



**PROVOCATION IN SLOW AND ESCALATING  
LOSS OF SELF-CONTROL**

BY

**GEORGE KAMAU KINUTHIA**

(STUDENT NUMBER 214582222)

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**SUPERVISOR: PROFESSOR SHANNON HOCTOR**

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## **DECLARATION / STATEMENT OF ORIGINALITY**

I do hereby declare that the dissertation titled '*Provocation in slow and escalating loss of self-control*' is my own work and that all sources used and referred to have been acknowledged in full. This project is an original piece of work which is made available for photocopying and for inter-library loan.

Thus signed and dated on the 3<sup>rd</sup> day of December 2014 at Pietermaritzburg.

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George Kamau Kinuthia

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## CHAPTER 1

### Introductory Overview

#### 1.1 Introduction and background

Traditionally, the non-pathological incapacity based on provocation has operated to reflect a compromise between human frailty and harshness of law in criminal law. The defence mitigates the harshness of the law in instances of unpremeditated murder (crimes). This position has evolved out of the courts' concern that killing due to certain frailties is less blameworthy than other killings, and equally, less susceptible to the deterrent effects of punishment. While in some jurisdictions such as South Africa, the defence can afford the accused a complete acquittal, in others, such as Kenya and Canada, it is only a partial defence. Nonetheless, the doctrine has evoked intense debate especially among women rights advocates and activists for its supposedly profoundly gendered nature.

Proponents of abolishing and reforming the defence contend that while the defence is favourable to men who kill their spouses, it totally ignores the situation of women who kill in non-confrontational instances arising from cumulative serious violence and abuse. They reason that the society has traditionally institutionalised female subordination through unfair practices in law, and as such, the continued application of the defence in its present form, is just but an extension of the practice. Most of the criticism directed at the defence emanates from the concept of loss of self-control which, in many regimes, is constrained almost exclusively to the requirement of the emotion of sudden anger or rage mostly associated with men. In consequence, other passions such as fear, despair, compassion, and empathy, that are mostly associated with women, and that are manifested in the gradual loss of self-control, are disregarded. This, they claim, elevates the position of men and confers upon them an undue advantage over women before the law, thereby denying women their right of access to justice. Furthermore, the situation is exacerbated by the fact that women who kill in non-confrontational circumstances rarely succeed when they rely on other defences. To this end, focus has been directed towards the reformation of the defence so as to accommodate the reality of women who kill in non-confrontational situations, and ultimately, restore gender equality in its application.

This thesis seeks to critically evaluate the aspect of gradual loss of self-control in relation to the defence on provocation in instances where women kill in non-confrontational circumstances. In most jurisdictions, very little, if any, has been done to address this question,



despite concerted deliberate attempts through international conventions and domestic legislation to ensure that both genders are afforded equal rights before the law. In some jurisdictions such as England and Wales (UK) and South Africa, the impetus for change is apparent. The research seeks to establish, among other things, the cause of this increased scrutiny on the defence in relation to women who kill in non-confrontational situations.

The research proceeds from the presumption that a reformulated defence of provocation would be an appropriate defence for a woman who kills her abuser in a non-confrontational circumstance. Accordingly, many important aspects of the study rely heavily on related existing literature. The methodology used is a combination of broad literature survey and comparative analysis between the legal position in South Africa and Kenya and the position in relatively developed legal systems (England and Wales, Australia and Canada).

## 1.2 Overview of the chapters

Chapter One sets out the general tone and the agenda of the thesis through a brief introductory overview and breakdown of the chapters. Chapter Two seeks to demystify and understand the conduct of the accused woman who kills in non-confrontational circumstances. The section attempts to briefly explicate the cause of the accused's conduct, the nature and extent of the various defences available to her and the relevance of the defence of provocation. Chapter Three traces the origin of the law of provocation, and thereafter proceeds to illuminate its development in South African and Kenyan criminal law. Chapter Four is a follow-up of the previous chapter on the origin and development of the law, and focuses on the current position and application of the law in the two countries. Chapter Five delves into the grounds for reformation of the law with a glimpse of selected jurisdictions outside South Africa and Kenya. Lastly, Chapter Six comprises a concluding argument drawn from the preceding discussion.

## CHAPTER 2

### Brief Exploratory Insight into the Accused's Conduct and the Defences available

#### 2.1 Understanding the Accused

##### 2.1.1 Conduct of the Accused

Women who kill in non-confrontational situations present a unique and multifarious position in criminal law.<sup>1</sup> The same could obviously be said of men who kill in similar circumstances especially in same-sex relationships.<sup>2</sup> Numerous theories have been espoused to explain the cause of the seemingly unwarranted killings and correspondingly, to influence the appropriate treatment in law. One such theory and of particular relevance to this thesis is the Battered Woman Syndrome (BWS) that seeks to explicate the psychosomatic and behavioural patterns presented by a woman who has experienced repeated abuse over a period of time.<sup>3</sup> The term was coined by the respected American psychologist, Dr. Lenore E. Walker to describe the victim's experience of cyclic episodes of violence characterised by distinct periods of tension building, acute battering and remorse, forgiveness and affection by the abuser.<sup>4</sup> The victim is bound to the situation by the inability to respond appropriately in what Walker refers to as 'learned helplessness'.<sup>5</sup> Learned helplessness is a consequence of the victim's genuine love for the abuser compounded with individual fears.<sup>6</sup> Although BWS has been variously dismissed as not being accurately reflective of the victim's reality,<sup>7</sup> it is nonetheless, submitted that it

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<sup>1</sup> J Dressler 'Battered women and sleeping abusers: Some reflections' (2005) 3 OSJCL 457 at 457 for example, refers to 'non-confrontational homicide' where the accused unexpectedly kills her victim while he is passive (asleep, watching a game or eating). CJ Rosen 'The excuse of self-defence: Correcting a historical accident on behalf of the battered women who kill' (1986) 36 AULR 11 at 13 contends that such cases present a difficult time for the courts and criminal justice officials as it involves sympathetic defendants who cannot fairly be blamed for their conduct but who would have no defence if the law was strictly applied.

<sup>2</sup> SB Sorenson & KA Thomas 'Intimate partner violence in same-sex relationships' 2009 EJOFCV 1 at 2 note that the rates of intimate partner violence (IPV) is higher among gay men and due to societal homophobia, the victims' experiences often go unreported /unnoticed.

<sup>3</sup> LE Walker 'Who are battered women?' (1997) 2 JWS 52 at 52 defines a battered woman as a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her into doing what he wants without regard for her rights as an individual.

<sup>4</sup> Ibid 53-54.

<sup>5</sup> Ibid 55.

<sup>6</sup> Walker (n 3 above) 54 notes that the victim's reasoning is clouded by numerous fears including losing out economically, loneliness and death or serious injury in attempt to flee.

<sup>7</sup> JH Krause 'Distorted reflections of battered women who kill: A response to Professor Dressler' (2006) 4 OSJCL 555 at 565 points out that BWS has proven to be extremely problematic as an empirical, cultural and political model and is not an accurate portrayal of the reality of the abused woman. See also M Reddi 'Battered Woman Syndrome: Some reflections on the utility of this 'syndrome' to South African women who kill their abusers' (2005) 18 SAJC 259 at 262 submits that the reality of a battered woman's reactions vary and cannot be encapsulated in a common set of characteristic as suggested by BWS.

represents a reasonable attempt to explicate the cause for the seemingly unprovoked killings and ushered a paradigm shift in approaching such cases.<sup>8</sup>

### 2.1.2 Excuse or Justification?

A woman's conduct or actions where she kills in non-confrontational circumstances may either be excusable or justifiable.<sup>9</sup> Central to the two concepts is the consideration of blameworthiness of the particular act.<sup>10</sup> Justification is inferred from the conduct of the accused while excuse focuses on the state of the mind of the actor.<sup>11</sup> Whereas justifiable conduct is objectively assessed in relation to the appropriateness of the act,<sup>12</sup> excusable conduct is subjective and relates to the accused's mental state at the given time.<sup>13</sup> Grounds for justification include private defence, necessity, consent and official capacity.<sup>14</sup> Conversely, insanity, infancy, youth, automatism and provocation are examples of excusable grounds.<sup>15</sup> The general criminal law approach attendant in any jurisdiction is also vital in comprehending the nature of the accused's conduct. For example, the South African criminal law system is traditionally associated with psychological approach while the Kenyan criminal law pursues the normative theory of fault approach.<sup>16</sup>

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<sup>8</sup> Reddi (n 7 above) 261 explains that besides explaining the reality of the battered woman, BWS seeks to illustrate the dynamics of the abuser or batterer thus putting the entire situation into perspective. At 272 she notes that BWS evidence is generally introduced in cases where the woman has killed her abuser in non-confrontational circumstances. In *S v Ferreira* (2004) 2 SACR 454 (SCA) at 466i-467b the court noted that the theory had been referred to in other jurisdictions to admit evidence relating to self-defence for abused women.

<sup>9</sup> L Katz et al *Foundations of Law* (1999) at 269 generally refers to justifications and excuses as affirmative defences comprising claims by the defendant for exculpation. A Simester 'On justifications and excuses' in L Zedner & JV Roberts *Principles and Values in Criminal Law and Criminal Justice, Essays in Honour of Andrew Ashworth*, 95 at 97 makes a distinction between irresponsible (excusable) and rationale-based (justifiable) conduct.

<sup>10</sup> KJ Heller 'Beyond the reasonable man? A sympathetic but critical assessment of the use of subjective standards of reasonableness in self-defence and provocation cases' (1998) 1 AJCL 1 at 10.

<sup>11</sup> Dressler (n 1 above) 463.

