (Ibid. 59-64). The laissez-faire approach promotes the view that if there is not a good reason for the state to interfere, every citizen has a right to do what and how she or he likes. This approach refuses any preventative and restricting provisions that consider difference in society on the side of the state. Because of the flexibility and liberality of English law, this approach has long been favoured (Ibid. 61). However, differential treatment has been argued to be required in some circumstances in order to achieve genuine rather than only formal equality (Poulter, ‘Ethnicity, Law and Human Rights’ 62). Poulter also submits that differential treatment can be a feature of sentencing at court in criminal cases (Ibid. 63). This then would, unlikely a culture defence as

discussed so far, not change the conviction but it might still mitigate the punishment. In this context, Poulter also mentions the cases of *R v Adesanya* (1975) 24 ICLQ 136 and *R v Bibi* [1980] 1 WLR 1193: In both cases the female defendants, with Nigerian and Muslim origins, were either given a complete discharge or had their prison sentence gravely reduced, due to notions of culturally shaped behaviour (Poulter, 'Ethnicity, Law and Human Rights' 63). According to Poulter, the modern multicultural state should not simply tolerate difference but actively include it (Ibid. 34). As it has been demonstrated above with the statutory provisions especially designed for Muslims, Jews and Sikhs, an active inclusion of difference has been pursued in England, at times.

5. 6. *Interim Resume for the Culture Defence Debate*

Renteln's final suggestion for the culture defence is the no-harm principle, limiting cultural pluralism and tolerance where irreparable physical harm is involved (Renteln, 'The Cultural Defense' 217). Under this principle, she would for instance tolerate polygamous marriages but not practices such as female genital mutilation, and obviously not honour killings. However, Renteln is right in revealing difficulties of her own approach: It requires a definition of 'harm', a notion which differs between cultures, too. Renteln then determines "traditions that cause death" (Ibid.) to definitely count as harmful. Honour killings would thus require no cultural considerations for the sake of pluralism. Renteln rightfully objects that valuing life is not a universal attitude, but then switches to purely normative arguments which are incoherent with her previous discussion. She states that "in liberal democracies, a premium is placed on the preservation of life" (Ibid.) and that traditions causing death "should be prohibited." (Ibid.) This normative argument seems rather odd considering her relativistic reflections on the non-universality of human rights. However, this reflects a common problem: the fundamental gap between *is* and *ought*. As Frick puts it, "no direct way of reasoning exists from the realm of facts to the realm of norms from a logical point of view" (Frick 566). Once having accepted that values are not universal, there is simply no logical ground anymore for arguing that some external values should be condemned, while others are being tolerated, and the arguments are doomed to be normative. From a purely logical point of view, one would need to either completely accept pluralism and with it a culture defence, or refuse it. Real

cultural relativism can only be radical, otherwise it denies its own logic. Poulter points out, though, that very few pluralists subscribe to radical cultural relativism and that pluralism must have its limits for the “need to maintain a cohesive society founded on shared fundamental values.” (Poulter, ‘Ethnicity, Law and Human Rights’ 20) Therefore, the English approach to multiculturalism is a limited version of pluralism. A culture defence would not be coherent with this ‘pluralism within limits’, because if it would exist it would rather promote pure pluralism. However, it is “pluralism within limits” (Ibid.) that lacks a logical and clear foundation, for the limits can be said to be arbitrarily, since taken from normative arguments, just as it would be arbitrarily to adopt a culture defence generally but then exclude it for cases involving serious bodily harm. Although ‘pluralism within limits’ is therefore a difficult and challenging, as well as challengeable balancing act, there are policy reasons supporting this approach, as explained well by Poulter in his text about cultural pluralism and its limits: Social cohesion and the “integrity of the ‘social and cultural core’ of English values as a whole” (Poulter, ‘Cultural Pluralism and its Limits’ 4),³⁸ which minorities should take on, too, can require minorities to give up some of the elements of their culture.

Many objections have just been made against the culture defence, including the risk of reinforcing unreflected arrogant Western views about the own free will, rationality and liberty opposing the non-western culturally determined ‘other’, having no agency and being merely the ‘products’ of their culture. Moreover, accepting specific conduct to be the result of a specific culture inherits the risk of cultural essentialism, denying minority cultures the capability to change, as well as ignoring their internal diversity, which promotes stereotypes and prejudice, and also tends to neglect victims’ and potential victims’ rights. Thus, a culture defence could violate the liberal ideal of individual freedom, as well as the modern state’s assurance to protect the liberty of the individual. Potentially preventing otherwise severe punishments, the culture defence can also undermine the memetic power of the law.

On the other hand, it has been submitted that a culture defence could help to admit that the majority culture’s law necessarily reflects the cultural milieu of its makers and cannot rightly be claimed to be universally valid. Moreover, it has

³⁸ Poulter also argues in this text that in order to define those core values of society, other Western democracies have a written constitution, which British society lacks. (11)

been argued that pluralism requires a more sophisticated approach to difference and equality, so that specific treatment and an active inclusion of difference is sometimes justified. Furthermore, it has been determined that a post-modern approach to difference avoids thinking in binaries and instead promotes a matrix of difference factors with differing relevances in differing contexts. As one of those difference factors, culture can be the crucial aspect in some contexts.

Given that the law reflects the values of the majority culture, it can be concluded that without any cultural considerations at court, defendants from the majority culture are likely to be advantaged since they share the same set of cultural values as the lawmakers and the judiciary, and their culture is thus automatically and unconsciously taken into account.

6. Sex, Age and Culture: Proposal to Include Culture as Relevant Characteristic in the Loss of Self-Control Defence

Now, what do the arguments in favour and disfavour of the culture defence reveal as for the partial defence of loss of self-control, then provocation, and the ordinary person's characteristics? As it has just been stated, the law reflects the cultural milieu of its makers and the values of the dominant culture. The ordinary person is thus also a person from the majority culture: In allegedly excluding culture from this person, it is automatically the majority culture that is taken for granted. For achieving the aim of individualised justice it should thus be considered to add culture to the characteristics of the ordinary person. Moreover, the just mentioned post-modern approach to difference requires that not only sex and age be considered as relevant characteristics. It is being completely ignored that these factors are only two in the matrix of various factors and that they are only relevant in some contexts, while irrelevant in others.

