

Sentencing Guidelines For HBV and Honour Killings

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Abstract

Honour-Based Violence (HBV) and Honour Killings are crimes committed to salvage the reputation of families and are usually committed because of the deviant (and usually sexual) behaviour of a woman is perceived to have brought about shame. Violence, it is believed, must then be inflicted in order to modify that behaviour and to cleanse the family's reputation of dishonour. This article will explore the role of the criminal courts in tackling HBV by appropriately punishing those who perpetrate such acts. It will argue that despite the increasing number of prosecutions in these types of cases, Sentencing Council guidelines are needed not only to help achieve consistency, but to help to ensure that sentencing judges apply relevant aggravating and mitigating factors that will lead to the imposition of a proportionate sentence that is commensurate with the seriousness of the offence. This article will offer proposals and will examine the main aggravating and mitigating factors a newly devised Sentencing Council guideline should include.

Keywords

Honour-Based Violence; Sentencing Guidelines; Judges; Aggravating; Mitigation

The Prosecuting Authorities and HBV

HBV and forced marriages are crimes currently commanding increasing media, political and academic attention in the UK.¹ The Crown Prosecution Service (CPS) has specifically published detailed legal guidance on the prosecution of HBV,² and recent

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¹ See L. Welchman and S. Hossein (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (Zed Books: London, 2005); M.M. Idriss and T. Abbas (eds), *Honour, Violence, Women and Islam* (Routledge-Cavendish: London, 2010); A.K. Gill, C. Strange and K. Roberts (eds), *Honour Killing and Violence: Theory, Policy and Practice* (Palgrave MacMillan: Hampshire, 2014); and K.A. Roberts, G. Campbell and G. Lloyd, *Honor-Based Violence: Policing and Prevention* (Taylor and Francis: Boca Raton, 2014).

² CPS, *Honour-Based Violence and Forced Marriage (Legal Guidance)*, at http://www.cps.gov.uk/legal/h_to_k/honour_based_violence_and_forced_marriage/ (last accessed 5 March 2015).

statistics reveal that 206 defendants in total were prosecuted between 2013-2014 for 'honour' crimes.³ Currently, there is a 59.7% conviction rate, positively demonstrating the CPS is attempting to bring perpetrators to justice. The CPS has also undertaken some very high profile HBV prosecutions in recent years, undoubtedly helping to raise the profile of such crimes and to send an important declaratory message that the criminal law considers it an abhorrent practice. Perhaps the most well known prosecution is that of the murder of Banaz Mahmod in 2006. Banaz's father, uncle and three others were found guilty of her murder and burying her body underneath a fridge in a garden in Birmingham – her crime was that she fell in love with a man that her family did not approve of. Under the leadership of DCI Caroline Goode, the Metropolitan Police Service helped to create an extradition treaty between the UK and the Iraqi authorities for two of her killers, a treaty which had never been created before. In *R v Mahmod Babakir Mahmod*,⁴ Banaz's father appealed against his conviction for her murder and his life sentence on the basis of fresh evidence, but the Court of Appeal rejected this. More recently, the long and protracted honour killing case concerning the murder of Shafiea Ahmed in September 2003 saw both Shafiea's parents eventually convicted of her murder in 2012 in the case of *R v Ahmed and Ahmed*.⁵ The parents had suffocated her with a plastic bag because they believed she had become 'too westernised', with the sentencing judge commenting that Shafiea had been 'squeezed between two cultures'. During the trial, Alesha Ahmed (Shafiea's sister) had provided testimony against her parents that she had witnessed her parents murder Shafiea in their living room. These two examples demonstrate that prosecuting authorities treat HBV very seriously and will actively seek to bring perpetrators to justice for their crimes. It also demonstrates that existing criminal laws seem sufficient to tackle HBV and honour killings, with perpetrators facing the full rigour of English criminal law and the mandatory life sentence for committing murders.

However, Parliament in response to HBV recently criminalised breaches of Forced Marriage Protection Orders (FMPOs) issued under the Forced Marriage (Civil Protection) Act 2007.⁶ The Anti-Social Behaviour, Crime and Policing Act 2014 ('the 2014 Act') implemented these changes. Separately, the 2014 Act also made it a criminal offence to force a person into a marriage without their consent. But given that forced

³ CPS, *Violence Against Women and Girls Crime Report, 2013-2014*, at 61 http://www.cps.gov.uk/publications/docs/cps_vawg_report_2014.pdf (last accessed 5 March 2015).

⁴ *R v Mahmod Babakir Mahmod* [2009] ECWA Crim 775.

⁵ At Chester Crown Court (unreported), when sentencing took place on 3 August 2012. Sentencing remarks are available on LexisLibrary.

⁶ See M.M. Idriss, 'Forced Marriages – The Need for Criminalisation?' (forthcoming).

marriages were criminalised in June 2014, there are no sentencing guidelines available for sentencing judges to apply when dealing with forced marriage perpetrators at the sentencing stage, even though a year has since passed since criminalisation. Sentencing guidelines are needed to provide details of the aggravating and mitigating features in both HBV and forced marriage cases in order to allow sentencing courts to properly sentence offenders for these crimes and to meet the demands of justice and fairness for both victims and perpetrators.