<sup>12</sup> Heller (n 10 above) at 10-11 refers to generally acceptable behaviour which is encouraged and tolerated and future similar circumstances would provoke similar response or reaction. See Rosen (n 1 above) 18 defines justification defences as those that identify objectively determinable external circumstances that render otherwise criminal acts acceptable to society. Katz et al (n 9) at 269 refers to the right conduct under the specified conditions.

<sup>13</sup> Heller (n 10 above) 11 notes that excusable conduct is 'personal and limited to the specific individual caught in the maelstrom of circumstances.'

<sup>14</sup> CR Snyman *Criminal Law* (2008) at 103. Other grounds include impossibility, disciplinary chastisement and *negotiorum gestio*.

<sup>15</sup> Simester (n 9 above) 96-97 says that these grounds are predicated on the denial of the accused's moral responsibility and the recognition of her inadequacy or incapacity to process and apply moral reasoning to her conduct.

<sup>16</sup> S Goosen 'Battered women and the requirement of imminence in self-defence' (2003) 16 PELJ 70 at 99. See also Rosen (n 1 above) 18.

## 2.2 Defences Available

### 2.2.1 Private Defence

Accordingly, various defences may be available to a woman who kills in non-confrontational circumstances. The accused can plead private defence where she uses reasonable or deadly force against the victim.<sup>17</sup> Snyman defines private defence as the use of necessary and reasonably proportional force against an attacker to resist an on-going or imminent attack that threatens life, bodily integrity, property and/or any other protectable interest.<sup>18</sup> Private defence is assessed objectively with the aim of negating the accused's conduct. Invariably, since battered women present different characteristics, the court will objectively assess the reasonableness of the woman's appraisal regarding the imminence of her perceived threat.<sup>19</sup> Provided all the other conditions relating to the attack and the accused's conduct have been met,<sup>20</sup> for the accused to succeed on self-defence, her conduct must be a reasonable response to the perceived imminent threat from her perspective.<sup>21</sup> Moreover, the court will have to be satisfied that her conduct is reasonable in relation to the prevailing circumstances.<sup>22</sup> However, women who kill in non-confrontational circumstances rarely succeed when they rely on the defence of self-defence. Obviously, this is occasioned by the requirement of immediacy threshold which rarely obtains in non-confrontational instances.<sup>23</sup> Numerous decisions by the courts have served to illustrate the unsuitability of self-defence in non-confrontational instances and the difficulties exerted on the

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<sup>17</sup> Reddi (n 7 above) 270.

<sup>18</sup> Snyman (n 14 above) 103. This definition was also embraced by the court in *S v Engelbrecht 2005 (2) SACR 41 W* at para 228. See also Reddi (n 7 above) 270 where she points out that a person threatened with imminent attack can strike a pre-emptive blow aimed at averting the perceived threat.

<sup>19</sup> Reddi (n 7 above) 270 alludes that a woman's appraisal of danger may be influenced by her past experiences and even where objectively there may be no danger, she may have a unique perception of the danger of the situation and its likely outcome based on her previous experiences of abuse and violence.

<sup>20</sup> The accused's conduct must constitute a necessary reasonable response directed at the attacker against an unlawful attack upon a legally protected interest.

<sup>21</sup> Reddi (n 7 above) 271.

<sup>22</sup> The accused must show that at the relevant time, there were no less harmful means available to defend herself or her threatened interests and why she was unable to disengage from the abuser or seek external assistance. In *Ex parte die Minister van Justisie: In re S V Van Wyk 1967 (1) SA 488(A) at 498B* held that reliance on self-defence may fail in cases of extreme disproportion in the use of force. In *S v T 1986 (2) SA 112 (O)* at 129 it was held that in assessing the reasonableness of the accused's conduct, the court is guided by factors such as the relative size and strength of the parties, gender, age, means available, nature of threat, interests threatened and persistence of the threat.

<sup>23</sup> R Bradfield 'Domestic homicide and the defence of provocation: Tasmanian perspective on the jealous husband and the battered wife' (2000) 19 UTLR 5 at 10 points out that in most instances relating to such killings, a woman's conduct can be construed as vengeful, deliberate and/or premeditated killing. See also Goosen (n 16 above) 75 is of the view any measures taken after the attack has ended would be deemed retaliatory rather than defensive and therefore unjustified.

accused.<sup>24</sup> Unsurprisingly, the same position is held and supported by many legal scholars.<sup>25</sup> It has been argued that the behaviour manifested by victims of BWS and indeed any other syndrome, is psychological and hence calls for a subjective perspective. Consequently, the same cannot be objectively justified.<sup>26</sup> Nonetheless, there are indications that the courts are willing to move away from the rigidity of the traditional test of self-defence which could well eventuate into a boon for the victims of BWS as illustrated in the words of Holmes J in *S v Ntuli*:<sup>27</sup>

South African courts must be careful to avoid the role of armchair critics, wise after the event, and weighing the matter in the secluded security of the court-room. The approach is that in applying these formulations (the triggering conditions) to flesh and blood facts, the courts adopt a robust attitude, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence.<sup>28</sup>

Similarly, in *Engelbrecht*, the court recognised that self-defence could be available where there was an on-going pattern of behaviour suggestive of imminent or inevitable violence.<sup>29</sup>

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<sup>24</sup> In *Norman v State* 1988 (2) 366 (SE) 586-587 for example, the defendant who had been married to the deceased for twenty five years had gone through a long history of verbal and physical abuse which was disclosed and corroborated by several witnesses. Norman often threatened the defendant in public that he would kill her or cause grievous bodily harm on her person. On the fateful day, Norman decided to take an afternoon nap. The defendant went to her mother's place and found a gun. She went back home and shot Norman to death. At the trial, she unsuccessfully asserted that the killing was an act of self-defence. The court held that as matter of law, the sleeping victim did not present the threshold of imminent threat. In *Engelbrecht* (n 18 above) the court held that the accused who had killed her husband while he was asleep, could not avoid liability by relying on self-defence because there was no attack pending upon her or her daughter.

<sup>25</sup> Dressler (n 1 above) 457 for example, refers to non-confrontational 'self-defence' homicide as morally unjustifiable. See also Krause (n 7 above) 558 postulates that the chief obstacle in a non-confrontational situation is proving that the threat was imminent in the absence of any on-going attack. Goosen (n 16 above) 75 is of the view that the requirement that the attack must have commenced or must be on-going is problematic, as battered women tend to kill in instances where their abuser is asleep or incapacitated and there is no imminent threat of harm.

<sup>26</sup> Dressler (n 1 above) 463. The syndrome seeks to explain why the actor should be treated differently than others and not blame her when we would blame others who commit the same act. See also M Reddi 'Domestic violence and women who kill: Private defence or private vengeance' (2007) 124 SALJ 22 at 25 points out that it would be difficult for a battered woman who has responded to a threat of harm from her own perception to be viewed as having acted reasonably.

<sup>27</sup> 1975 (1) SA 429 (A).

<sup>28</sup> Ibid 437e.

<sup>29</sup> *Engelbrecht* (n 18 above) para 391-397. The court followed the Canadian case *R v Lavallee* 1990 (55) CCC (3d) at para 348 where it was held that requiring a systematically abused woman to wait until the commencement of an attack to defend herself is tantamount to sentencing her to murder by instalment, and at 349 that the requirement of imminence should be extended to situations of inevitable abuse where patterns or cycles of regular or frequent abuse were apparent. The argument is supported in *S v Motleleni* 1976 (1) SA

### 2.2.2 Putative Private Defence

An accused woman who intentionally kills in non-confrontational circumstances whilst under an honest but mistaken belief that she is entitled by the law to kill in such circumstances may raise the defence of putative private defence which, unlike private defence, is evaluated subjectively.<sup>30</sup> The accused will be required to show that she did not have the requisite intention to act unlawfully and as such, was acting under a genuine albeit mistaken belief. It is immaterial whether her actions are rational or not. However, the accused may not inevitably escape liability and will most probably be found guilty for culpable homicide arising from negligence.<sup>31</sup> The extra-ordinary circumstances of a battered woman, when assessed objectively, can be used to prove incapability on her part to foresee that her conduct would be unlawful, thereby extinguishing negligence and render the charge of culpable homicide untenable.<sup>32</sup>

### 2.2.3 Automatism

In some cases the accused's conduct can be ascribed to post-traumatic stress caused by her past experiences which may be exhibited in the form of sane automatism. If she kills her passive abuser in such a state she can be deemed as having acted involuntarily and consequently criminal liability would not attach.<sup>33</sup> The onus is on the prosecution to prove otherwise but the accused has to establish a factual ground that is sufficient to cast doubt on the voluntariness of her actions.<sup>34</sup> Therefore, in order to controvert the assumption that the

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403 (A) at 406c where it was held that in applying objective standards, one must decide what the fictitious reasonable man, in the position of the accused and in light of all the circumstances, would have done. The reasoning is further augmented by Goosen (n 16 above) 76 where he is of the view that a 'legal convictions' test approach informed by the fundamental values of the Constitution, namely, human dignity, equality and freedom would guide to evaluate the particular circumstances of the accused in line with s 9 of the Constitution.

<sup>30</sup> Reddi (n 7 above) 275. In *S v De Oliviera* 1993(2) SACR 59 (A) at 631 held that the defence is applicable where the accused honestly believes that his life is in danger even though, when objectively viewed, this is not the case.

<sup>31</sup> Ibid 275.

<sup>32</sup> Ibid 276.

<sup>33</sup> Reddi (n 7 above) 276 refers to sane automatism as a term used to indicate that the condition of automatism is not caused by mental pathology (mental disease or defect).