It has been shown in chapter 4 that the provocation defence has always depended on cultural notions of what counts as sufficient provocation and what does not and thus, has reflected social values, norms and morals. The roots of the defence also demonstrate that it has always been inextricably linked with dominant ideas of honour and dishonour. The provocation defence can thus be said to have always reflected dominant culture. It "makes allowances for the ways in which reasonable people are influenced and compelled by dominant cultural conceptions of natural honour." (Sing 1869) Now, it shall be argued that with the

alleged exclusion of culture, that is based on the ethnocentric notion that the dominant culture is rather a universal code of conduct instead of just a culture, but which actually is an inclusion of the dominant culture, the loss of self-control, then provocation defence can be seen as a majority culture defence. Thus, it shall be demonstrated in the following how the provocation defence has been successfully applied by male majority culture defendants who have killed their wives, and then, how provocation has been tried to mitigate an honour killing committed by a Muslim defendant. Subsequently, the underlying notions of what excuses the one killing but not the other shall be considered and finally it will be considered whether an inclusion of culture in the defence of loss of self-control could provide a juster and more precise treatment of all defendants.

*6. 1. Provocation as Majority Culture Defence: R v Suratan; R v Humes; R v Wilkinson*³⁹

Firstly, three cases shall be discussed which illustrate well how a shared set of values of defendants who had killed their wives and judiciary can serve to reduce punishment with the help of the provocation defence. This has been the case in *Suratan*, *Humes* and *Wilkinson*: Whilst Darren Anthony Suratan, who had killed his partner by striking her with several blows was acquitted of murder due to a lack of intent to kill her and subsequently convicted of manslaughter, the two other defendants were convicted of only manslaughter due to provocation. Mr Suratan's wife was a heavy drinker and this circumstance was taken into account by the sentencing judge who accepted that the defendant was stressed because of the victim's conduct. Mr Suratan was sentenced to 3 ½ years imprisonment (*Attorney General's References (Nos 74, 95 and 118 of 2002)* [2002] EWCA Crim 2982).

The case of Leslie Humes, who had killed his wife with whom he had four children, by stabbing her, is slightly more complex: Mr Humes was a hard-working solicitor. Prior to the killing, the marriage with Mrs Humes had ran into difficulties and Mrs Humes had a new lover, which she concealed from Mr Humes, though. However, ten days before the fatal incident, she told him that the marriage was not working anymore and after repeatedly talking to him for hours she asked him to leave the family. Mr Humes was highly upset and left for a hotel.

³⁹ *Attorney General's References (Nos 74, 95 and 118 of 2002)* [2002] EWCA Crim 2982

Before he wanted to leave for a family visit in Scotland, he went back home to say goodbye to his children. Mrs Humes informed the offender that she had something to say to him, and although he submitted not being strong enough to hear it, she told him that she had a new lover and that she was soon going to sleep with this new person. At this point, the defendant attacked Mrs Humes with a knife. The fatal attack was witnessed by one of the children. Mr Humes then tried to kill himself, he survived though. Mr Humes offered a plea to manslaughter by reason of provocation, which was accepted by the prosecution. There was evidence that Mr Humes had not eaten and slept for many days prior to the killing and that he was highly stressed. He was sentenced to 7 years imprisonment (Ibid.).

Finally, Mr Mark Paul Wilkinson, killed his partner Ms Lewis with whom he had two young children by smothering her. Due to relationship problems, one month prior to the killing Ms Lewis together with the children had left the family home. The defendant had had great difficulties with coping with the situation and later said he was heart-broken. However, when Ms Lewis went to visit Mr Wilkinson and he showed her some pictures of their children, she made comments on her having the children and him only having the pictures. Moreover, she told him that she had someone new and wanted to bring up the children with the new person, regardless of whether she would hurt the defendant or the children. This was when the defendant “boiled over” (Ibid.[68]), got hold of her and smothered her. Mr Wilkinson was accused and tried for murder. He contended that he was guilty of manslaughter by reason of provocation. The jury found him guilty of manslaughter and he was sentenced to 4 years imprisonment (Ibid.).

How did it come that in three cases of men having killed their wives the highest sentence to be served in prison was 7 years? These sentences can be said to reinforce notions of judges and jury to be rather sympathetic with men killing their unfaithful wives. However, in the present cases there was no unfaithful conduct involved: Ms Humes and Mrs Lewis had already left the defendants and were thus, ‘morally entitled’ to have new relationships. As Burton argues, the point made by the House of Lords in *Smith* that “male possessiveness and sexual jealousy should not today be an acceptable reason for loss of self-control leading to homicide” (*R v Smith* [2003] 3 WLR 654 qtd. in Burton 279-280), has been almost ignored by sentencing decisions as in *Suratan*, *Humes* and *Wilkinson*. It must be considered that these decision have been made prior to the 2009 Act, in

which it is statutorily fixed now that sexual jealousy would not be a qualifying trigger to loss of self-control. However, as has been commented by Law Commission and Government, it is only sexual jealousy alone. There could still be additional circumstances such as provoking words or conduct that would then amount to a qualifying trigger. This was also the case in *Humes* and *Wilkinson*: It was finally words that made the defendants lose their self-control. It is thus unclear whether such a case would have a different outcome following the 2009 Act. It shall be argued that even under the new Act, male defendants from the majority culture are still more likely to have a successful defence in provocation when having killed their wives out of passion than defendants from a minority culture who have killed female family members for honour reasons. Closer examination of the *Wilkinson* and the *Humes* case shall demonstrate which factors were mitigating.

Before the Court of Appeal the Attorney General submitted that for three reasons in all three cases the imposed sentence had been too lenient: His first point was that “as society advances, possessiveness and jealousy are no longer acceptable reasons for loss of self-control leading to homicide” (*Attorney General's References (Nos 74, 95 and 118 of 2002)* [2002] EWCA Crim 2982 [9]), that secondly “the manner in which juries are to be directed following the decisions of the House of Lords in *R v Smith (Morgan)* [2001] 1 AC 146 has increase the availability of the defence” (*Ibid.*) and thirdly, that “the present level of sentencing does not stand comparison with levels adopted for certain other serious offences” (*Ibid.*). As to the first submission, the court rightly pointed out that it rather concerns the availability of the provocation defence and not the level of sentencing. As to the second submission, the court simply rejected the view that the House of Lords decision in *Smith* had made the defence more available and furthermore, that even if this was the case that a properly directed jury would still convict a defendant of murder instead of manslaughter if jealousy had been the only reason for the defendant's rage. It is interesting to see that the court actually made a point for trusting the jury in this matter, considering how Government by means of the 2009 Act had basically shown mistrust in the jury. However, the third submission was also rejected on the basis that in provocation cases it is being assumed that the defendant had reasonably lost his self-control and had thus a reasonable excuse for his conduct. Furthermore, the Attorney General had referred

to the deterrent effect of punishment which was undermined by unduly lenient sentences. The court held that with some cases a deterrent effect was not so necessary, especially in a domestic setting. They furthermore rejected the notion of the domestic setting being an aggravating factor and rather found it more often as the basis for an excuse (Ibid.). The submission that a deterrent effect had not been so important in these cases reveals the notion that these killings were no general societal or cultural problem of violence against women but rather tragic isolated cases.