Court of Appeal Judgments on HBV and Forced Marriages

The necessity to develop sentencing guidelines for crimes relating to HBV and forced marriages may not be necessary if Court of Appeal judgments are available that provide detailed guidance on sentencing principles for these types of cases. Guideline judgments by the Court of Appeal are the result of appeals from the Crown Court and take the form of judicial statements on a variety of matters relating to sentencing practice in the Crown Court. They are therefore very useful guidance for sentencing judges in both Crown Courts and Magistrate's Courts.⁷ The guidance provides a system of consistency to sentencing judges because of the discretion open to sentencing judges and the wide range of sentences available at their disposal. This includes variations contained within each of the available sentences and the reasons underlying their choice of sentence (e.g. community sentences and the variety of requirements that can be attached to such sentences).⁸ Through the development of guideline judgments, the Court of Appeal has historically been provided with the task of shaping sentencing law and to provide an overall system of balance within sentencing practice.⁹ Guideline judgments recommend appropriate starting points when sentencing offenders for criminal offences and outline how various aggravating and mitigating factors determine the final sentence imposed by

⁷ R. Henham, 'Sentencing Policy and the Role of the Court of Appeal' (1995) 34(3) *The Howard Journal of Criminal Justice* 218, at 218. The Court of Appeal has issued many guideline judgments for a variety of offences: see *R v Millberry* (2003) 1 WLR 546; *R v Richardson* (2007) 2 Cr App R (S) 36; *R v Saw* (2009) 2 Cr App R (S) 54; *Attorney-General's Reference (Nos. 3, 73 and 75 of 2010)* (2011) 2 Cr App R (S) 100; and *R v Blackshaw* (2012) 1 Cr App R (S) 114.

⁸ Henham, above n. 7 at 218.

⁹ *Ibid.*, at 218 and 220. See also J.V. Roberts, 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing', in J.V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press: Cambridge, 2011) at 7.

the court by allowing it to adjust the sentence across the category range.¹⁰ The guidelines allow the Court of Appeal to consider the relationship between the different variations of the same offence and provide judges with a specific framework within which to pass sentences. They are also provided with guidance in a single judgment that is easily accessible instead of having to rely on a number of conflicting appellate decisions.¹¹ Henham notes that there is ‘no constitutional precedent which establishes that the formulation of sentencing policy through the interpretation of legislation should fall upon the Court of Appeal’.¹² However, given the status of the senior judges involved in producing guideline judgments, any guideline judgment issued by the Court of Appeal are marked out for being authoritative and are therefore followed.¹³

Court of Appeal Guideline Judgments on HBV, Honour Killings and Forced Marriages

Unfortunately, there are no Court of Appeal guideline judgments on HBV or forced marriage that provides sentencing guidance to the lower courts. In fact, there are only a small number of appeal cases on HBV that have actually reached the Court of Appeal (and there are to date no appeal cases specifically on the criminalisation of forced marriages). This is understandable since the Court of Appeal deals with only a small sample of cases clustered around very serious offences where long custodial sentences are at issue in scenarios that mainly concern drug importation, armed robbery and rape.¹⁴ Of the small number of HBV cases to reach the Court of Appeal, none of the judgments can really be described as ‘guideline judgments’ because they are very fact-specific and of limited value.¹⁵ All of the applicants in the appeal cases attempted to appeal against their convictions on the basis of a misdirection, fresh evidence or unfairness in the proceedings that rendered their convictions ‘unsafe’. The Court of Appeal, however, rejected all of these contentions. All of the judgments focus on individual facts, appeals and offences and do not provide general sentencing principles.¹⁶ In these cases, the Court of Appeal

¹⁰ G. Dingwell, ‘The Court of Appeal and Guideline Judgments’ (1997) 48 *Northern Ireland Legal Quarterly* 143 at 144.

¹¹ A. Ashworth, ‘Techniques of Guidance on Sentencing’ (1984) *Criminal Law Review* 519 at 521; and Dingwell, *ibid* at 144.

¹² Henham, *above n. 7* at 219.

¹³ M. Wasik, ‘The Status and Authority of Sentencing Guidelines’ (2007) 39 *Bracton Law Journal* 9 at 10.

¹⁴ *Ibid* at 11.

¹⁵ *Ibid* at 10; and Roberts, *above n. 9* at 7.

¹⁶ Wasik, *above n. 13* at 11.

upheld all of the original trial courts' convictions that the perpetrators were guilty for being directly involved in or for being a party to the murder of a young woman perceived to have brought shame upon the family.¹⁷ Indeed, this is one of the general criticisms of the Court of Appeal – there is a common trend for the Court to concentrate on the immediate cases before them ‘without questioning the general principles behind cases of that type or their inter-relationship with other similar cases thus creating a lack of coherence and direction in the development of sentencing principles’.¹⁸ By failing to provide guideline judgments for the lower courts in HBV cases, this might have the effect of generating inconsistent sentences between different courts sentencing offenders for similar offences in future cases. This is undesirable as the rule of law demands that like offenders (and offences) should be treated alike. Dingwell notes that ‘It is somewhat ironic that the ability of the senior judiciary to determine sentencing policy is being threatened partly by their unwillingness to perform this very function in the first place’ (i.e. by not issuing guideline judgments when they have the opportunity to do so).¹⁹ One remains optimistic that the Court of Appeal will soon issue sentencing guidelines in a case before it.²⁰ The Court of Appeal has, however, made some useful remarks about HBV and the law’s attitude towards such crimes. For example, in *AM v Local Authority, The Children’s Guardian, B-M (Children)*,²¹ the Civil Division of the Court of Appeal in a child law case stated that the concept of ‘honour’ in HBV has been distorted to what has been described as ‘sordid criminal behaviour’ and that ‘Arson, domestic violence and potential revenge likely to result in abduction or death are criminal acts which will be treated as such’.²² This demonstrates the Court of Appeal’s general attitude towards honour killings – that they are serious crimes that will be appropriately punished by English criminal law.

¹⁷ See the Court of Appeal ‘honour killing’ murder cases of *R v Mohammed* [2005] EWCA Crim 1880; *R v Mahmud Babakir Mahmud* [2009] ECWA Crim 775; *R v Nazir* [2009] EWC Crim 213; and *R v Choir Ali* [2011] EWCA Crim 1011. In *R v Dominik Krynski* [2013] EWCA Crim 2267, a case of blackmail involving the ‘honour’ of a young Muslim girl who feared that she might be the victim of an ‘honour killing’, D threatened to send photographs of V to her family in sexually compromising positions.