<sup>34</sup> *S v Humphreys* 2013 (2) SACR 1 (SCA) at para 11 in confirmation of the criterion laid out in *S v Cunningham* 1986 (1) SACR 631 (A) at 635B and 635I to establish the presence or otherwise of automatism. Scott J defined factual foundation as medical evidence of an expert nature which is necessary to displace the natural inference that an accused had acted voluntarily or consciously. The court is guided by the expert evidence, other facts of the case and the accused's own actions in the intervening period. The same had previously been underlined in the case of *S v Trickett* 1973 (3) SA 526 (T) at 537D where Marais J concluded that to effectively raise the defence of automatism, there must be sufficient cogent evidence to raise reasonable

accused did not act voluntarily, evidence of expert nature will have to be adduced in addition to the accused's own account or evidence of the circumstances at the material time.

#### 2.2.4 Provocation

An accused woman who kills in non-confrontational circumstances may plead lack of criminal capacity resulting from non-pathological causes. The accused can introduce evidence to show that she was acting under a temporary and relatively brief episode of emotional upset arising from intoxication, emotional stress or provocation. Snyman defines non-pathological criminal incapacity as the inability of the accused to channel her conduct to accord with his insight into right or wrong while under a brief spell of emotional disturbance induced by some external force.<sup>35</sup> Non-pathological incapacity as manifested in the form of loss of self-control and emotional stress<sup>36</sup> will only be successful if the accused adequately demonstrates that she lacked the capacity to appreciate and/or act in accordance with such appreciation arising from non-mental illness.<sup>37</sup> Where provocation<sup>38</sup> is relied on as a defence, it has been generally accepted in a majority of cases that the onus lies with the state to prove accused's criminal capacity beyond reasonable doubt by ousting absence of such provocation.<sup>39</sup> For the accused to rebut the presumption of capacity, she will be required to lay a factual foundation in her defence and in the absence of sufficient evidence to cast doubt on her capacity, will be found to possess criminal capacity.<sup>40</sup> As held in *S v Cunningham*,<sup>41</sup> in the absence of exceptional circumstances, a sane person who engages in criminal conduct is presumed to do so voluntarily and consciously.<sup>42</sup> It is trite law that the court is seized with the ultimate decision upon consideration of all the evidence before it.<sup>43</sup> However, it is generally accepted that

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doubt as to the voluntary nature of the act and medical or other expert evidence to preclude presence of mental illness or disorder. See also Snyman (n 14 above) 57.

<sup>35</sup> Snyman (n 14 above) 163.

<sup>36</sup> CR Snyman 'The tension between legal theory and policy considerations in the general principles of criminal law' (2003) AJ 1 at 21 is of the opinion that emotional stress and provocation, like cause and effect, are merely flip sides of the same coin. Emotional stress can be in the form of emotional storm, emotional collapse, shock, fear, panic and tension.

<sup>37</sup> In terms of s 78(1) of the Criminal Procedure Act 51 of 1977.

<sup>38</sup> Snyman (n 36 above) 12 defines provocation as aggressive conduct by the accused triggered by the victim's insulting or provocative behaviour.

<sup>39</sup> For example in *S v Lesch* 1983 (1) SA 814 (0) at 823A; *S v Arnold* 1985 (3) SA 256 (C) at 264H-I; *S v Campher* 1987 (2) SA 940 (A) at 264H-I at 958J-959A; *S v Wiid* 1990 (1) SACR 561 (A) at 564b-e.

<sup>40</sup> S Hoctor 'A peregrination through the law of provocation' in Joubert (ed) *Essays in honour of CR Snyman (2008) 110* at 129.

<sup>41</sup> 1986 (1) SACR 631 (A).

<sup>42</sup> Hoctor (n 40 above) 129.

<sup>43</sup> Ibid 129. The court will take into cognizance the expert evidence and all the other facts of the case including the accused's reliability as a witness and her conduct at the relevant time. See also FFW Van Oosten 'Non-pathological criminal incapacity versus pathological criminal incapacity' (1993) 6AJCJ 127 at 141 concurs

psychiatric or psychological evidence, although not binding on the court,<sup>44</sup> is valuable for laying out the accused's factual foundation.<sup>45</sup> Provocation has the effect of procuring acquittal, excluding intention, operating as a ground of mitigation of punishment<sup>46</sup> and confirming presence of intention.<sup>47</sup>

### 2.2.5 Diminished Capacity

Where the accused can demonstrate that her criminal capacity has been affected by the victim's provocative conduct, or repressed emotional stress induced by the victim's conduct, she can plead diminished responsibility.<sup>48</sup> Diminished responsibility is an individualised concession and compromise between law and psychoanalysis which serves as mitigating factor during sentencing by taking into cognizance of the social and emotional pressures bearing upon the accused at the time of her unlawful conduct.<sup>49</sup> An essential requirement is that the accused must have acted immediately and within the heat of the moment.<sup>50</sup> Some commentators have argued, however, that although diminished responsibility serves as a useful tool to enable the battered woman to escape a conviction of murder, it nonetheless has the effect of stereotyping her as mentally incapacitated.<sup>51</sup> Nevertheless, South African criminal law by dint of the Criminal Procedure Act 51 of 1977 recognises the accused's predicament in such circumstances.<sup>52</sup>

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that the court of itself has the discretion, on the basis of the accepted facts, to decide whether the defence raised has sufficient evidence.

<sup>44</sup> *S v Laubscher* 1988 (1) SA 163 (A) at 172C-G; *S v Calitz* 1990 (1) SACR 119 (A) at 127a-d; *S v Shivute* 1991 (1) SACR 656 (Nm) at 665c-e where it was ruled that psychiatric or psychological evidence concerning a non-pathological condition does not fulfil an indispensable function despite the fact that expert evidence was put before the court in all the three cases.

<sup>45</sup> *S v Campher* (n 39 above) 966J-967C; *S v Wiid* (n 39 above) 564e-f.

<sup>46</sup> *Snyman* (n 14 above) 241. See also *Van Oosten* (n 43 above) 140 where he notes that provocation can negative voluntariness of an act, criminal capacity and criminal intention.

<sup>47</sup> *Snyman* (n 14 above) 242. In *S v Lesch* (n 39) at 826A it was held *in casu* that provocation had not excluded but contributed to the intention.

<sup>48</sup> *Hector* (n 40 above) 130. He defines diminished responsibility as diminished capacity of the accused to appreciate the wrongfulness of her conduct or act in accordance with the appreciation of its wrongfulness at that particular time.

<sup>49</sup> A Norrie *Crime, Reason and History (A critical introduction to criminal law)* (2001) at 191. See also *Hector* (n 40 above) 130 lists the social and emotional pressures to include prolonged periods of sustained and mounting mental strain, heightened tension, considerable stress, extreme provocation, intoxication and emotional stress.

<sup>50</sup> *Hector* (n 40 above) 130.

<sup>51</sup> For example, Norrie (n 49 above) 191.

<sup>52</sup> S 78(7) provides that if the court finds that the accused at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness or to act in accordance with such an appreciation of its wrongfulness was diminished by reason of mental illness or defect, the court may take the fact of such diminished responsibility (capacity) into account when sentencing him.



## Why the Defence of Provocation?

The defence of provocation echoes a compromise between the value we attach to human life and the society's interest for self-preservation through maintenance of law and order.<sup>53</sup> Customarily, and over time, the courts have regarded provocation as recognition of human weakness and, accordingly, killing arising from certain human frailties is to be perceived less blameworthy than, and treated differently from, other forms of killing. This is especially significant when the provocative conduct of the victim is brought into the equation.<sup>54</sup> Similarly, it has been contended that certain groups of people are predisposed by the society to intensely provocative situations.<sup>55</sup> Accordingly the inability or ineffectiveness of the society to remove or resolve the reality of such people inevitably leads to killings.<sup>56</sup> The defence of provocation therefore serves as a concession to the individuals in the society who are overwhelmed by fervently provocative conditions. In this regard emphasis is on the corrective feature of the defence of provocation by seeking to cure social ills that play on human frailty.<sup>57</sup> The discourse for the need to avail defence of provocation to the accused who kills as a result of pent-up emotions is further vindicated by the general trend of the law in the various criminal law jurisdictions and the unsuitability of the other defences such as private defence.<sup>58</sup> In South Africa, courts have already recognised that emotional stress and provocation can lead to a condition of non-pathological incapacity.<sup>59</sup> Proceeding from the above, it is submitted that it would not be confounding to discern the proximate relationship between the conduct of the woman who kills in a non-confrontational situation and the defence of provocation.

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<sup>53</sup> J Greene 'A provocation defence for battered women who kill' (1989) 12 ALR 145 at 145 is of the opinion that the defence of provocation is a consequence of the competing values and interests within the society and has a substantial effect on the accused.

<sup>54</sup> Ibid 145 argues that the provocative conduct of the victim tips the scales in favour of the provoked killer.

<sup>55</sup> Ibid 146 gives an example of victims of domestic violence who suffer directly at the hands of their abusers and indirectly from the society's indifference to their plight.

<sup>56</sup> Ibid 146.

<sup>57</sup> Ibid 148 for example, battered women who kill can collectively and continuously demand the concession of provocation defence until the society effectively resolves the problem of pervasive domestic violence.

<sup>58</sup> Many jurisdictions are reviewing their laws to conform to emerging legal issues. This will be the subject of discussion in chapter four.

<sup>59</sup> For instance, in *S v Arnold* (n 39 above) and *S v Campher* (n 39 above).