Moreover, it has been taken to be reasonable that the defendants had lost their self-control to the degree that they killed their ex-partners. What is important is that it was not the pure loss of the partner that made these defendants snap. Both Wilkinson and Humes did not become violent by the mere fact that their partners wanted to leave them: They killed them the moment they got to know that another man was 'taking over' their family. Mr Wilkinson killed Ms Lewis when she told him that she thought about setting up with another man and having him as a surrogate father for the children. As Burton put it he "faced a dual threat of loss of possession of both his former partner and his children." (Burton 281) Mr Humes snapped when his wife told him that she had big feelings for another man and that she was going to sleep with him. It is certainly a sense of humiliation and degradation that these defendants experienced. Burton submits that prior to these cases, as well as in the very cases, "the Court regarded provocation that challenged a man's self image and sexual prowess as grave and requiring a merciful approach to sentencing." (Burton 282) That their loss of self-control at the respective moment was reasonable could be decided by the jury because they could to a degree understand the situation. Family life and mutual love are values which most members of modern Western societies share. If this was not so, how could a sensible jury have come to the conclusion that the defendants' loss of self-control after having learned that they had lost both their loved one's affection and their family to another man was reasonable?

Now, is it not unfair to partially excuse these killings because jury, defendant and the reasonable person share a set of values and deny honour killing defendants a provocation defence because they are not 'understandable' for a jury that does not share the values of the defendant?

6. 2. A 'Provoked' Honour Killing? *R v Mohammed*⁴⁰

One of the high profile honour killing cases is *R v Mohammed*. The case was the following: The defendant, who was a devout Muslim had found a young man in his daughter's bedroom. He had locked the bedroom, fetched a knife and downstairs found his daughter Shahida, subsequently stabbing her to death. The defendant pleaded guilty to manslaughter for reason of provocation but was convicted of murder. His ground of appeal was the evidence of his violent disposition, which may have been crucial, considering the importance that had been given to Mr Humes and Mr Wilkinson having been described as decent men. The evidence had been given by six of Mr Mohammed's children and was used by the prosecution in order to show that provocation was not the sole reason for his conduct. Interestingly, the case demonstrates very well the influence of the *Holley* approach that has also been enshrined in the 2009 Act, on the consideration of culture in provocation cases: That *Holley* overruled *Smith* had been decided just at the time before the appeal. Thus, the trial judge had directed the jury according to the approach adopted in *Smith* and told them they should

take into account any characteristic which increased, or may have increased, the effect of the provoking conduct and, in particular, his Muslim and cultural beliefs. Also they should take into account his depression and 'any conclusions you may reach on whether or not the defendant had a violent disposition'. He directed the jury that, on the second question, they should ask themselves whether there was anything about the applicant's own personality, character or religious beliefs which reduced his power of self-control and, if so, whether it amounted to a sufficient excuse for the killing to reduce the crime from murder to manslaughter. ([2005] EWCA Crim 1880, [2005] All ER (D) 154, [36] (Scott Baker LJ))

The jury had been directed to consider the defendant's religious and cultural beliefs in assessing the question whether he could be sufficiently excused. However, the prosecution had brought evidence of the defendant having a violent temperament. The jury had to consider whether if the defendant had lost self-control, this was only due to his violent temperament and if it was, he could not rely on provocation. If it was not his violent disposition or not only it, that caused the loss of self-control, then the jury had to go on and consider whether any of his other characteristics, including his cultural beliefs, provided a sufficient excuse to reduce murder to manslaughter (*Ibid.* [40] (Scott Baker LJ)). However, the jury convicted the defendant of murder. Under the *Holley* approach the probability of a different outcome would have lessened: As the appeal judge stated, under the new approach the

40 *R v Mohammed* [2005] EWCA Crim 1880, [2005] All ER (D) 154

applicant's temperament was relevant to the first or subjective element of provocation. It was also relevant to the gravity of the provocation to him (...) It was not, however, relevant to how the reasonable man would have reacted for the reasonable man is a fixed rather than a variable creature. The yardstick is a person of the age and sex of the appellant having and exercising ordinary powers of self-control. (Ibid. [57] (Scott Baker LJ))

In their conclusion the Court of Appeal stated that although the jury had been directed to follow the broader approach of Lord Hoffmann in *Smith*, they should have really been told to use a much tighter test as developed in *Holley* (Ibid. [73] (Scott Baker LJ)).

It seems the reason that even under the *Smith* approach the jury had convicted the defendant of murder was indeed the evidence of the defendant's violent disposition because his children had reported of frequent violent punishments and that the defendant had prior to the killing spoken of either killing the victim or himself in case he would find out that she was with a man. What would have happened if there had been no evidence of such a disposition and Mr Mohammed would indeed have been not only a devout Muslim but also a loving family father? (Phillips, 'When Culture Means Gender' 32) Considering the cases of *Wilkinson* and *Humes*, as well as another honour killing case, namely *R v Yones* [2007] EWHC (QB)1306, it seems likely that Mr Mohammed could have succeeded with his provocation defence: In the case of Leslie Humes, who successfully pleaded provocation and was sentenced to only 7 years imprisonment, it was contended that it was one of the mitigating factors that the defendant was of good character and not normally aggressive or violent (*Attorney General's References (Nos 74, 95 and 118 of 2002)*[52]-[63]). Similarly, Mr Wilkinson, who had been sentenced to 3 years only, had been described by witnesses as "a man of previous good character, putting everything into the relationship" (Ibid.) The trial judge also made a comment about the defendant being a "hardworking and decent young man" (Ibid.). Furthermore, in the case of *Yones*⁴¹, the loving attitude of the defendant was taken into account as a mitigating factor: Mr Yones had stabbed to death his daughter Heshu, who had been in a relationship with a Lebanese Christian. Two days after having received an anonymous letter in which his daughter was being described as a "prostitute and slut who regularly slept with her boyfriend" (*R v Yones* [2007] EWHC (QB) 1306 [12]), the defendant was alone with his daughter in the flat and there, he stabbed her to death. However, Mr

41 This is the case which has shortly been described in the introduction of this paper.

Yones felt immediate remorse. He pleaded guilty to murder. His remorse, as well as the provoking effect Heshu's conduct may have had on the defendant were taken as mitigating factors. It had also been submitted that Mr Yones had been a "loving father and he and Heshu got on well." (Ibid.) The judge set the minimum term as 14 years, whilst for murder 30 years to lifelong imprisonment are possible, too.