¹⁸ Henham, above n. 7 at 219.

¹⁹ Dingwell, above n. 10 at 150.

²⁰ A. Ashworth, ‘The Sentencing Guideline System in England and Wales’ (2006) 19 *South African Journal of Criminal Justice* 1, at 4; A. Ashworth and J. Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’, in A. Ashworth and J.V. Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press: Oxford, 2013) at 4-5.

²¹ [2009] 2 FLR 20.

²² *Ibid* at [117]-[119].

In *R v Ibrahim and Iqbal*,²³ two defendants (together with two other accomplices) were found guilty of the ‘honour killing’ of a husband and wife when they poured petrol through their letterbox and set fire to their home. In fact, they had firebombed the wrong house in a case of mistaken identity – the defendants were intending to kill another man who was having a sexual relationship with Ibrahim’s sister, which Ibrahim felt had brought shame on the family. The Court of Appeal rejected their appeals against conviction and upheld the sentences of the two defendants for the murders (28 and 25 years minimum terms of imprisonment respectively). The President of the Queen’s Bench Division, Sir John Thomas, stated that the sentencing judge had acted properly in imposing a lengthy sentence on the two defendants, and that ‘this kind of honour killing needed to be marked by a severe sentence’.²⁴ This is because ‘honour killings cannot be tolerated in this society and must be marked by severe deterrent sentences’.²⁵ The evil surrounding HBV was further exemplified in this case because two completely innocent people were needlessly killed. The case of *Ibrahim* demonstrates that the Court of Appeal’s approach to sentencing is that a lower court’s first inclination should be to impose ‘severe deterrent sentences’ to mark the court’s disapproval of such crimes and to deter other would-be honour killers from committing similar offences. Deterrence, in this context, can be understood to be both ‘individual’ as well as ‘general’ – to punish, incapacitate and to deter not only the actual perpetrators from ever committing this type of conduct again, but to deter others in general who may be contemplating committing honour killings in future.²⁶ Honour killings, because of the very damage they cause, in the Court of Appeal’s view, must represent one of the most serious crimes in English criminal law.

Similarly, in *R v Vakas*,²⁷ D was convicted of conspiracy to murder as part of a group of perpetrators. V had begun an online friendship with the married sister of D and thus D conspired to murder V as a result of the dishonour this relationship had brought on D’s family. V received a telephone call from D’s sister asking him to meet her at an internet cafe in the early hours of the morning. V walked to the café, which was closed, and then set off to return home keeping D’s sister informed by mobile telephone of his location. As he continued to walk, V was attacked by a group of hooded males, dragged

²³ [2011] EWCA Crim 3244.

²⁴ *Ibid* at [23].

²⁵ *Ibid*.

²⁶ A. Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press: Cambridge, 2010, 5th Edition) at 78-84. See also *R v Storey* (1973) 57 Cr App R 240.

²⁷ [2011] 2 Cr App R (S) 110.

into the middle of the street, stabbed and suffered an attack which left him suffering fractures to his nose and jaw. An attempt was also made to pour a bottle containing 91% solution of sulphuric acid down V's throat. V put his hands over his mouth and the solution was poured over his head and body. The attackers then ran off when a witness shouted at them. V was taken to hospital where it was discovered that he had suffered 47% burns to his head, neck, chest, abdomen, upper limbs and back. So horrific were his injuries that one witness described V looked like something from a horror film. V spent two months in intensive care, undergoing several skin grafts, and he was permanently deformed and required a personal carer. D was sentenced to 30 years imprisonment for conspiracy to murder after the original sentencing court and the Court of Appeal both referred to sentencing guidelines on attempted murder in order to determine the appropriate sentence in the present case by way of comparison.²⁸ In the Court of Appeal, Maddison J repeated the trial judge's comments that this was 'a terrible crime involving no sort of honour at all',²⁹ with D displaying no remorse for his crime. Madison J also explained that this was a case that could be described as 'sadism':

Whether or not a case can properly be described as sadistic will depend on the facts of the particular case. In our view, the judge was entitled to conclude that conduct of the kind involved here did involve sadism. This offence was meticulously planned. The object was to satisfy family honour. It was an offence of revenge. The complainant was stabbed and mercilessly beaten, causing serious injuries to him before any attempt was made to force him to drink the sulphuric acid...The most appalling and painful external and internal injuries were clearly within the contemplation of those involved. The object of the exercise was...to cause [V] to suffer an agonising death...In all those circumstances the judge was right, in our view, to describe this as a case of sadism.³⁰

Two points are discernible from the case of *Vakas*. First, the Court of Appeal was prepared to utilise existing sentencing guidelines when making comparisons of the current offence with other similar offences (e.g. guidelines on attempted murder were used in comparison, although the offence charged with in the present case was conspiracy to commit murder). Second, the Court of Appeal was prepared to label some cases of

²⁸ See Sentencing Guidelines Council, *Attempted Murder – Definitive Guideline* (July 2009).

²⁹ [2011] 2 Cr App R (S) 110 at [14].

³⁰ *Ibid* at [23]-[25].