## CHAPTER 3

### Historical Background and the Development of the Defence of Provocation

#### 3.1 Historical Background

##### 3.1.1 Roman Context

Under the Roman law, a precursor to the contemporary conception of criminal law whereby punishment for unlawful behaviour is meted out by public authority may be the Twelve Tables of 450 BC.<sup>60</sup> By 200 BC attendant criminal law included the domestic jurisdiction of the *paterfamilias*,<sup>61</sup> private criminal actions, exercise of *tresviri capitales* (minor magistrates with police functions) and the trials before *comitias* (assemblies of people). Then later in 149 BC a permanent court of senators, the *quaestiones perpetuae*,<sup>62</sup> was created upon the passage of the *lex Calpurnia* which was instituted to deal with both compensation and punishment.<sup>63</sup> The establishment of the Roman Empire (the *Principate*) is attributed to gradual disappearance of the *quaestiones perpetuae* and crimes could now be brought before officials who included the Emperor, the Urban Prefect and the senators. For example, by 4 BC the Senate was dealing with non-capital offences.<sup>64</sup> Indeed the senate is credited with the development of the interpretation of the *leges publicae* which were used to setup the *quaestiones perpetuae*.<sup>65</sup> It seems that the exercise of public authority in the administration of criminal law really gained impetus under the *Principate* and it is within this era that a set of laws creating offences and the prescribed punishment were decreed.<sup>66</sup> This served as the foundation of the Roman substantive crimes which subsequently came to be known as '*crimina publica*' and later '*criminal extraordinaria*'.<sup>67</sup> Much of the knowledge we have on Roman law is greatly attributed to the grand efforts of Emperor Justinian<sup>68</sup> who decreed the collection and collation of the numerous scattered Roman legal texts into one compilation

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<sup>60</sup> S Hoctor 'Tracing the origins of the defence of non-pathological incapacity in South African law' (2011) 17 *Fundamina* 70 at 71. The partly penal and partly compensatory rules were delictual in nature with a penal character to punish the wrongdoer.

<sup>61</sup> A *paterfamilias* was the senior ascendant male in a family. All his descendants through his sons were in his paternal power as long as he lived and he had powers of life and death over them. He also had the only proprietary capacity in the group.

<sup>62</sup> *Quaestio* originally referred to a commission of inquiry and when convened ad hoc, could be described as *extraordinaria*. *Quaestiones perpetuae* was in the normal sense of the term a permanent jury court.

<sup>63</sup> OF Robinson *The Criminal Law of Ancient Rome* (1995) at 1.

<sup>64</sup> *Ibid* 6-7.

<sup>65</sup> *Ibid* 9.

<sup>66</sup> Hoctor (n 60 above) 71.

<sup>67</sup> *Ibid* 71 notes that '*Crimina publica*' and '*crimina extraordinaria*' may be classified together, as opposed to '*delicta*' (*privata*). '*Criminal publica*' comprised offences regulated by *leges* while '*crimina extraordinaria*' comprised offences regulated by an imperial decree. Conversely, '*delicta*' comprised delicts or torts.

<sup>68</sup> Emperor of the Eastern Roman empire from 527 to 565 AD.

which came to be known as *Corpus iuris civilis*.<sup>69</sup> Through the influence of Italian jurists known as Glossators and Commentators, the Justinian collation spread to the whole of Western Europe and in the middle of the thirteenth and sixteenth centuries reached the Netherlands and consequently, the blend between the local customary law and the received Roman law gave rise to Roman-Dutch law.<sup>70</sup>

### 3.1.2 English Context

During the early English medieval times murder was viewed as an extremely abhorrent crime often subject to '*lex talionis*'.<sup>71</sup> However towards the twelfth century during the Anglo-Saxon era, there was a clear shift towards drawing a distinction between the various forms of homicide.<sup>72</sup> Nonetheless the presumption was that acts of murder were only actuated through *malitia praecogitata* (malice) and where express evidence was lacking, it was implied that the death was a direct consequence of the accused's wickedness of the mind. The strict interpretation of conduct resulting in murder was due to deficient policing systems and the fact that any crime was perceived to be an affront to the divine authority of the king.<sup>73</sup> In the thirteenth century royal prerogative extended capital punishment to all felonious killings. Accordingly, only *de gratia* (royal pardon of grace) could save the accused from

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<sup>69</sup> Snyman (n 14 above) 6. The *Corpus iuris civilis* comprised four parts namely the *Institutiones*, the *Digesta* or *Pandectae*, the *Codex* and the *Novellae*. See also Hoctor (n 60 above) 71-72 notes that *Corpus iuris civilis* is broad authority for all the currently recognised common-law crimes in South African criminal law. However, the principal sources of information regarding Roman criminal law are the so-called '*libri terribiles*'.

<sup>70</sup> Snyman (n 14 above) 6. Hoctor (n 60 above) 72 attributes the rediscovery of Roman law as the work of the Glossators, who wrote short explanatory notes or '*glossae*' on words or phrases of the *Justinianic* texts although they did not advance the development of criminal law as their explanations of the Roman texts made no reference to the customs and statutes of the time. However a more significant role in the development of the criminal law was played by the Commentators (or post- Glossators), who wrote longer notes or commentaries on the *Justinianic* texts seeking to systematise these and to link them with the prevailing statutory, customary and canon law.

<sup>71</sup> EO Isedonmwun 'A requiem for provocation?' (1988) 32 JAL 194 at 195. NH Frijda 'The *Lex Talionis*: On vengeance' in Der Poll & Sergeant JA (ed) *Essays on emotion Theory* (2009) at 263 contends that the concept of *lex talionis* is driven by the passionate human desire for vengeance or private vindication. At 264 notes that it was based on the Law of *Talion* (i.e. an eye for an eye, a tooth for a tooth) and greatly contributed to concept of lawfulness.

<sup>72</sup> J Horder *Provocation and Responsibility* (1992) at 6 notes that killings by stealth were capital offences as opposed to other forms of killings which could be cured through compensation to the deceased's kin.

<sup>73</sup> Isedonmwun (n 71 above) 195. G Burges 'The divine right of kings reconsidered' (1992) 107 (425) TEHR 837 at 837 notes that the authority of the monarchy was absolute and God given and quotes an excerpt of a speech by King James I to the Lords of Commons on 21<sup>st</sup> March 1609 'Monarchy is supreme on earth and kings are God's lieutenants on earth [...]'. Similarly, it was worth noting that 'devils of the mind and stigma of the body' permeated the societal thinking and could be used to explain the accused's proclivity to crime.

execution.<sup>74</sup> Consistent with this new development was the categorization of non-felonious homicides into justifiable and excusable killings. Justifiable homicide such as slaying a fleeing outlaw did not attract any punishment. On the contrary, excusable homicide comprising *homicides se defendendo* (killing in self-defence) and *homicides per infortunium* (accidental killing) did not lead to exoneration of the killer.<sup>75</sup> Even so, persons convicted of excusable homicide were favoured with lenient treatment and were subject to automatic grant of *de cursu* (royal pardon).<sup>76</sup> A perceptible progenitor to provocation in the sixteenth century was the practice of chance medley<sup>77</sup> as the society gradually started to tolerate the notion that killing under certain circumstances could be vindicated.<sup>78</sup> Chance medleys were manifested in sudden brawls which were exacerbated by the practice of wearing side arms, incessant breaches of honour and the frenzy that attended to such brawls. The inevitable outcome of such affrays, especially where arms were involved was death. Although chance medley did not *per se* afford the accused the shelter of self-defence, the confusion generated therefrom implied difficulty in assessing the *malitia praecogitata* with regard to those who killed and, as such, policy consideration dictated that their actions were excusable. Accordingly, such killings attracted the less lenient punishment of forfeiture of property and compensation of the victim's dependants under the direction of the clergy.<sup>79</sup> Thus, the courts began viewing killings arising from the melees as less blameworthy from other forms of killings as exemplified in the words of Lord Goddard CJ in *R v Semini* :

Where the killing was the outcome of a quarrel or fight, it excusable though not justifiable, if the killer had not begun but had taken part in the fight, or having begun it he endeavoured to decline any further struggle and retreated, but, being closely pressed, killed his antagonist to avoid himself being maimed or killed.<sup>80</sup>

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<sup>74</sup> Horder (n 72 above) 6. *De gratia* took precedence over penitence to the deceased's kin for killings committed through *malitia praecogitata*.

<sup>75</sup> Horder (n 72 above) 6. See also BJ Brown 'The demise of Chance Medley and the recognition of provocation as a defence to murder in English law?' (1963) 7 (4) *AJLH* 310 at 310.

<sup>76</sup> *Ibid* 6.

<sup>77</sup> Brown (n 75 above) 310.

<sup>78</sup> J Horder 'The duel and the English law of homicide' (1992) 12 (3) *OJLS* 419 at 424 defines chance medley as 'an unlawful killing that came about through a chance encounter with the victim, whether the killing was intentional or not [...]'. Previously, at 420-421 he distinguishes between sudden encounter (justifiable homicide) and combatting where both parties consent to a duel under the auspices of self-appointed experts and subscribing to informal rules (*code duello*).

<sup>79</sup> Brown (n 75 above) 310 – 312.

<sup>80</sup> *R v Semini* 1949 (1) *KB* 405 at 407.

The compromise position adopted by the courts as a direct consequence of the difficulty of proof associated with incidents of chance medley is what gave rise to provocation.<sup>81</sup> The nature of the killing obscured existence of *praecogitata malitia* with the result that the accused's unjustifiable conduct could not be construed as murder and could only be clarified from the nature of provocation. Nevertheless, there was unprecedented acceptance of provocation especially upon the abolition of chance medley in 1828 due to the steady decline of the customary adorning of side-arms in public and the passing of the Statute of Stabbing by King James 1 in 1604.<sup>82</sup> The place of provocation as the new applicable law and the death knell for chance medley was put to rest in *R v Semini* where Lord Goddard CJ held that chance medley which could afford the accused an exemption from corporal punishment was no longer applicable since its abolishment.<sup>83</sup>

At this juncture the test for provocation was very painstakingly rigid and could only be countenanced as being adequate to take away a reasonable man's ability of his self-control only where the killing arose from finding one's spouse in *flagrante delicto* with another,<sup>84</sup> proportionate retaliation upon a physical attack<sup>85</sup> and extreme verbal provocation.<sup>86</sup>

The defence of provocation was finally confirmed by the enactment of s 3 of the Homicide Act of 1957 which provided that: -

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.