However, as the *Mohammed* case demonstrates, it seems that under the old approach to provocation culture could have been taken into account in honour killing cases. Another case, one of the first high-profile honour killing cases, supports this assumption: *R v Shabir Hussain* [1997] EWCA Crim 2876. The defendant had killed his sister in law, Tasleem Begum, while she was waiting for her lover. He overran her with his car, several times. The defendant was, in the initial trial convicted of murder and sentenced to life imprisonment. However, he appealed and at the retrial he pleaded guilty to manslaughter by reason of provocation. The provocation plea was accepted by the prosecution and the defendant sentenced to 6 ½ years imprisonment. It was submitted that he had felt provoked by the victim's dishonourable conduct, which consisted of her refusing to sign the documents for her husband from an arranged marriage from Pakistan that would enable him entry to the UK, and in seeing her lover, a married man (Phillips, 'When Culture Means Gender' 31; Carline 81; Reddy 314). The often cited words of the judge that demonstrate how the defendant's culture was considered were that the victim's conduct "would be deeply offensive to someone with your background and your religious beliefs" (qtd. in Phillips 'When Culture Means Gender' 31; Carline 81; Reddy 314) and that "I accept there has been considerable pressure on you for the last few years. Something blew up in your head that caused you a complete and sudden loss of self-control" (Ibid.). It is explicitly stated that in this case the reasonable person must have been someone with the defendant's background and religious beliefs. This consideration reduced a whole life imprisonment sentence to 6 ½ years.

It has often been argued it is troubling that in these cases culture had been invoked as a reason of provocation and thus, as a defence. Anne Phillips for instance states that "the fact that a defendant can legitimately cite the shame brought on his family by a sister's or daughter's transgressive behaviour remains disturbing" (Phillips, 'When Culture Means Gender' 33). Notwithstanding the important and right claims of women's groups and other campaigners against

honour killings and honour related violence, it must be considered that excluding culture from the provocation defence as it gives majority culture defendants who kill their wives in a rage, such as *Humes* and *Wilkinson*, a considerable advantage. Is it not generally troubling if a female spouses' non-violent behaviour can partially excuse killing her? In an ethnocentric manner such an advantage for majority culture defendants renders the femicides of the dominant Western culture as less horrific and the respective defendants as less monstrous than those of minority cultures (see Carline 80-92).

6. 3. *Culturally Shaped Symptoms of the Same Phenomenon? Honour and Passion*

This advantage for majority culture defendant exists because the Western notion of passion is seen to be more excusable than non-Western notions of honour: In the cases of *Humes* and *Wilkinson* it was passion that drove the defendants, as almost always in domestic homicide provocation cases. What if Western notions of passion have a likeness? It has occasionally been argued that this likeness in the East is honour. Lama Abu-Odeh argues that "the crime that has the most affinity with the crime of honour in the Arab world (is) the killing of women in the heat of passion for sexual or intimate reasons" (Abu-Odeh 289). He submits that following orientalist tradition, the West is taken to have passion whilst the East is said to have honour instead. Although passion is no official defence in England, provocation or loss of self-control can be said to be the defence for passionate acts, as the two cases of *Wilkinson* and *Humes* demonstrate. Again, it remains to be seen what impact the exclusion of sexual jealousy in the 2009 Act has.

If crimes of honour and crimes of passion are two differently culturally shaped manifestations of the same underlying motives, the truly universal law would have to treat both similarly. In excusing one but not the other, it demonstrates once more how culturally shaped the law is in itself. Regarding the legal provisions for fatal violence against women in Arab countries, some similarities can indeed be found. According to Abu-Odeh there are

deep similarities between the internal tensions within each legal system as to what constitutes a killing of women that is legally tolerated (either fully or partially), and that these tensions, although sometimes defined differently, have been surprisingly resolved in the same way. (Abu-Odeh 290)

Passion, as well as honour, serve as excuse or even justification⁴² for men

⁴² Abu-Odeh argues that honour serves even as a justification, in that the nature of the act is seen as justified. (292)

killing female relatives. In crimes of passion, because of the very idea of passion, which is related to romantic fusion and sexual jealousy (Abu-Odeh 293; CIMEL/ Interights 16) these relatives are necessarily wives or partners, whereas the idea of honour is more related to status and collectivity (Abu-Odeh 293; CIMEL/ Interights 16) and the females concerned can be daughters, sisters, cousins, etc.. Abu-Odeh argues that in legally negotiating the elements of passion and honour, the Arab criminal legal systems stress the honour element, while Western, his example is the American, criminal legal systems stress the passion element. In English law, the passion element is being emphasised with the loss of self-control, that until 2009 needed to be sudden. Because of the excusing nature of passion, the judge in *Wilkinson* could speak of a “violent, *emotional* reaction to the situation in which the offender eventually found himself” (*Attorney General's References (Nos 74, 95 and 118 of 2002)* [2002] EWCA Crim 2982 [52]-[63]) and therefore, “be as merciful as his public duty allowed.” (Ibid.) Although the ‘slow-burn’ kind of provocation has been accepted with the implementation of the 2009 Act, it has been submitted that the more remote a killing is from the actual provocative act, the less likely the defendant is to have a defence in provocation because time lapses will still be taken into consideration as circumstances (Edwards 226). In the Jordanian criminal law for instance, any requirement of immediacy had been removed in Article 98 of the Jordanian Penal Code, it reads: “He who commits a crime in a fit of fury caused by an unrightful and dangerous act on the part of the victim benefits from a reduction of penalty.” (Jordanian Penal Code art. 98 qtd. in Abu-Odeh 304) It provided for honour to take precedence over passion (Abu-Odeh 304). Abu-Odeh succeeds in what Spatz has tried so unsuccessfully: He shows that when it comes to legal approaches towards violence against women, what seems so disparate at first glance are really symptoms of the same phenomenon, namely male claims to power over women.