HBV as a form of ‘sadism’ in order to reflect the barbarity with which such acts are perpetrated, as well as reflecting the physical and psychological harm such crimes cause victims. Given the availability of other relevant sentencing guidelines as used in *Vakas*, is it really necessary to create separate sentencing guidelines for HBV, honour killings and forced marriages? Separate guidelines on HBV and forced marriage are needed because the current Court of Appeal judgments considered so far do not explore other aggravating and mitigating features that are relevant in these types of cases. One might have thought that sentencing courts could use sentencing guidelines on domestic violence since HBV does bear some similarities with domestic violence and violence in the home.³¹ However, the author has argued elsewhere that while HBV shares similarities with domestic violence in general, HBV can sometimes be differentiated from domestic violence because of its characteristics and additional risk factors that would appear to make it very different (i.e. HBV represents serious and organised crime).³² Therefore, any newly developed sentencing guidelines on HBV and forced marriages would need to recognise these differences. This includes multiple perpetrators that sometimes extend beyond the family home (e.g. community and non-blood relations) and where violence inflicted upon V is not within the ‘domestic’ context but within gang/community-related violence. The current sentencing guideline on domestic violence overlooks these important differences and does not specifically include within its aggravating factors the participation of multiple perpetrators and gang/community-related violence in HBV and honour killings.

It is submitted that one of two approaches might therefore be undertaken: (1) either the current sentencing guidelines on domestic violence needs to be updated to reflect HBV, honour killings and forced marriages in general, together with the recognition of additional factors that make such offences aggravated (i.e. the participation of multiple perpetrators or gang/community-related violence); or (2) create new separate guidelines on HBV, honour killings and forced marriages and recognising these additional aggravating factors. Whatever the route, the time is now ripe for the Sentencing Council to issue guidelines on HBV and honour killings, especially since breaching FMPOs and forcing a person into marriage without their consent are now separate criminal offences under the reforms made by ss.120-122 of the 2014 Act.

³¹ The Sentencing Council currently utilises its predecessor’s guidelines on domestic violence: Sentencing Guidelines Council, *Overarching Principles: Domestic Violence – Definitive Guideline* (December 2006).

³² See M.M. Idriss, ‘Not Domestic Violence or Cultural Tradition: Is HBV Distinct from Domestic Violence?’ (forthcoming).

Sentencing Council Guidelines on HBV, Honour Killings and Forced Marriages

The Criminal Justice Act 2003 ('the 2003 Act') created the Sentencing Guidelines Council (SGC), which was tasked with devising sentencing guidelines for courts in England and Wales. The Sentencing Council replaced the SGC in 2010 under the Coroners and Justice Act 2009 ('the 2009 Act') after it had been accused of adopting overly rigid, bureaucratic and repetitive processes when creating guidelines.³³ The Sentencing Council now has ultimate responsibility for issuing guidelines, although the Court of Appeal continues to issue its own guideline judgments, which are viewed as complimenting the Sentencing Council. Both are treated in the same manner, not least because the same personnel overlap both the Court of Appeal and the Sentencing Council.³⁴ Section 125 of the 2009 Act also requires courts to apply the relevant Sentencing Council guidelines applicable to the case before them.³⁵ As judges are increasingly encountering HBV and honour killing cases in the criminal courts, it is imperative that guidance is provided in this area to allow sentencing judges to impose sentences fairly, consistently and to promote public and victim confidence.³⁶ There needs to be a structured system of guidance for the courts to consider (in addition to the other guidelines that may be appropriate) that provides details on the aggravating and mitigating factors that may reduce or increase the sentence imposed on HBV offenders.³⁷ Existing guidelines do not incorporate specific guidance on matters peculiar or unique to HBV and honour killings and so it would be useful for judges to have these factors conveniently compiled into a single document when sentencing HBV offenders.

³³ See generally M. Wasik, 'Going Around in Circles? Reflections on Fifty Years of Change in Sentencing' (2004) *Criminal Law Review* 253; Ashworth, above n. 26; and S. Easton and C. Piper, *Sentencing and Punishment*, (Oxford University Press: Oxford, 2012) at 47-51.

³⁴ Wasik, above n. 13 at 16-18. Wasik also mentions *R v Peters* [2005] 2 Cr App R (S) 627, where Judge LJ stated 'Guidelines, whether resulting from cases decided in this court, or produced by the Sentencing Guidelines Council, are guidelines: no more, no less'.

³⁵ For a commentary on s.125 of the Coroners and Justice 2009 Act on sentencing, see A. Ashworth, 'Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council' (2010) *Criminal Law Review* 389; Ashworth, above n. 26; J.V. Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51 *British Journal of Criminology* 997; A. Ashworth, 'Departures From the Sentencing Guidelines' (2012) *Criminal Law Review* 81; and Ashworth and Roberts, above n. 20 at 5.

³⁶ See Roberts, above n. 9 at 4; and Ashworth and Roberts, above n. 20 at 1.

³⁷ See also generally A. Ashworth, 'Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing', in Roberts (ed), above n. 9 at chapter 2.

Limitations

As there are currently no Sentencing Council guidelines on HBV, honour killings and forced marriages, it becomes very difficult to analyse an area lacking such information. The following sections should therefore be viewed as suggested proposals that the Sentencing Council might consider when drafting new sentencing guidelines in this area.

The 'Cultural Defence'

HBV and honour killing perpetrators (mostly male) often seek to justify the homicides of women by asserting that their actions uphold cultural and moral standards held by the family.³⁸ This is particularly the case in sexual infidelity and honour killings cases, where a woman's sexual behaviour is the central reason for her killing. Perpetrators will often seek to mitigate sentences by reference to cultural standards through provocation or loss of control type defences, which must be rejected by the courts and this rejection must also be recognised within sentencing guidelines. The 'cultural defence' devalues women and perpetuates a message that the killing of women will be partially excused on cultural grounds. Accepting the 'cultural defence' will also mean that justice will not be uniform –