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<sup>81</sup> Brown (n 75 above) 313.

<sup>82</sup> Ibid 313-314. The statute of Stabbing made it a non-clergyable offence to strike or thrust any person who had not acted in the first instance and had the effect of reducing murder to manslaughter. It came to be closely associated with provocation and subsequently judicially extended to include use of firearms and other blunt weapons was intended on controlling outrages by persons of inflammable temperament.

<sup>83</sup> *R v Semini* (n 80 above) 407.

<sup>84</sup> *Holmes v DPP* 1946 AC 48 at 498.

<sup>85</sup> *Mancini v DPP* 1942 AC 1 at 9.

<sup>86</sup> *Holmes v DPP* (n 84 above) 600.

## 3.2 The Development of Defence of Provocation

### 3.2.1 The case of South Africa

The Roman-Dutch law was introduced into the Cape region of South Africa in 1652 by Dutch settlers who set up the Dutch East India Company (DEIC). Upon the advent of British colonisation of the Cape, the new powers did not interfere with the established Roman-Dutch law although English influence was noticeable, especially with regard to criminal law taxonomy. However, English law took precedence in the subsequent years preceding the Union of South Africa in 1910 due to numerous difficulties experienced with the Roman-Dutch law. The other provinces followed suit of the practice in Cape and consequently, a hybrid system drawn from both English law and Roman-Dutch law was formed.<sup>87</sup>

Under the Roman law, homicide was dispensed with largely under *lex cornelia de sicariis* as a means of curbing infractions and maintaining the peace.<sup>88</sup> Nonetheless, anger was viewed as an extenuating basis for mitigation with distinction been made between *proposito* (premeditated crimes) and *impetus* (unpremeditated crimes), and increasingly there were indications that it could function as a complete defence albeit sporadically<sup>89</sup> Indeed passion could be a plea for defence and a factor of consideration to reduce the punishment although it did not affect the accused's liability.<sup>90</sup> Although the South African criminal Law is modelled largely along the Roman and Roman-Dutch law, seemingly in practice, the courts initially deliberately embraced the English law of provocation.<sup>91</sup> Section 141 of the Native Territories

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<sup>87</sup> Hoctor (n 60 above) 73 highlights the problems that gave English law dominance over Roman-Dutch law as unfamiliarity with Dutch or Latin amongst practitioners, difficulty in accessing old authorities, uncertainty and lack of uniformity in writings of the Dutch jurists and the Rigid nature of the Roman-Dutch law which had ceased evolving in the Netherlands since 1809 with the introduction of the Napoleonic Code Penal which was introduced into the Netherlands in 1811.

<sup>88</sup> Robinson (n 63 above) 41. At 43 ' The *lex Cornelia* inflicts the penalty of deportation on anyone who kills a man or carries a weapon for theftuous purposes, and on anyone who possesses, sells, or prepares poison for the purpose of killing a man, or who gives false witness whereby someone dies or death is brought about. For all these crimes it is agreed that the penalty of death should be imposed on the better classes, but the lower classes are crucified or thrown to the beasts. A murderer is someone who kills a man with any sort of weapon, or brings about a death'.

<sup>89</sup> Hoctor (n 40 above) 111-112.

<sup>90</sup> Robinson (n 63 above) 21 notes, for example, that a man who killed his wife upon catching her in adultery was generally accepted to have mitigating circumstances to plead. See also Hoctor (n 40 above) 112 adds that Roman-Dutch writers regarded anger as a factor mitigating punishment only where the anger was justified and not a ground for excluding capacity. See also J Burchell 'A provocative response to subjectivity in the criminal law' (2003) AJ 23 at 24 also points out that Roman and Roman-Dutch Law did not regard anger , jealousy or other emotions as an excuse for any criminal conduct but only as factors which might mitigate punishment only if such emotions were justified by provocation. For further reading on the same see Hoctor (n 60 above) 74.

<sup>91</sup> Hoctor (n 40 above) 113 notes that the position of South African courts was influenced by the need to circumvent the brutal sentencing regime for murder where the death penalty was mandatory with no

Penal Code (NTPC) served as the apt avenue through which to hand down a verdict of culpable homicide as opposed to murder where the circumstances suggested that the killing was less blameworthy.<sup>92</sup> It can thus be contended that at this juncture the test for provocation was greatly influenced by policy considerations and, as such, objective in nature.<sup>93</sup> This was tailed by a period of inconsistency as the courts vacillated between objective and subjective tests of inquiry as demonstrated in the succeeding cases.<sup>94</sup> Despite the axiomatic lack of clarity as to the position of the courts with regard to provocation, there was a strong drive towards establishing the subjective (principle) approach as the established test. For example, in the case of *R v Tenganyika*<sup>95</sup> the court favoured a two-tier evaluation of the accused involving both subjective and objective assessments with a resultant conviction of at least culpable homicide. However, in subsequent judgments the subjective inclination was apparent.<sup>96</sup> A contemporaneous development at the time was the increased scrutiny on the concept of criminal capacity which was brought to prominence by the Rumpff Commission of Inquiry

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provisions for extenuating circumstances. Under the English ‘specific intent’ approach, crimes requiring ‘specific intent’ could be negated by factors such as provocation or intoxication resulting in convictions for less serious crimes for which a lesser form of *mens rea* was required. See also Burchell (n 90 above) 25 contends that the courts adopted the position after the introduction of the death penalty for murder in 1917.

<sup>92</sup> Hoctor (n 40 above) 113. In *R v Butelezi* 1925 AD at 160 it was held, as per Solomon JA, that the NTPC (aka Transkeian Penal Code) correctly set the applicable law in South Africa on the subject. For additional insight on NTPC (Act 24 of 1886 of the Cape) see Snyman (n 14 above) 8. See also Burchell (n 90 above) 25 where he is of the view that under the influence of NTPC South African Courts adopted a position that provocation could never be a complete defence to killing and at most it could only be a partial defence.

<sup>93</sup> Hoctor (n 40 above) 113-114 submits that at this stage the inquiry into provocation generally invoked the test of the ‘reasonable man’ and was consistent with the test of intention flowing from the English common law presumption that a person was presumed to intend the natural and probable consequence of his actions. Snyman (n 36 above) 12 defines the approach as ‘Policy approach’ where the inquiry is not limited to the accused’s state of mind but goes further and also takes objective factors into consideration. He contends that the objective factor in this instance encapsulates the important pragmatic view that law expects people to control their temper. This is in contrast to the ‘Theoretical approach’ which is a pure derivative of legal theory and does not countenance the practical demands of the criminal justice. The inquiry here is purely subjective and limited to the accused’s state of mind at the crucial moment. He is of the view that a subjective approach can in certain extreme cases lead to provocation operating as a complete defence which can result in acquittal of the accused.

<sup>94</sup> In *R v Thibani* 1949 (4) SA 720 (A) at 731 the subjective undertone was discernible as Shreiner JA held that provocation had assumed its proper place as a special kind of tool for establishing intent and the act beyond reasonable doubt. In *R v Kennedy* 1951 (4) SA 431 (A) the appellate division conversely adopted the objective approach in entirety. Similarly, in *R v Molako* 1954 (3) SA 777 (0) at 781 B-G although the court exhibited slightly cautious support for subjective assessment for provocation, it was nonetheless quick to underscore the significance of the presumption that a sane person is responsible for the consequences of his actions.

<sup>95</sup> 1958 (3) SA 7 (FSC). The first stage would involve a subjective inquiry to determine whether the accused had ‘intent to kill’ which could result in either acquittal or culpable homicide while the second stage required an objective assessment as to whether a reasonable person in the circumstances of the accused would have lost his self-control, which could also result in culpable homicide despite the accused having ‘intent to kill’.

<sup>96</sup> The subjective approach was evident in *S v Dlodlo* 1966 (2) SA 401 (A), *S v Delpport* 1968 (1) PH H172 (A) and *S v Mokonto* 1971 (2) SA 319 (A). The ruling in *S v Mokonto* was especially significant as it heralded the preclusion of s 141 of the NTPC from South African criminal law through the court’s rejection of the code’s objective approach which it viewed as being incongruous to modern judicial thinking.

into Responsibility of Mentally Deranged Persons and Related Matters of 1967 (hereinafter referred to as the Rumpff report). The report created a novel model for evaluating criminal capacity based on cognitive and conative elements<sup>97</sup> which greatly influenced the provisions of s 78(1) of the Criminal Procedure Act.<sup>98</sup> These provisions were initially envisioned for matters related to mental illness but were subsequently used by the courts to infer the test of non-pathological incapacity. The Commission also recognized affective mental functions relating to a person's emotional state, though in its view they were not relevant to criminal liability, especially where there was a finding of both cognitive and conative elements in the accused conduct.<sup>99</sup> However, a finding of strong emotional disturbances could negate the accused's cognitive capacity and by extension, criminal capacity.<sup>100</sup>

Centred on the theoretical foundations of the Rumpff report, there was gradual recognition and development of defence of non-pathological incapacity in ensuing court decisions. The tone for the trend was set in the case *S v Chretien* whereby the court held that voluntary intoxication could negative criminal liability.<sup>101</sup> Subsequently, and amidst the prevailing tension between policy and principle considerations with regard to the question of provocation or emotional stress, the courts' inclination to adopt the defence of non-pathological incapacity was evident.<sup>102</sup> Unsurprisingly therefore, in *S v Vuuren*, the court accepted the defence was available where the accused's conduct stemmed from intoxication in combination with other factors such as provocation and emotional stress.<sup>103</sup> In the same year, the approach taken in *S v Chretien*<sup>104</sup> was confirmed in *S v Lesch*.<sup>105</sup> Thus the principle that a purely mental assessment can be used to ascertain criminal incapacity in the absence of a biological condition was established.<sup>106</sup>

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<sup>97</sup> The report made a recommendation for the inclusion of assessment of both cognitive and conative functions in the legal test for criminal capacity. Hoctor (n 40 above) 118 defines cognitive capacity as the presence of adequate insight into one's conduct and conative capacity as the ability to control such conduct.