6. 4. *The Ordinary Person as a Person of the Defendant's Sex, Age and Culture*

As it has been argued in chapter 4, the reasonable person re-establishes standards that might not meet reality. The “allegedly universal, classless, and sexless nature of the reasonable man was a device which promoted the myth of the objective, value-free nature of the criminal law.” (Donovan & Wildman 448) Just as the law is not really universal, so is not the reasonable person. They are instead

necessarily culturally shaped by the culture of their makers. As M. Naeem Rauf argues, if a defendant was “a foreigner of more excitable temperament or was for some other reason peculiarly susceptible to provocation, it was neither fair nor logical to judge him by the standard of the ordinary Englishman.” (Rauf 84) It is the ordinary English or at least Western person that really is the ordinary person, for there is no universal standard. As it has been stated already, the provocation defence is thus a majority culture defence. It has been shown in chapter 4 that its development had been deeply influenced by male notions of honour and shame. It had been, and is still today, influenced by societal standards and understandings as to what constitutes dishonour and to what is reasonable. Provocation has always been linked with contemporary sentiments and sensibilities, it reflects the majority culture. As Anna Carline argues,

the partial defence of provocation has long been used successfully by men who kill their partners, and while the current law focusses on a loss of self-control, the roots of the doctrine are premised upon a white Western notion of male honour. (Carline 809)

She stresses how the provocation defence has its very roots in honour killings, as it served to excuse men and save them from the death penalty, who in hot blood killed in order to defend or restore their honour (Carline 82). As also stated in chapter 4.1, one valid reason for such a killing used to be a wife’s conduct. As it is being argued here, Carline’s theory also submits that the construction of the provocation defence enables to condemn honour killings as committed by Asian Muslim men, and at the same time accepts those white Western notions of honour that are often inherent in domestic homicide cases in the style of *Humes* and *Wilkinson*. The reasonable person being a white Western construct, this notion is inherent with it, too. As Carline submits, feminist analysis has demonstrated that the person “embodies the characteristics of the white, middle-class, Western, heterosexual man” (Carline 89). Now, with the Coroners and Justice Act 2009 it has been provided for that the person is not necessarily a man, by adding ‘sex’. The person remains a white, middle-class, Western, heterosexual person, though, whereby for the present context, the attributes ‘white’ and ‘Western’ are most significant. The argument that the reasonable person is not neutral or universal, at all, is not new. It has always reflected community values as to what “constitutes understandable human frailty” (Donovan & Wildman 447). Those community values are determined by the dominant culture. As it has been stated in regard to *Humes* and *Wilkinson*, because love and family life have been values appreciated

within the dominant Western English community, the jury could sympathise with the defendants and their frailty facing the threat of losing those assets. If the provocation defence as a cultural phenomenon has “continually mitigated Western forms of honour killing” (Carline 90), with the help of the Western shaped reasonable person, it is, from a relativistic point of view, simply unfair that it should not mitigate the forms of honour killings discussed in this paper. It has been submitted for the American criminal law, that

courts have slowly come to accept the widespread scholarly belief that the formal neutrality of the objective standard is systematically biased against the (...) provocation claims of individuals from groups that lack significant economic, political, and social power in American society, particularly women, the poor and nonwhites. Consequently, American courts now routinely allow juries to consider a wide variety of a defendant's personal characteristics when determining the objective reasonableness of her (...) provoked act. (Heller 4-5)

Without considering the American approaches any further here, the possibility of a wider approach to objective reasonableness shall be recognised. As to the English criminal law, Sebastian Poulter in his text on cultural pluralism and legal limits, calls for consideration of ethnicity when it comes to reasonableness. As he puts it,

[t]he reasonable man still treads his tortuous way through the legal landscape, and in assessing standards of reasonable conduct the judiciary will often need to bear in mind the ethnicity of those who currently ride on the buses in Clapham (or indeed other parts of the country). (Poulter, 'Cultural Pluralism and its Limits' 11)

Although Poulter speaks of ethnicity, it could easily be replaced by the term culture since it is rather culture than mere ethnicity that shapes human conduct.

Moreover, it has been argued in this paper that from a multicultural and post-modern approach to difference and identity, there is no logical reason to treat sex and age as in every context more relevant than culture, for instance. “Not only does culture inform and construct law, it also informs and constructs our identities and our experiences” (Carline 91). As Williams has argued, this postmodern approach

starts from the notion of a fragmented and shifting self. Sometimes I feel like a white, sometimes a heterosexual, sometimes a Jew, sometimes a lawyer, sometimes an Episcopalian. (...) each person is embedded in a matrix of social and psychological factors that interact in different contexts.” (Williams 307)

She furthermore argues that “‘neutral’ standards systematically disadvantage outsiders” (Ibid. 323), because there is no such thing as a purely neutral standard. And so is not the reasonable person.

Adding culture as a characteristic of the reasonable person would escape the criticism that the culture defence has been object of: The approach would not

grant minority culture defendants a special treatment because with every defendant his or her culture would have to be taken into account, also if the defendant is from the majority culture. Although in the latter case it might be more of a pro forma requirement to consider culture, this would demonstrate the very awareness of the Western culture being a culture, too. Thus, the notion of superiority in relation to other cultures would be avoided and instead the non-universality of own values admitted. The approach would thus also escape the arrogant notion of the 'inferior other', incapable of change, needing a special defence because they simply cannot live up to the universally valid Western standard, anyway. Moreover, the approach would take into account the post-modern approach to difference in that it would at least regard one more important identity aspect of the defendant that can under certain circumstances overshadow the other characteristics of sex and age. Of course, the approach is open to feminists' and women's groups' potential objections that every honour killer should be convicted of murder and be severely punished in order to extinguish the practice, referring to the memetic power of the law. But then, so should every male defendant who in a rage kills a female victim with whom he has been in an intimate relationship. Denying Muslim honour killing defendants the defence of provocation, which would basically be the case without adding culture to the reasonable person (Sing 1849), for reasons of deterrence, whilst granting the defence to majority culture defendants, would contradict the principle of English criminal law that punishing an individual for a greater social purpose is not justifiable (see chapter 3.2). If the preferred English approach to punishment is just deserts, the punishment must be justified on the crime rather than fulfil some other purpose (Ibid.)