³⁸ See M-M Sheybani, 'Cultural Defense: One Person's Culture is Another's Crime' (1987) 9 *Loyola of Los Angeles International and Comparative Law Journal* 751; M. Spatz, 'Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives' (1991) 24(4) *Columbia Journal of Law and Social Problems* 597; S. Bandalli, 'Provocation – A Cautionary Note' (1995) 22 *Journal of Law and Society* 398; L. Abu-Odeh, 'Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West'' (1997) *Utah Law Review* 287; A. Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' (2003) 66(4) *Modern Law Review* 510; A.D. Renteln, *The Cultural Defense* (Oxford University Press: New York, 2004), especially chapter 3 and 31-36; C.A. Madek, 'Killing Dishonor: Effective Eradication of Honor Killing' (2005-2006) 29 *Suffolk Transnational Law Review* 53; M.H. Cheema, 'Judicial Patronage of Honor Killings in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation' (2008) 15 *Buffalo Human Rights Law Review* 51; J.A. Cohan, 'Honor Killings and the Cultural Defense' (2010) 40(2) *California Western International Law Journal* 177; and A. Carline, 'Honour and Shame in Domestic Homicide: A Critical Analysis of the Provocation Defence', in Idriss and Abbas (eds), above n. 1 at 80. See also the Australian case of *R v Dincer* (1983) 1 VR 461. Here, the judge reduced a Turkish's Muslim man's charge from murder to manslaughter. D killed his daughter after he discovered she was involved in an extramarital affair. The judge concluded because of his cultural differences and the tradition of honour killing in his culture, the defence of provocation was allowed. Many of the (above) academics argue that provocation defences are 'grossly unfair' because (supposedly available to all) the defence becomes available only to the dominant culture. Some argue cultural defences should even mitigate sentences. However, Phillips argues recognition of the cultural defence would threaten women and would signal society's tolerance towards the killing of women by mitigating the actions of offenders.

why should someone avoid harsher punishment because they acted on a (supposed) ‘cultural norm’?

The intertwined issues of sexual infidelity, loss of control and the ‘cultural defence’ are all relevant issues in the context of English criminal law and honour killings. The Court of Appeal case of *R v Clinton*³⁹ concerned sexual infidelity and the loss of control defence under the 2009 Act. This decision has been widely criticised,⁴⁰ namely because Lord Judge CJ held that sexual infidelity could be considered under s.54(1)(c) of the 2009 Act and the third prong of the defence, even though revenge killings are expressly excluded under s.54(4) and sexual infidelity as a ‘qualifying trigger’ is to be ‘disregarded’ under s.55(6)(c). Baker and Zhao argue that:

sexual infidelity is excluded from being considered under all the prongs of the new defence. It is expressly excluded as a form of qualifying provocation, which means it cannot be considered as a ‘circumstance’ that might prevent a person of D’s sex and age with a normal degree of tolerance and self-restraint from killing.⁴¹

The authors argue *Clinton* was wrongly decided,⁴² as it lets non-qualifying triggers in ‘via the backdoor’.⁴³ Lord Judge CJ’s decision to allow sexual infidelity to feature in loss of control cases could have implications for honour killing cases and may tempt some defendants to raise the issue in the hope of mitigating the homicide charges brought against them (i.e. that the issue of sexual infidelity, contextually, is but one of the circumstances in which D was in when D killed V in an honour killing). It would seem after *Clinton* that the partial defence of loss of control could amount to a form of individual defence of male honour, an issue that is very much relevant to crimes such as honour killings, where the sexual behaviour of a woman is central to the killing. These are factors that were expressly excluded by Parliament when reforming the defence. Speaking about honour killings and the loss of control defence specifically, Baker and Zhao explain that an honour killer (e.g. a father) might very well lose control upon discovering that a woman in the family (e.g. a daughter) has had a sexual relationship with another man outside wedlock and might feel ‘seriously wronged’ by this behaviour.

³⁹ [2013] QB 1. See also Andrew Ashworth, ‘Case Comment’ (2012) *Criminal Law Review* 539.

⁴⁰ See D.J. Baker and L.X. Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ (2012) 76 *Journal of Criminal Law* 254.

⁴¹ *Ibid* at 254.

⁴² *Ibid* at 274-275.

⁴³ *Ibid* at 260.

However, they argue that this does not qualify as an ‘objective trigger’ for the loss of control defence to apply, even if the killer felt wronged and ‘subjectively’ viewed the circumstances as one being extremely grave. They argue that it is irrelevant as far as the loss of control defence is concerned:

A normal person communally situated in contemporary Britain would not consider discovering his adult daughter dating someone of a different race or religious faith as constituting extremely grave circumstances. A normal relationship between a consenting adult couple does not constitute extremely grave circumstances, and a normal parent in contemporary Britain would not be unjustifiably wronged in an objective sense by having to deal with his or her adult daughter’s decision to choose her own partner.⁴⁴

This assessment accords with feminist perspectives seeking to exclude sexual infidelity as a qualifying trigger in loss of control cases by providing women with greater protection from the law and to prevent men from relying on partial defences to excuse.⁴⁵ The reforms under the 2009 Act are welcome as they signal that Parliament no longer accepts that the sexual independence of women is a legitimate reason to lose self-control and an excuse to killing in today’s modern society. While it is hoped that the Supreme Court deals with the issues presented in *Clinton* at the next available opportunity in order to provide clarification on sexual infidelity as a qualifying trigger, any sentencing guidelines on HBV and honour killings should clearly state that a ‘cultural defence’ put forward by an offender at the sentencing stage as a factor to mitigate sentence is irrelevant (as it should also be at the trial stage). On this basis, honour killers should face the full rigour of sentencing law and when a sentencing court is required under statute to provide reasons for its sentence under s.174 of the 2003 Act, the court should also state openly in such cases that there is no ‘honour’ in HBV or honour killings and that the criminal law does not view such crimes as ‘honourable’ but rather ‘dishonourable’.

Mitigation, HBV and Young Offenders

Should mitigation be afforded in HBV cases where perpetrators are young teenagers? At the sentencing stage, criminal courts normally consider the relative youth or young age of

⁴⁴ Ibid at 262.