<sup>98</sup> Act No. 51 of 1977.

<sup>99</sup> Hoctor (n 40 above) 119.

<sup>100</sup> Ibid 120.

<sup>101</sup> 1981 (1) SA 1097 (A) at 1104E-H & 1106.

<sup>102</sup> Van Oosten (n 43 above) 136. He observes that following the decision in *S v Chretien*, policy consideration seems to have carried the day as the legislature intervened to reverse the decision through the enactment of Criminal Law Amendment Act 1 of 1988. See also Burchell (n 90 above) 23 where he is of the view that tension between descriptive and normative rules in the criminal is more apparent pronounced in the attitude of the courts to the predicament of a killing occasioned by provocation.

<sup>103</sup> 1983 (1) SA 12 (A) at 17G-H.

<sup>104</sup> *S v Chretien* (n 101 above).

<sup>105</sup> *S v Lesch* (n 39 above) 825A-826A. The court agreed that provocation can negative voluntariness of an act, criminal intention and criminal capacity rendering the accused incapable of appreciating the wrongfulness of his or her conduct.

<sup>106</sup> Van Oosten (n 43 above) 140.



However, it was not until the case of *S v Arnold* that provocation prevailed as a complete defence. In that case it was held that the evidence of provocation raised by the accused had led to the deduction that the accused who had been charged with murder and was relying on the defence of non-pathological incapacity, lacked criminal capacity and consequently, was acquitted.<sup>107</sup> In the subsequent case of *S v Campher*<sup>108</sup> the conviction of murder by the court a quo was upheld, but the court in a majority statement, reiterated that indeed the defence of non-pathological incapacity existed and that the provisions of s 78 of Criminal Procedure Act 51 of 1977 were relevant for its assessment.<sup>109</sup> The case for the defence was further augmented in the case of *S v Laubsher*<sup>110</sup> whereby the court developed a theoretical framework for establishing the tests for both cognitive and conative capacities<sup>111</sup> and subsequently, in *S v Wiid*,<sup>112</sup> it obtained appellate endorsement.

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<sup>107</sup> *S v Arnold* (n 39 above).

<sup>108</sup> *S v Campher* (n 39 above).

<sup>109</sup> At 954F and 965H respectively, Viljoen JA held that s 78 extended to non-pathological factors. At 955B-C it appears he confirmed his reasoning on the matter as in the previous case of *S v Adams* 1986 (4) SA 882 (A) at 900C-E holding that the fundamental principles of criminal incapacity should apply irrespective of what caused the accused's mental disturbance or emotional upheaval and whether the accused's aberration was temporary or permanent. In concurrence, Boschhoff AJA held that criminal capacity could also apply in the case of temporary clouding of the mind.

<sup>110</sup> *S v Laubsher* (n 44 above).

<sup>111</sup> *Ibid* 166G-167A.

<sup>112</sup> *S v Wiid* (n 39 above).

### 3.2.2 The case of Kenya

British imperialism has long been attributed for the rapid evolution of the modern legal systems and the widespread application of the English common law.<sup>113</sup> The expansion of the British Empire in the eighteenth and nineteenth centuries resulted in the transplantation of the English common law in most parts of the globe. Accordingly, criminal law in Kenya and by extension, the law of provocation, like in many other countries which endured the influence of British colonial reign, is a direct derivative of the English Common law heritage.<sup>114</sup> The English common law was introduced to Kenya through the East African Order-in-Council of 1897.<sup>115</sup> Prior to that there was no clear distinction between criminal and civil matters and correspondingly, punishment of the offender and compensation of victim were intimately intertwined. However, with the advent of colonial rule a new dispensation of criminal law was ushered and acts such as murder, rape and theft which were hitherto considered merely a preserve of the disputing parties, were taken over by the state in order to preserve the social order.<sup>116</sup> As the empire grew in stature and size, the Colonial Office through the Colonial Legal Service deemed it appropriate to align the procedural and the penal laws of the colonies to as nearly as that in force in England in order to enhance administrative efficiency. Accordingly, the use of the Indian codes was withdrawn in many colonial dependencies where they had previously been applied. But the potent was equally manifest as some of the received laws became inapplicable compelling the Colonial Office to accord each dependency with its own unique code.<sup>117</sup>

The law of provocation was introduced into Kenya through the Colonial Office Model Code (COMC) in 1930 replacing the Indian Penal Code (IPC) of 1860. The COMC was itself modelled largely along the Queensland Criminal Code of 1899 which had been preceded by the English Criminal Code of 1880.<sup>118</sup> Under the IPC, the defence of provocation could be construed from the provisions of s 38 which provided that ‘Persons concerned in a criminal act may be guilty of different offences. Where several persons are engaged or concerned in

<sup>113</sup> This is the part of English law that is not the result of legislation. It originated from the customs of the English people and was justified and developed by the decisions and rulings of the courts.

<sup>114</sup> SF Joireman ‘The evolution of the common law: Legal development in Kenya and India’ (2006) 44 (2) CCC 190 at 190-191.

<sup>115</sup> W Musyoka *Criminal Law* (2013) at 19.

<sup>116</sup> JJ Collingwood *Criminal Law in East Africa and Central Africa* (1967) at 2.

<sup>117</sup> AN Doorly ‘British magistrates in East and West Africa’ (1945) 3 (27) 3 SCLIL 87 at 90. In Kenya, the Indian Penal Code had been in operation since 1897 when Kenya became a British protectorate and was replaced by the Penal Code of 1930.

<sup>118</sup> Collingwood (n 116 above) 6.

the commission of a criminal act, they may be guilty of different offences by means of that act.’

Accordingly, where one killed another arising from an intensely provocative situation, the killing could only result in a conviction of culpable homicide and murder. Nevertheless, provocation was an example of a law which had to be adapted to the local customs in Kenya (East Africa). For example, the definition was modified to include ‘any wrongful insult’ over and above the traditional English law requirement of just ‘any wrongful act’. This was clearly aimed at placating the local customs where verbal insults were highly admonished, and could easily eventuate into conflicts. Another notable departure from the English law with regard to the law of provocation was the omission of the requirement that the accused’s conduct be reasonable in relation to the nature of the provocation. Understandably, it was an indication of the Colonial Office’s recognition that the concept of appropriateness was alien to the local systems and would be a source of more difficulties as opposed to providing the desired legal cure. Indeed, it has been noted that courts often reduced convictions for murder to manslaughter even where they found that the retaliatory conduct of the accused was disproportionate to the provocation.<sup>119</sup> Thus in the case of an educated African man, reasonableness of his conduct was to be assessed against what the average uneducated tribal villager might have done in the circumstances and not against what the average Englishman would have done.<sup>120</sup> Likewise, sudden discovery of adultery (in the absence of the act) could amount to provocation<sup>121</sup> and prior knowledge was immaterial.<sup>122</sup> Under the English law, provocation as a defence would not have been available to a man who killed a woman who had cohabited with him for a long time, on finding her in *flagrante delicto* with another man unless he had been lawfully married to the woman.<sup>123</sup> But in the Kenyan (East African) context this was allowed irrespective of the nature of their relationship.<sup>124</sup> The need to contextualize the application of the law of provocation was captured in the words of H. Grattan Bushe:-

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<sup>119</sup> JS Read ‘Criminal law in Africa of today and tomorrow’ (1963) 7 JAL 5 at 9.

<sup>120</sup> *Kasumbwe v R* 1944 RNCA 116 at 119. The test is that of an ordinary reasonable person of the class to which the accused belongs.

<sup>121</sup> *Chacha s/o Wamburu v R* 20 EACA 339. This was a departure from the English rule that adultery *per se* is not provocation unless the deceased is caught in *flagrante delicto*. See *Greyson v R* 1961 RN 337 (FSC) and *Manyeni s/o Mukonko v R* 21 EACA 274.

<sup>122</sup> *Lokora s/o Omeri v R* 1960 EA 323 (CA).

<sup>123</sup> See for example, *R v Greening* 1913 (3) KB 846.

<sup>124</sup> As held in *Kalume wa Teku v R* 21 EACA 201. Also confirmed in *R v Alayina* 1957 RN 536 (NY).



Where provocation is in question, especially for the purpose of deciding whether the crime committed is murder or manslaughter, the standard, when you are trying a Native, should not be the standard of the ordinary Englishman, but of the Native.<sup>125</sup>

Be that as it may, the codes in most dependencies bore close similarity to each other although they were not identical. For the most part the penal codes were modelled along the common law of England. Similarly, the criminal procedure codes were a semblance of the practice and procedure observed in English Courts and in instances where the English law was found wanting, the difficulty was aptly resolved using the provisions of the Indian criminal procedure. Consequently, a common feature of criminal in most British colonies including Kenya was the fusion of English and Indian procedural law.<sup>126</sup>

Upon independence in 1963, Kenya domesticated the former British legal system, along with the COMC which became the Kenyan penal code<sup>127</sup> to date. It is noteworthy that although after independence, law reform in East Africa and Kenya began drifting towards a unified criminal process where all criminal cases were to be handled under a common criminal code; there hasn't been a perceptible jurisprudential departure from the pre-independence dispensation. Indeed the only remarkable variation was the codification of most of the English common law offences.<sup>128</sup> This can be attributed largely to the principle of legality or *nullum*

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<sup>125</sup> HG Bushe 'Criminal justice in East Africa' (1935) 34 (135) JRAS 117 at 127 in a presentation to the Royal African Society on the state of criminal justice in East Africa. This reasoning was supported by the courts for example, in *Rex v Yonasani Egalu and others R 1942 (9) EACA 65* it was held (as per Webb CJ, Wilson J and McRoberts J) that where a local ordinance designed to suit the circumstances of the people of East Africa deals completely with a matter and differs from the English law, it must be construed in its application free from any glosses derived from any expositions from English law.