It must also be kept in mind that before a defendant can successfully raise the defence of provocation, or rather loss of self-control, after all, under the Coroners and Justice Act 2009, the defence is only put to the jury if in the opinion of the trial judge evidence is adduced on which "a jury, properly directed, could reasonably conclude that the defence might apply." (Coroners and Justice Act 2009 s (54)(6)) A second hurdle for a successful defence is that the defendant must have lost self-control, in the first place. Thus, the most terrible killings, which is not to say that not all these killings are awful, could still not be excused with a loss of self-control defence. Honour killings that are highly premeditated, and

those in which contract killers were hired, are those that should not be excused. Cases such as the murder of Bahnaz Mahmud, a 16-year old Kurdish girl who had left her Kurdish husband from an arranged marriage in order to be with an man from a different Kurdish clan, would not be excused: Bahnaz's father had previously attempted to kill her, as well as her older sister and she had been threatened several times.⁴³ Her family had finally agreed to have her killed during a meeting and had hired two extended family members to carry out the killing. She was then murdered in an extremely brutal fashion.⁴⁴

Similarly, Rukhsana Naz, a 19-year old from Pakistan, had been murdered by her mother and brother because she had become pregnant by another man and wanted to divorce her husband from the arranged marriage. The mother and sons had made plans to kill her after she had refused to have an abortion and one week before the killing had already forced her to sign a will (Brandon & Hafez 50). Interestingly, one of the defendants, the victim's brother, submitted a plea of provocation on the ground of Rukhsana's pregnancy, though. This case was still to be decided under the *Smith* approach and so the jury was asked to consider "whether Rukhsana's conduct was so as to cause 'a reasonable and sober person' of her brother's 'age, religion and sex' to act as he did." (Phillips 'When culture means gender' 28) The jury decided that it was not and also convicted him of murder (Ibid.). This decision demonstrates that even if culture, or religion as a part of culture, was added to the ordinary person, this would not need to be a flood gate for honour killing excuses.

In another highly premeditated case, Surjit Athwal, a 27-year old woman had been killed by her Sikh relatives-in-law, under the order of her mother-in-law. The latter had arranged for Surjit to visit India for an alleged family wedding, where she was being killed then (Brandon & Hafez 45). There are many more such cases (see Brandon & Hafez 'Crimes of the Community'). Because of the premeditation, no loss of self-control defence should be available here.

Of course, it is still open to discussion how culture could be a mitigating factor at sentencing stage. In the case of Shakeela Naz, the mother of Rukhsana, who

43 The tragic case of Banaz Mahmud is well-known because it actually demonstrates severe failures on the side of the police and local authorities, to whom the girl had been talking several times, saying that she was afraid of being killed. "Her accounts were dismissed as 'dramatic and calculating'." (Brandon & Hafez 56)

44 On the orders of her father, Banaz was being raped and beaten before she was being killed. (Brandon & Hafez 59)

was sentenced to life imprisonment, the cultural background did serve as a mitigating factor on appeal:

The Lord Chief Justice, in recommending a minimum period which was three years shorter than that recommended by the trial judge did so expressly on the basis that her cultural background mitigated the criminality of her act. (*R v Naz* [2007] EWHC 2925 [12])

In the case of Bachan Athwal, who had ordered the murder of Surhit Athwal, her daughter-in-law, culture also worked to reduce the minimum term for a life sentence to 15 years. However, culture here did not mitigate the criminality of the act but rather “the grave cultural difficulties she (would) encounter within the prison system” (*R v Athwal & Anor* [2009] EWCA Crim 789, [2009] 1 WLR 2430 [67]) persuaded the Appeal Judge to reduce the minimum term. In other cases, though, culture could not be invoked as mitigating factor (see *R v Abdul Haq* [2005] EWHC 304): “A significant degree of planning or premeditation” (Ibid. [18]), “mental or physical suffering inflicted on the victim before death” (Ibid.) or “the abuse of a position of trust” (Ibid.) can even be aggravating factors.

7. Conclusion

In the beginning of this paper it had been explained that the phenomenon of honour killings within minority culture groups has increasingly come to the agenda in the UK. The legal problem that can arise with those honour killings has been illustrated with the German example, where the crucial question has been whether killing for the perceived family honour is a base motive.

In the following, it had been stated that although English law does at conviction stage not consider motive, it also has not found a coherent way to deal with honour killings, which has its roots in some contradicting principles of English criminal law. The partial defence to murder of loss of self-control, then provocation, demonstrates this very well. This defence has often been mentioned in connection with honour killings, as well as with the so-called culture defence. It has been explained that the provocation defence has its very roots in a form of honour killings and that the most important qualifying trigger to provocation used to be men finding other men with their wives. The behaviour of women, as it has been shown, used to be reason enough for an ordinary man to be so provoked as to kill. This is just the same with honour killings in today’s Muslim communities in the UK.

Furthermore it had been shown how the concept of the reasonable person against which a defendant must be measured has developed in favour of a more objective approach to provocation. Under the *Smith* approach it had been legitimate to consider culture as a relevant characteristic to be added to the reasonable person. However, in that under the much criticised Coroners and Justice Act 2009 the only characteristics to be added have been sex and age of the defendant, the culture of the person is automatically be taken to be the majority's because the law naturally embodies the culture of its makers. The author has submitted that it is incoherent to consider sex and age as only characteristics and has proposed to add culture. The majority culture's unawareness of being a culture, too, has been discussed in the context of the culture defence debate.

Moreover, it has been discussed in how far a state can and should consider diversity and multiculturalism, at all. Although the author has not favoured the approach of a culture defence because it would not be coherent with the English 'pluralism within limits', arguments in order to consider culture legally have been made. The main argument can be said to be the ethnocentric notion of the own culture being a universally valid code of conduct and thus, superior to others. This, at it has been shown, has enabled courts to excuse wife killings of majority culture defendants because they were 'understandable', that is reasonable.

Honour and passion have furthermore been said to be actually related rather than opposing notions. It has finally been submitted that adding culture to the reasonable person would escape the criticism that has been issued regarding the culture defence and at the same time it would make the provocation defence available to some honour killing defendants who would otherwise be denied the defence. The defence can only be equally available if the reasonable person ceases to be a majority culture person.

The reader may wonder why several times the author has mentioned the basic phenomenon of discussed femicides in minority cultures as well as in Western majority culture being the patriarchic claim of male dominance over women, and still has not come to the conclusion that violence against women should generally be punished more severely. The latter surely is a very legitimate claim. However, this paper has not been concerned with gender equality but rather with an equally fair treatment of culturally diverse defendants and a coherent way to deal with honour killings under the English criminal law as it is. Not excusing any of those

killings would require to abolish the loss of self-control defence completely. This approach could be the research object of a completely different paper, though.