⁴⁵ Ibid at 273.

an offender to afford some mitigation and there is argument that where the HBV perpetrator is young, more lenient sentences might be appropriate, unless the gravity of the offence outweighs this.⁴⁶ However, given the seriousness of HBV there is also a strong argument that youth should not mitigate sentences. In HBV cases, it is possible (and likely) that parents or other older members of the family/community may coerce younger males to inflict HBV or honour killings, knowing very well that the criminal law (as is the case in other criminal jurisdictions) may mitigate the sentence due to the fact that the court is dealing with a young offender.⁴⁷ Sentencing guidelines should expressly state that youth will not mitigate sentences in these types of cases. If youth was a mitigating factor, this might encourage families to pressure their youngsters into committing HBV and would signal a message that the criminal law will be more lenient to young HBV offenders. Age, therefore, should not be a mitigating factor regardless of whether the perpetrator is young or old. This would be very similar to serious road traffic offences where young perpetrators have caused death by dangerous driving. Young drivers are still likely to face substantial custodial sentences despite their relative young age and immaturity.⁴⁸ Conversely, senior or older members found to have incited or encouraged younger persons to commit honour crimes should themselves face prosecution and have their sentences increased for abusing their positions by coercing others to commit offences on their behalf.

R v Ahmed and Ahmed (2012) (Chester Crown Court)

In the Crown Court case of *R v Ahmed and Ahmed*,⁴⁹ Mr. Justice Roderick Evans provided sentencing remarks when sentencing the parents of Shafilea Ahmed to life imprisonment for her murder. Specifically, he said with regards to the mitigating features of the case that there was no pre-existing plan to kill Shafilea Ahmed on the night she was

⁴⁶ See *R v Sharkey and Daniels* [1995] 16 Cr App R (S) 257 and *R v Howells* [1999] 1 Cr App R (S) 335.

⁴⁷ See Abu-Odeh, above n. 38; S.A. Warraich, 'Honour Killings and the Law in Pakistan', in Welchman and Hossein (eds), above n. 1 at 78 (see also chapters 5, 6, 9 and 10); L. Pervizat, 'Lack of Due Diligence: Judgments of Crimes of Honour in Turkey', in Idriss and Abbas (eds), above n. 1 at 142; and R. Hussein, 'A Comparative Study of the Reform Work Conducted in Asian and Europe to Combat Violence and 'So-Called' Honour Murders', in Idriss and Abbas (eds), above n. 1 at 154.

⁴⁸ See M. Hirst, 'Causing Death by Driving and Other Offences: A Question of Balance' (2008) *Criminal Law Review* 339; *R v Braid* (2002) 2 Cr App R (S) 110; *R v Richardson* (2007) 2 Cr App R (S) 36; *A-G's Reference (No. 71 of 2006)* [2008] 1 Cr App R (S) 78; and *A-G's Reference (No. 17 of 2009)* (2010) 1 Cr App R (S) 12.

⁴⁹ At Chester Crown Court (unreported), when sentencing took place on 3 August 2012 at 3-4. Sentencing remarks are available on LexisLibrary.

murdered and there was an absence of previous convictions which, under s.143 of the 2003 Act, the court had to acknowledge. These are factors that would normally mitigate a sentence, which all sentencing courts must consider when sentencing offenders. However, in the circumstances of the case, Mr. Justice Evans stated this had little influence on the final sentence imposed, given the serious aggravating features of the case. Mr. Justice Evans stated Shafiea's parents were the very people to whom she should have been able to look for protection and trust. Their treatment of her and her murder was not only motivated by (false) cultural and honour-based notions but it was also a fundamental breach of trust as one can imagine.⁵⁰ Her parents had acted in concert as a team (i.e. as multiple perpetrators) to murder Shafiea in the living room of the family home.⁵¹ The impact of HBV crimes is thus seriously aggravated by the participation of multiple perpetrators and sentencing guidelines must reflect this.

However, the violence experienced by Shafiea was not an isolated incident. In the year before her murder, they had subjected her to repeated acts of violence and abuse and even abducted her by taking her to Pakistan to force her into marriage against her will. There was, therefore, a history of violence and abuse inflicted on Shafiea leading up to her murder that the sentencing court had to take into consideration. She was also very vulnerable when they killed her – she was still weak from the effects of ingesting bleach while in Pakistan, which she had taken to avoid her forced marriage and her physical weakness would also have meant that defending herself from her parent's attack was all the more difficult. It was also a horrifying feature of the case that the parents killed Shafiea in the presence of their other children in the family home – this was a serious aggravating feature of the offence.⁵² After killing Shafiea the parents had attempted to conceal her body and not only did they lie and mislead the authorities to cover up the murder, but they also lied on oath to a Coroner and made their surviving children put forward an account that was intended to hide their crime. There was no admission of guilt and there was certainly no remorse. Mr. Justice Evans accordingly imposed a minimum term of 25 years imprisonment upon both parents, ruling that this was commensurate with the seriousness of the offence and that he could not differentiate between the two perpetrators.

⁵⁰ Breach of trust cases include: *R v Kay* [2007] EWCA Crim 2962; *R v Mangham* [1998] 2 Cr App R (S) 344; *R v Strongman* [2010] EWCA Crim 25; and *R v Hart* [2006] EWCA Crim 2766.

⁵¹ See *R v Dolan and Whittaker* [2007] EWCA Crim 2791; *R v Dobson, Bundy and Flower* [2007] EWCA Crim 2918; and *R v Blackshaw* [2012] 1 Cr App R (S) 114 for group offending and multiple perpetrator cases.

⁵² See Sentencing Guidelines Council, *Overarching Principles: Domestic Violence – Definitive Guideline* (December 2006) at 5, para. 3.11-3.12.