<sup>126</sup> Doorly (n 117 above) 90.

<sup>127</sup> Penal Code 81 of 1948. Aspects related to provocation will be discussed in detail in chapter 3.

<sup>128</sup> The 1930 Penal Code was replaced by the current 1948 Penal Code in an attempt to bring all criminal offences under a single regime and most of the laws that had been contextualised on African set-ups were reversed back to English common law in the new Code. However, many offences still remained unlegislated. For example, customary criminal law was recognised and applied through African or native courts. Criminal offences which prosecuted under this law included adultery, fornication, rape, unnatural sexual behaviour, incest, assault, theft, arson trespass, damage to property and practising witchcraft. The coming into force of the independence Constitution completely excluded the African criminal on account of the fact that customary law was unwritten and hence inconsistent with s 77(8) of the Constitution. Nonetheless, the English common law influence remained and s 3 of the 1948 Penal Code, provided that the Code was to be interpreted in accordance with the principles obtaining in England and the terms used in the Code were presumed to be used with the meaning attaching to them in English criminal law and were to be construed in accordance with the English law (repealed in 2003 through the Criminal Law (Amendment) Act No. 5 of 2003). This strong attachment of English common law to Kenyan and East African criminal law can be seen in *Uganda v Mbulimbuli 1975 HCB 225* where, as per Ssekandi Ag. J, the court held that the Ugandan equivalent of s 208 of the Penal Code on the defence of provocation is an accurate codification of the English common law on the defence of provocation.



*crimen sine lege, nulla poena sine lege* as embodied in s 77(8) of the post-independence Constitution.<sup>129</sup> By dint of this principle all criminal offences are defined in legislation thereby excluding common law offences.

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<sup>129</sup> The principle is provided for in s 50(2) (n) of the current Constitution.

## CHAPTER 4

### The Present Law

#### 4.1 The case of South Africa

Although much of the development of the law of provocation in South Africa is to be found at common law, it is settled law that the provisions of s 78(1) of the Criminal Procedure Act are applicable.<sup>130</sup> The section provides that:

A person who commits an act which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable-

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

Accordingly, the test for the defence involves a two-legged inquiry. In the first instance, inquiry into the ability to differentiate between right and wrong (or the cognitive or mental component), and secondly, inquiry into the ability to control oneself in accordance with such discernment (also referred to as the physical or conative component).<sup>131</sup> Absence of one of the two capacities would therefore result in the accused lacking criminal capacity. Equally incontestable is the fact that the defence has progressively developed to gain unparalleled endorsement by the courts.<sup>132</sup> However, the Supreme Court of Appeal (SCA) brought a different albeit contentious perspective in the momentous judgement of *S v Eadie*<sup>133</sup> which traversed through a repertoire of erstwhile judgements in the development of the defence and

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<sup>130</sup> The provisions that were initially intended for pathological defences were extended to cover non-pathological defences such as intoxication, emotional stress and provocation. The position has found resonance with numerous court decisions (for example, *S v Campher* (n 39 above), *S v Adams* 1986 (4) SA 882 (A) and *S v Eadie* 2002 (1) SACR 663 (SCA)) and legal scholars (for example see R Louw 'S v Eadie: The end of the road for the defence of provocation' SACJ (2003) 16 200 at 200, Hoctor (n 40 above) 119).

<sup>131</sup> The second leg deals with the concept of self-control. Louw (n 130 above) 201.

<sup>132</sup> The exponential growth is buttressed by willingness of the courts to entertain the notion of non-pathological incapacity especially in the 1980s and 1990s with resultant acquittals in three high court decisions viz *S v Arnold* (n 39 above), *S v Nursingh* 1995 (2) SACR 331 (D), *S v Moses* 1996 (1) SACR 701 (C) and one supreme court of appeal ruling viz *S v Wiid* (n 39 above).

<sup>133</sup> *S v Eadie* (n 130 above).

a host of numerous standpoints of various legal scholars. Drawing from previous judgments<sup>134</sup> the court reaffirmed that the onus of rebutting a defence of temporary non-pathological criminal incapacity by the accused lay on the state and that:

- (i) in discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
- (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
- (iii) evidence in support of such a defence must be carefully scrutinised;
- (iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.<sup>135</sup>

The SCA, ostensibly in an attempt to induce clarity regarding the application of the defence, as per Navsa JA, set the following criteria:<sup>136</sup>

- a. For the accused to escape liability on the basis of the defence the evidence adduced regarding the conative or physical leg of the test should be such that it draws an inference that the accused's conduct was involuntary.<sup>137</sup>
- b. Courts must be careful when dealing with the defence and only in exceptional circumstances should the natural inference that people act consciously and voluntarily be disturbed. A person has a free choice to succumb to or resist temptation. Where one succumbs, he or she must face the consequences of his or her conduct.<sup>138</sup>
- c. Sane automatism is synonymous with non-pathological incapacity due to emotional stress and provocation. Thus, where the cognitive leg is established, the accused would have to successfully raise involuntariness as a defence in the second leg.

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<sup>134</sup> *S v Calitz* (n 44 above) 126 H-127 C; *S v Wiid* (n 39 above) 564B-G; *S v Potgieter* 1994 (1) SACR 61 (A) at 72J-73H; *S v Cunningham* (n 34 above) 635I-636C; *S v Francis* 1999 (1) SACR 650 (SCA) at 652C-H.

<sup>135</sup> *S v Eadie* (n 130 above) para 2.

<sup>136</sup> Over and above the requirements of paragraph 2.

<sup>137</sup> *S v Eadie* (n 130 above) para 42 and 57.

<sup>138</sup> *Ibid* 43 and 58.

Consequently, an in-depth recall of events militates against a claim of loss of self-control.<sup>139</sup>

- d. For the State to succeed in its cause, it must prove that the accused acted consciously in a goal-directed manner.<sup>140</sup>
- e. The conditions relating to the commission of the offence, or the undesired conduct of the deceased, or the victim, should rightly be considered as mitigating factors during sentencing.<sup>141</sup>
- f. Courts should not be quick to accept the accused's *ipse dedit* regarding his or her state mind. The accused's conduct should also be assessed against the court's experience of human behaviour and social interaction.<sup>142</sup>

Remarkably enough, the judgment introduced an element of objectivity into the inquiry of the defence. This was yet another example of the simmering consternation between theoretical approach (subjectivism) and policy approach (objectivism) in South African criminal law.<sup>143</sup> The introduction of the defence in the first instance was regarded as a conquest for the theoretical approach to provocation.<sup>144</sup> However, the judgment by Navsa JA in *S v Eadie* appears to have elevated the policy approach in relation to provocation thereby effectively terminating the hitherto purely theoretical approach.<sup>145</sup> This approach seems to have been enthused by the SCA's desire to ensure that courts approach the accused's case premised on permissible inferences from objective facts and circumstances.<sup>146</sup> The pragmatic approach was also evident in the earlier case of *S v Kensley*<sup>147</sup> where Van Den Heever JA held:

Criminal law for purposes of conviction - sentence may well be a different matter - constitutes a set of norms applicable to sane adult members of society in general, not

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<sup>139</sup> Ibid 44 and 57. At para 53 it was held that the second leg should read to mean that looking into all the circumstances of the case, the accused could not resist or refrain from the act or was unable to control himself or herself to the extent of refraining from committing the act.

<sup>140</sup> Ibid 58.

<sup>141</sup> Ibid 61.

<sup>142</sup> Ibid 64.

<sup>143</sup> Snyman (n 36 above) 2, 11 and 12 alludes that this tension between theory and practical demands of criminal justice is particularly evident in the law's treatment of the defence of provocation. At 14, he notes that the tension between the two considerations is very evident in the judgement. See also Van Oosten (n 43 above) 36 where the same tension was observed in *S v Chretien* (n 101 above).

<sup>144</sup> Snyman (n 36 above) 13.

<sup>145</sup> Ibid 14. At para 64 *S v Eadie* (n 130 above), Navsa JA admits that critics would describe the position taken by the court as yielding to principle.

<sup>146</sup> The court's insistence on this approach is noticeable through most of the judgement, for example, at para 43 and 58.

<sup>147</sup> *S v Kensley* 1995 (1) SACR 646 (A).



different norms depending on the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do.<sup>148</sup>

Although the approach has been criticised, it has nonetheless, been interpreted as an indication of the imminent inclination of criminal law as South Africa confronts emerging crime issues.<sup>149</sup> The judgment is equally notable for equating the defence of non-pathological incapacity with that of sane automatism.<sup>150</sup> This in essence means that where the accused, as a result of provocation, relies on the defence, the court should treat the defence as no more than that of sane automatism. While some scholars concur with judgement's position,<sup>151</sup> others have been highly critical.<sup>152</sup> Nevertheless, this had the effect, as is discernible throughout the judgment, of raising the bar where the accused raises the defence.<sup>153</sup>

Strikingly enough, from the judgement, Navsa JA was not forthright as to the actual position of the defence of non-pathological incapacity in South African criminal law. Whereas some excerpts in the judgment suggest that the defence is still part of the law,<sup>154</sup> others indicate the

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<sup>148</sup> Ibid 658G-I.

<sup>149</sup> Snyman (n 36 above) 22 is of the view that the judgment in *Eadie* marks a turning point that might herald a long-awaited reintroduction of more objective considerations, thereby ensuring a better balance between subjectivity and objectivity in the construction of criminal liability which would be most beneficial for the law. See also Louw (n 130 above) 206 where he is of the view that the judgement may be a hint at a swing towards a more normative approach in South African criminal law heralded by public sentiment aghast at the country's alarming crime rate.