Bibliography

- Abbas, Tahir. "Honour-Related Violence towards South Asian Muslim Women in the UK: A Crisis of Masculinity and Cultural Relativism in the Context of Islamophobia and the 'war on Terror'." *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 16–29. Print.
- Abu-Odeh, Lama. "Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West.'" *Utah Law Review* (1997): 287–307. Print.
- Brandon, James, and Salam Hafez. *Crimes of the Community. Honour-Based Violence in the UK*. London: Centre for Social Cohesion, 2008. Print.
- Burgess-Proctor, Amanda. "Intersections of Race, Class, Gender and Crime. Future Directions for Feminist Criminology." *Feminist Criminology* Vol 1.No 1 (2006): 27–47. Print.
- Burton, Mandy. "Sentencing Domestic Homicide Upon Provocation: Still 'Getting Away with Murder'." *Feminist Legal Studies* Vol 11 (2003): 279–289. Print.
- Carline, Anna. "Honour and Shame in Domestic Homicide: A Critical Analysis of the Provocation Defense." *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 80–96. Print.
- Chan, Wendy. "Legal Equality and Domestic Homicides." *International Journal of the Sociology of Law* 25 (1997): 203–229. Print.
- Claes, Erik, and Jogchum Vrielink. "The Cultural Defence and Societal Dynamics." *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Eds. Marie-Claire Foblets and Alison Dundes Renteln. Oxford: Hart Publishing Ltd, 2009. 301–321. Print.
- Clough, Amanda. "Loss of Self-Control as a Defence: The Key to Replacing Provocation." *The Journal of Criminal Law* Vol 74 (2010): 118–126. Print.
- Coleman, Doriane Lambelet. "Individualizing Justice through Multiculturalism: The Liberals' Dilemma." *Columbia Law Review* Vol 96.No 5 (1996): 1093–1167. Print.
- Demian, Melissa. "Fictions of Intention in the 'Cultural Defense.'" *American Anthropologist* Vol

- 110.No 4 (2008): 432–442. Print.
- Detmold, M J. “Provocation to Murder: Sovereignty and Multiculture.” *Sydney Law Review* VOL 19.No 5 (1997): 5–31. Print.
- Dustin, Moira, and Anne Phillips. “Whose Agenda Is It? Abuses of Women and Abuses of ‘culture’ in Britain.” *Ethnicities* Vol 8.No 3 (2008): 405–424. Print.
- Edwards, Susan S. M. “Anger and Fear as Justifiable Preludes for Loss of Self-Control.” *The Journal of Criminal Law* Vol 74 (2010): 223–241. Print.
- Erez, Edna, Madelaine Adelman, and Carol Gregory. “Intersections of Immigration and Domestic Violence. Voices of Battered Immigrant Women.” *Feminist Criminology* (2008): n. pag. Print.
- Erez, Edna, and Caroline Coppins Hartley. “Battered Immigrant WOMen and The Legal System: A Therapeutic Jurisprudence Perspective.” *Western Criminology Review* Vol 4.No 2 (2003): 155–169. Print.
- Fitz-Gibbon, Kate. “Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control.” *Journal of Law and Society* Vol 40.No 2 (2013): 280–305. Print.
- Frick, Marie-Luisa. “The Cultural Defense and Women’s Rights: An Inquiry into the Rationales for Unveiling Justitia’s Eyes to ‘Culture’.” *Philosophy and Social Criticism* Vol 40.No 6 (2014): 555–576. Print.
- Gill, Aisha. “Reconfiguring ‘honour’-Based Violence as a Form of Gendered Violence.” *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 218–232. Print.
- Gordon, Neal A. “The Implications of Memetics for the Cultural Defense.” *Duke Law Journal* Vol 50 (2001): 1809–1834. Print.
- Greco, Luis. “Ehrenmorde Im Deutschen Strafrecht.” *Zeitschrift für Internationale Strafrechtsdogmatik* Vol 7.No 8 (2014): 309–319. Print.
- Heller, Kevin Jon. “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use

of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases.”

American Journal of Criminal Law Vol 26.No 1 (1998): 1–120. Print.

Herring, Jonathan. *Criminal Law*. Basingstoke: Palgrave Macmillan, 2013. Print.

Hucklesby, Anthea. “Sentencing and Court Processes.” *Student Handbook of Criminal Justice and Criminology*. Eds. John Muncie and David Wilson. London: Cavendish Publishing Limited, 2004. 203–221. Print.

Husseini, Rana. “A Comparative Study of the Reform Work Conducted in Asia and Europe to Combat Violence and ‘so-Called’ Honour Murders.” *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 154–168. Print.

Idriss, Mohammad Mazher. “Honour, Violence, Women and Islam- an Introduction.” *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 1–16. Print.

Law Commission. *A New Homicide Act for England and Wales? A Consultation Paper* (Consultation Paper No 177, 2005)

Law Commission. *Murder, Manslaughter and Infanticide. Project 6 of the Ninth Programme of Law Reform: Homicide* (Law Com No 304, 2006)

Law Commission. *Partial Defences to Murder. Final Report* (August 2004)

Levine, Kay L. “Negotiating the Boundaries of Crime and Culture: A Sociological Perspective on Cultural Defense Strategies.” *Law and Social Inquiry* (2003): 39–86. Print.

Littman, Rachel J. “Adequate Provocation, Individual Responsibility and the Deconstruction of Free Will.” *Albany Law Review* Vol 60 (1996): 1127–1170. Print.

Lorenz, Pia, and Daniel Schneider. “Erstaunliche Zahlen: Ehrenmorde Für Deutsche Gerichte Nicht Besonders Verwerflich.” *Legal Tribune Online* 8 May 2011. Web.

Mackay, R D. “Partial Defences to Murder Appendices.” *Partial Defences to Murder. Final Report*. Law Commission. (August 2004)

- Macklem, Timothy, and John Gardner. "Provocation and Pluralism." *The Modern Law Review* Vol 64.No 6 (2001): 815–830. Print.
- Magnarella, Paul J. "Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial." *The Journal of Ethnic Studies* Vol 19.No 3 (1991): 65–84. Print.
- Maier, Sylvia. "Honour Killings and the Cultural Defense in Germany." *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Eds. Marie-Claire Foblets and Alison Dundes Renteln. Oxford: Hart Publishing Ltd, 2009. 229–247. Print.
- Meeto, Veena, and Heidi Safia Mirza. "'There Is Nothing 'honourable' about Honour Killings': Gender, Violence and the Limits of Multiculturalism." *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 42–67. Print.
- Menjivar, Cecilia, and Olivia Salcido. "Immigrant Women and Domestic Violence. Common Experiences in Different Countries." *Gender and Society* Vol 16.No 6 (2002): 898–920. Print.
- Ministry of Justice. *Murder, manslaughter and infanticide: proposals for the reform of the law* (Consultation Paper CP19/08, 2008)
- Moller Okin, Susan. "Feminism and Multiculturalism: Some Tensions." *Ethics* Vol 106.No 104 (1998): 661–684. Print.
- Morgan, Chris. "Loss of Self-Control: Back to the Good Old Days." *The Journal of Criminal Law* Vol 77 (2013): 119–135. Print.
- Muncie, John. "Contemporary Criminology, Crime and Strategies of Crime Control." *Student Handbook of Criminal Justice and Criminology*. Eds. John Muncie and David Wilson. London: Cavendish Publishing Limited, 2004. 3–21. Print.
- Narayan, Uma, and Andrew Von Hirsch. "Three Conceptions of Provocation." *Criminal Justice Ethics* 15.15 (1996): n. pag. Print.
- Norrie, Alan. *Crime, Reason and History. A Critical Introduction to Criminal Law*. London: Orion Publishing Group Ltd, 1993. Print.