Given the detail of Mr. Justice Evans' comments on the aggravating and mitigating features of the 'honour killing' of Shafiea Ahmed, it is submitted that these remarks concerning aggravating and mitigating factors should form the basis of any Sentencing Council guideline drafted on the issue for the benefit of all sentencing judges.

Deterrence

The sentence imposed by Mr. Justice Evans seems to reflect the thought that the threat of long custodial sentences would generally deter would-be honour killers from perpetrating these types of crimes. It reflects the rationale that honour killings should be treated like any other murder with aggravating features, which carries with it severe penalties and the mandatory life imprisonment sentence for murder, that they represent one of the most heinous crimes in English criminal law, are dishonourable acts and will be punished as such by the courts. Honour killings and HBV are aggravating crimes not only because they harm actual victims, but also serve to spread fear amongst other intended (female) victims that they too will face violence if they defy cultural norms of expected behaviour. Honour killings and HBV are carried out to control unwanted or undesired behaviour, whether it is sexual behaviour (including homosexuality, promiscuity and sex before/after marriage), the wearing of make-up or for behaving too 'westernised'. HBV is thus a tool that is used to terrorise other women and forces them into compliance with acceptable norms of behaviour. By imposing lengthy custodial sentences, the criminal law can send a powerful message that it will not tolerate HBV and honour killings and the wider messages it attempts to signify.

The imposition of suspended sentences under s.189 of the 2003 Act in these types of cases should also be strictly limited and used only in exceptional cases, given the seriousness of HBV. Judges should also note Victim and Family Impact Statements and the effects such violence has had on victims and their families when determining the final sentence to impose.

HBV as a Statutory Aggravating Factor under the Criminal Justice Act 2003?

One possible reform for Parliament to consider is to make HBV a statutory aggravating factor under the 2003 Act, which would require sentencing courts to pass more severe penalties when crimes have been committed in the HBV context. For example, ss.145 and 146 of the 2003 Act already make it a statutory aggravating feature for crimes to be

committed based on hostility directed towards the victim based on their race, religion, sexual orientation or disability. This is based on society's disapproval of such crimes, particularly because they are very harmful and damaging to individual victims personally, as well as to society and the community in general. Similar symbolic messages could be provided by creating a statutory aggravating provision making it an aggravating feature to 'commit crimes related to so-called honour'. This position would recognise HBV and honour killings as very harmful to victims that disproportionately target women deemed to have breached the honour code. Such an aggravating feature would help to portray the message that Parliament will not tolerate HBV or the gender/social inequalities that it promotes. So while ss.145-146 focus on race, religion, sexual orientation and disability as aggravated features of a crime, the suggested reform would focus on making it an aggravating feature to *commit a crime against a woman because she is woman* (i.e. gender). Such a reform would signal that the safety and security of all women is paramount. This also includes the right to liberty, security and freedom for all to exercise one's personal rights (e.g. the right to marry) and that religious or cultural values can never justify violence committed in the name of 'honour' against women.⁵³ It will also ensure the accountability and punishment of offenders by making it a statutory requirement for sentencing courts to punish perpetrators for committing the initial offence (e.g. assault) according to the normal offence category but then adding the additional element to the sentence in recognition of its aggravating features for having been committed in the context of HBV. Like ss.145 and 146 of the 2003 Act, there is no reason why a newly created statutory aggravating feature to 'commit crimes related to so-called honour' cannot be applied to all types of criminal offences (e.g. murder).

With regards to the above recommendation, it would be necessary for legislative drafters to define concepts such as honour, HBV and honour killings. It would be preferable for drafters to do so with recognition that honour crimes are a form of violence against women (VAW). Legislative drafters should be encouraged to provide general and wide definitions of HBV and honour killings in order to encompass its wide-ranging forms (e.g. murder, rape, gang-rape, female genital mutilation, assault, battery, kidnap, etc.). However, it is important to acknowledge that any definition or list provided should not be construed as being exhaustive. This is so not to exclude a variety of other conduct from potential criminal prosecution or the recognition of new forms, tactics or contexts used by perpetrators to inflict HBV on victims (e.g. social media bullying or revenge porn, etc.). Given the familiarity and understanding of HBV and honour killings, the word

⁵³ Roberts, above n. 9 at 15.

'honour' could be retained instead of 'custom' or 'tradition' in order to allow the law (and the general public) to properly identify cases and to avoid stereotyping certain communities as practising HBV. But care must also be taken not to define honour simply as a 'male-defined' term or the embodiment of men/male perpetrators – this could be simply constructed through a statement that English criminal law considers 'honour' to be vested in each individual, man or woman, and that there is no 'honour' in HBV. Or it could be achieved by using a completely different concept. The word 'femicide' is a term that has been utilised by some campaigners who argue that 'no murder of a woman should be categorized by the rationale provided by the murderer, or by society itself, whether it be a so-called 'honour killing' or a crime of passion'.⁵⁴ Therefore, a suitable alternative might be to create a statutory aggravating provision that makes it an aggravating to 'commit crimes related to femicide', that is, it is an aggravating feature to kill women and girls simply because they are females/females with lessened value.⁵⁵ This would avoid inferences about the motives of killers; that violence is used as a tool against women; and that the murder of women is part of the wider continuum of VAW.⁵⁶

However, the major issue with the above reform is that commentators are divided about whether new laws are needed to address HBV and honour killings. For example, Aujla and Gill argue that creating new laws (such as new HBV statutory aggravating factors) could serve to create new problems, including creating a division between majority society and ethnic minority women (especially South-Asian and Muslim women), where it is largely believed that the latter is where HBV and honour killings is mainly practiced.⁵⁷ This is a stereotypical belief and many prominent authors have argued that HBV and honour killings are practiced in all societies and against all women regardless where she may live or her ethnicity.⁵⁸ Creating a new statutory aggravating provision may signal that ethnic minority women are more susceptible to HBV than majority women and that immigrants are not obeying English criminal law – such a reform may signal the point that new laws are needed to address what is primarily a

⁵⁴ A. Hogben, 'Femicide, Not 'Honour Killing'', in H. MacIntosh and Dan Shapiro (eds), *Gender, Culture, Religion: Tackling Some Difficult Questions* (Calgary: Sheldon Chumir Foundation for Ethics in Leadership) at 38.