- Payton, Joanne. "Collective Crimes, Collective Victims: A Case Study of the Murder of Banaz Mahmud." *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 67–80. Print.
- Poulter, Sebastian. "Cultural Pluralism and Its Limits: A Legal Perspective." 1990: n. pag. Print. ---. *Ethnicity, Law and Human Rights*. Oxford: Clarendon Press, 1998. Print.
- Raj, Anita, and Jay Silverman. "Violence Against Immigrant Women. The Roles of Culture, Context and LEgal Immigrant Status on Intimate Partner Violence." *Violence Against Women* Vol 8.No 3 (2002): 367–398. Print.
- Rauf, M. Naeem. "The Reasonable Man Test in the Defense of Provocation: What Are the Reasonable Man's Attributes and Should the Test Be Abolished?" *Criminal Law Quarterly* 30 (1987): 73–87. Print.
- Renteln, Alison Dundes. *The Cultural Defense*. Oxford: Oxford University Press, 2004. Print. ---. "The Use and Abuse of the Cultural Defense." *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Oxford: Hart Publishing Ltd, 2009. 61–85. Print.
- Roundtable on Strategies to Address 'Crimes of Honour': Summary Report*. London: CIMEL; Interights, 2001. Print.
- Sacks, Valerie L. "An Indefensible Defense: On the Misuse of Culture in Criminal Law." *Arizona Journal of International and Comparative Law* Vol 13.No 2 (1996): 523–550. Print.
- Sikora, Sikora, Damian W. "Differing Cultures, Differing Culpabilities: A Sensible Alternative: Using Cultural Circumstances as as Mitigating Factor in Sentencing." *Ohio St. LJ* 62 (2001) 1695.
- Sing, James I. "Culture as Sameness: Toward a Synthetic View of Provocation and CULTure in the Criminal Law." *The Yale Law Journal* Vol 108.No 7 (1999): 1845–1884. Print.
- Smartt, Ursula. "Honour Killings." *Justice of the Peace* Vol 170 (2006): 4–7. Print.
- Spatz, Melissa. "A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives." *Columbia Journal of Law and Social Problems* 24 (1991): 597–638. Print.

- Sullivan, G.R. "Review: Anger and Excuse: Reassessing Provocation." *Oxford Journal of Legal Studies* Vol 13.No 3 (1993): 421–429. Print.
- Thapar-Björkert, Suruchi. "Conversations across Borders: Men and Honour-Related Violence in the UK and Sweden." *Honour, Violence, Women and Islam*. Eds. Mohammad Mazher Idriss and Tahir Abbas. Abingdon: Routledge, 2011. 182–201. Print.
- Torry, William I. "Culture and Individual Responsibility: Touchstones of the Culture Defense." *Human Organization* Vol 59.No 1 (2000): 58–70. Print.
- Truffin, Barbara, and César Arjona. "The Cultural Defence in Spain." *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Eds. Marie-Claire Foblets and Alison Dundes Renteln. Oxford: Hart Publishing Ltd, 2009. 85–121. Print.
- Volpp, Leti. "Feminism versus Multiculturalism." *Columbia Law Review* Vol 101.No 5 (2001): 1181–1218. Print.
- Walker, Samantha. "How Is 'Honour' Based Violence Managed in England and Wales?" *Internet Journal of Criminology* (2012): n. pag. Print.
- Westen, Peter. "The Empty Idea of Equality." *Harvard Law Review* 95.No 3 (1982): 537–596. Print.
- Wildman, Stephanie M., and Dolores A. Donovan. "Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation." *Loyola of Los Angeles Law Review* Vol 14 (1980): 435–468. Print.
- Williams, Joan C. "Dissolving the Sameness/ Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory." *Duke Law Journal* Vol 1991.No 2 (1991): 296–323. Print.
- Woodman, Gordon R. "The Culture Defence in English Common Law: The Potential for Development." *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Eds. Marie-Claire Foblets and Alison Dundes Renteln. Oxford: Hart Publishing Ltd, 2009. 7–35. Print.
- Yeo, Stanley. "Sex, Ethnicity, Power of Self-Control and Provocation Revisited." *Sydney Law*

Review Vol 18.304 (1996): 305–322. Print.

Cases

AG for Jersey v Holley [2005] 2 AC 581(UKPC)
Attorney General's References (Nos 74, 95 and 118 of 2002) [2002] EWCA Crim 2982
Bedder v DPP [1954] 2 All ER 801
DPP v Camplin [1978] 2 WLR 679 (HL)
Luc Thiet Thuan v R [1996] 2 All ER 1033
People v. Chen. No 87-7774 (N.Y. Superior Ct., December 2, 1988)
People v. Kimura. No. A-091133 (Los Angeles Super. Ct. Nov. 21. 1985).
R v Abdul Haq [2005] EWHC 304 [18]
R v Ahulawalia [1992] 4 All ER 889 (CA)
R v Athwal & Anor [2009] EWCA Crim 789, [2009] 1 WLR 2430 [67]
R v Campbell [1997] 1 Cr App R 199 (CA)
R v Doughty (1986) 83 Cr App R 319 (EWCA Crim)
R v Dryden [1995] 4 All ER 987 (CA)
R v James; Karimi [2006] 2 WLR 887 (EWCA)
R v Mohammed [2005] EWCA Crim 1880, [2005] All ER (D) 154
R v Naz [2007] EWHC 2925 [12]
R v Newell [1980] 71 Cr App R 331 (CA)
R v Raven [1982] Crim LR 51 (CCC)
R v Shabir Hussain [1997] EWCA Crim 2876
R v Smith [1999] 4 All ER 387 (QB)
R v Thornton (No 2) [1996] 2 All ER 1023 (CA)
R v Yones [2007] EWHC (QB) 1306

Acts of Parliament

Coroners and Justice Act 2009
Homicide Act 1957
Motor-Cycle Crash Helmets (Religious Exemption) Act 1976
Slaughter of Poultry Act 1967