⁵⁵ Ibid.

⁵⁶ Ibid at 39.

⁵⁷ W. Aujla and A.K. Gill, 'Conceptualizing 'Honour' Killings in Canada: An Extreme Form of Domestic Violence' (2014) 9(1) *International Journal of Criminal Justice Sciences* 153, at 162.

⁵⁸ See N.V Baker, P.R. Gregware and M.A. Cassidy, 'Family Killing Fields: Honor Rationales in the Murder of Women' (1999) 5(2) *Violence Against Women* 164. See also the readings above n. 1.

(misconceived) ‘immigrant issue’.⁵⁹ Furthermore, existing English criminal laws appear to be successfully employed and utilised given the high profile criminal prosecutions mentioned, together with substantial custodial sentences – why then add new laws when the existing legal regime seems to be working? Yet the counter-argument and benefit of creating a new statutory HBV aggravating factor to ‘commit crimes related to so-called honour/femicide’ would be that it would recognise the wider context of VAW and gender-based violence – such a reform could help to capture white-majority men committing HBV or crimes against white-majority women linked to male honour and women’s lessened value.⁶⁰ Like s.145 of the 2003 Act and racially/religiously aggravated offences, although designed primarily to protect ethnic minorities, the provision does not preclude South-Asians being prosecuted for committing racially aggravated offences against the majority group or other ethnic minorities.⁶¹ Therefore, creating a new statutory aggravating factor could be a positive reform for *all women* in the pursuit of ending and/or punishing the wide spectrum of VAW, including white-majority women.

If it is decided that a new HBV statutory aggravating factor should not be drafted, existing statutory aggravating factors could still be utilised by sentencing courts in cases of HBV and honour killings. Not only are sentencing courts required to apply s.143 of the 2003 Act when assessing harm and culpability, but ss.145 and 146 may also be applicable in the HBV context. For example, s.145 of the 2003 Act may be a relevant aggravating feature if criminal offences are committed on the basis of racial or religious hostility, that is if a victim has experienced HBV because they are a ‘Sunni Muslim’ and dating a ‘Alevi Muslim’ girl. Section 145 could be utilised given that one of the reasons why perpetrators may inflict HBV is because it is perceived shameful for a woman to enter into a relationship with a man from a different race, religion, religious sect, ethnicity or caste (e.g. see the honour killing case of Tulay Goren). In this way, s.145 could be utilised by sentencing courts to treat the HBV attack as based on racial or religious hostility (or both). Furthermore, s.146 of the 2003 Act may also be relevant in the HBV context. Some victims of HBV may experience violence because it has been discovered (or the victim has revealed to their family) their sexual orientation (whether lesbian, gay or bisexual) and as a result of this discovery or revelation, family members inflict HBV because of the perceived shame brought upon the family. Section 146 could therefore be used if victims of HBV are targeted on the basis of their sexual orientation. Section 146

⁵⁹ Aujla and Gill, above n. 54 at 163.

⁶⁰ See Baker et al, above n. 58.

⁶¹ See *R v Masuk* [2006] 2 Cr App R (S) 46 and *R v Afzali* [2003] EWCA Crim 3718.

may also be applicable to those individuals targeted on the basis of their disability. For example, those with physical and learning disabilities are often forced into marriages without their consent by family members, who no longer wish to be their primary carers or assume responsibility over them. As the victim is specifically targeted for a forced marriage (now a criminal offence under ss.120-122 of the 2014 Act) because of their disability and the motivation behind the forced marriage by the perpetrator is to be rid of the person with the disability, one could argue that a forced marriage offence perpetrated against the disabled person based on their disability satisfies the hostility element for s.146. This is because perpetrators do not see the disabled individual as a ‘person’ and believe their choices and freedoms can be controlled. This may enable the sentencing court to treat the forced marriages of those with disabilities as a statutory aggravating factor and may say so openly in court. This will enable sentencing courts to show their disapproval, that forcing disabled people into marriage against their will (primarily because they are disabled) will attract a more severe sentence. It will also signal the courts’ recognition that crimes relating to sexual violence (including rape in general and rape within forced marriage) are commonplace against women with disabilities.⁶²

Conclusion

The aggravating and mitigating factors proposed in this article aim to provide sentencing courts with the necessary information needed to determine a fair and just sentence in HBV, honour killing and forced marriage cases. Sentencing Council guidelines on these issues are urgently needed given the increasing number of prosecutions in the courts and the current non-availability of sentencing guidelines issued by the Court of Appeal. Such guidelines will also help to achieve consistency in the sentencing of HBV offenders and honour killers, whilst helping to affirm a declaratory message that English criminal law considers such offences to be abhorrent practices. If, and when, the Sentencing Council does draft guidelines on HBV and honour killings, it will be possible to undertake a more thorough analysis of that document in order to explore whether it meets the demands of sentencing courts. This includes whether it appropriately recognises the balance between the harm caused to the victim(s) of HBV and the culpability of the offender(s), through the application of appropriate aggravating and mitigating factors.

⁶² Chih Hoong Sin et al, *Disabled Peoples’ Experiences of Targeted Violence and Hostility* (Equality and Human Rights Commission, Research Report No.21, 2009) at 19 and 31-39.