<sup>150</sup> *S v Eadie* (n 130 above) para 57.

<sup>151</sup> Louw (n 130 above) 202 for example, is the opinion that was decisive and dealt with the question in a simple and logical way.

<sup>152</sup> Snyman (n 36 above) 15-19.

<sup>153</sup> Louw (n 130 above) 204 alludes that it is more of a general rule than an exception as it is only in one case, *S v Wiid*, that the defence succeeded in the Appellate Division. He further notes that in *S v Eadie* (para 13, 14 and 15), both psychologists and psychiatrists were in agreement that it was a rarity for the accused to be so provoked as to act involuntarily. Captivatingly enough, at 205-206, he is of the opinion that the problem can be resolved by restructuring the test of the defence. He recommends an inquiry into the physical test in the first instance followed by an inquiry into the mental capacity of the accused.

<sup>154</sup> *S v Eadie* (n 130 above) para 3: '[...] I will consider whether the boundaries of the defence in question have been inappropriately extended [...]', at para 42: '[...] it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence [...]', at para 57: 'I am, however, not persuaded that the second leg of the test [...] should fall away', at para 64: '[...] the greater part of the problem lies in the misapplication of the test', and at para 65: 'It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity'.

contrary.<sup>155</sup> In the absence of an explicit expression abolishing the defence in the judgment, it is submitted that the defence still exists.<sup>156</sup> Nonetheless, the judgment had the twin effect of raising the threshold for its application, and constricting its scope.<sup>157</sup>

Beyond the controversies surrounding the judgement by Navsa JA, it is submitted that provocation law in South African criminal law is a trend-setter. It is therefore unsurprising that the development of this law has been referred to as ‘revolutionary trend’. It is even more spectacular given that, unlike in many other jurisdictions, the defence has successfully afforded the accused a complete defence. Indeed, as evidenced in the case of *S v Wiid*,<sup>158</sup> the current law in South Africa is responsive to the realities of the accused woman who kills in a non-confrontational situation. Equally notable was the implicit distinction in *S v Eadie*, between pent-up provocation or emotional stress and a sudden flare-up of temper. From the judgement it is discernible that courts ought to be more condoning to instances of gradual disintegration of powers of self-control as opposed to sudden flare-up of temper. Thus an accused who kills as a result of sudden flare-up of temper faces more scrutiny from the court through a sequence of inferential reasoning on the credibility of his evidence.

For the time being, the courts are to be guided by the wisdom of the SCA in accordance with the judgement of *S v Eadie*. However, taking into cognizance the fact that law must constantly mutate to accommodate emerging issues, it is submitted that the judgment should not elicit denunciation as the position is destined to evolve.<sup>159</sup> The judgement is just but an element in the continuum of growth of criminal law in South Africa. The development of the defence over the years is a testament to that.

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<sup>155</sup> Ibid para 51, for instance, Navsa JA assumes that provocation can only be a factor mitigating punishment, and not an exculpatory ground. At para 60 and 61 the dicta of the court amount to saying that if an accused alleges that because of provocation he was so emotionally distressed that he should not be convicted, his defence in fact amounts to one of automatism. The implication is that the accused cannot rely on provocation in the guise of non-pathological criminal incapacity.

<sup>156</sup> Snyman (n 36 above) 20-21 is of the opinion that considered as a whole, the judgment cannot be interpreted as abolishing this defence in toto. If the Supreme Court of Appeal wished to abolish the defence, it would have said so clearly. See also Hoctor (n 60 above) 81.

<sup>157</sup> *S v Eadie* (n 130 above) para 43, 44, 53, 57, 58 and 70. See also Hoctor (n 60 above) 81.

<sup>158</sup> *S v Wiid* (n 39 above). In this case, the psychiatric evidence was to the effect that given the accused’s intake of sedatives and alcohol and lack of eating, combined with the severe assault inflicted by the deceased and threat of death after the accused discovered that her husband was having another extramarital affair, the accused may well have lacked criminal capacity altogether and may not have been able to distinguish between right and wrong. The trial court held that it may have reasonably been possible that the accused may have been concussed after the assault and during the time she fired the fatal shots, thus accounting for the fact that she could not remember pulling the trigger of the pistol. The Appellate Division clearly emphasized that where a foundation for the defence of temporary non-pathological incapacity is laid, the State bears the burden of disproving this defence beyond reasonable doubt. Here the State was held not to have discharged this burden, and the defence of temporary non-pathological incapacity succeeded.

<sup>159</sup> Louw (n 130 above) 203 supports the mutability character of law by saying that the principles of liability should be flexible to serve the interests of justice.

## 4.2 The case of Kenya

In Kenya, codified provisions on the law of provocation are to be found in chapter nineteen (murder and manslaughter) of the Penal Code 81 of 1948.<sup>160</sup> S 207 of the Act provides more specifically that the accused is guilty of manslaughter only where his unlawful conduct, resulting in the killing of another, is occasioned by provocation.<sup>161</sup> Provocation is defined as:

Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.<sup>162</sup>

The section further provides that:

- a. Provocation exists where the accused assaults another in defence of a third person with whom he shares a special relationship.<sup>163</sup>
- b. In a matter relating to assault, a lawful act done on the accused is not a ground for provocation.<sup>164</sup>
- c. An act by a third person on the accused which arises from the conduct of another person induced by the accused to incite the said third person to do the act on the accused, is not a basis for provocation in a case relating to assault.<sup>165</sup>

According to the Act, manslaughter differs from murder in two aspects. Firstly, for a killing to amount to murder there must be malice aforethought whereas manslaughter is a consequence of an unlawful conduct resulting in death.<sup>166</sup> Malice aforethought exists where it is proved that there was:

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<sup>160</sup> Chapter 63 of the Laws of Kenya revised in 2012.

<sup>161</sup> The proviso to the section provides killing from provocation is distinct from murder where the act resulting in death is in the heat of passion caused by sudden provocation before there is time for the passion to cool.

<sup>162</sup> Penal Code 81 of 1948 at s 208(1).

<sup>163</sup> Ibid 208 (2). The nature of the special relationship is as expounded in the definition of provocation in s 208 (1).

<sup>164</sup> Ibid 208 (3).

<sup>165</sup> Ibid 208 (4).

<sup>166</sup> Ibid 203 Malice aforethought may be express or implied.

- a. Intention to kill or cause grievous bodily harm; or
- b. knowledge that the conduct in question is likely to cause death or grievous bodily harm; or
- c. intent to commit a felony; or
- d. intention to facilitate the flight or escape from custody of any person.<sup>167</sup>

Secondly, the penalty prescribed for murder is death<sup>168</sup> while manslaughter attracts a sentence of life imprisonment.<sup>169</sup> Therefore, manslaughter is a residual offence of murder in the absence of malice aforethought.

Although the ultimate decision as to whether there is sufficient provocation rests with the court upon consideration of all the facts of the case, in line with the code, the defence will only be available to the accused when the stipulated ingredients are proved to exist.<sup>170</sup> Firstly, it must be shown that the killing was done in the heat of passion and without time for it to cool. Thus, it has been held that provocation would not be available as a defence where the accused kills another arising from the conduct of the deceased several days prior.<sup>171</sup> Secondly, the provocation must be sudden. Hence, where the accused knew of his wife's infidelity and later killed her after she threatened to leave him, it was held that the wife's conduct did not amount to sudden provocation.<sup>172</sup> Thirdly, the provocative conduct must comprise an unlawful act in order to give rise to a legal provocation. Unlawful acts which have been held to amount to provocation include killing of the accused's relative,<sup>173</sup> an attack on the accused's wife or relative,<sup>174</sup> trespass to property,<sup>175</sup> a verbal insult of gross nature,<sup>176</sup> *flagrante delicto*,<sup>177</sup> and

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<sup>167</sup> Ibid 206. S 202(2) provides that unlawful is conduct amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm. Instances of unlawful killing amounting to manslaughter include provocation, excessive use of force in defence of person or property, omission to perform a duty recognised by the law of homicide, criminal negligence and pursuance of a suicide pact to kill another.

<sup>168</sup> Ibid 204.

<sup>169</sup> Ibid 205.

<sup>170</sup> Ibid 207.

<sup>171</sup> *R v Akope s/o Karuon* 14 EACA 105.

<sup>172</sup> *R v Jezelani* 14 EACA 70.

<sup>173</sup> *R Wesonga* 15 EACA 65.

<sup>174</sup> *Mantendechere s/o Masakhu v R* 23 EACA 443.

<sup>175</sup> *R v Marwa s/o Robi* 1959 EA 660 (CA).

<sup>176</sup> *R v Itima s/o Birigenda* 15 EACA 154.

<sup>177</sup> *Kalume wa Teku* (n 124 above).

witchcraft.<sup>178</sup> Fourthly, the provocation must be such as to deprive an ordinary person of the class to which the accused belongs of his power of self-control. The court is able to draw an inference based on the facts of the case.<sup>179</sup> Finally, the provocative act must be done in the presence of the accused,<sup>180</sup> either towards the accused or towards a person who has a specific relationship with the accused.<sup>181</sup>

According to s 207 of the Act, provocation is primarily a partial defence to murder.<sup>182</sup> However, its application has been extended to instances of assault, specifically resulting in grievous bodily harm, where the accused pleads provocation.<sup>183</sup> Although it would appear that the applicable law on provocation is wholly set out in the code, and clearly not in need of further interpretation, it is provided that where a question is not expressly provided for in the Code, it shall be determined in accordance to the principles of English criminal law and this explains the use of common law case law.<sup>184</sup> It is noteworthy however, that the majority of the case laws indicate that only men rely on the defence of provocation.<sup>185</sup> In the few instances where women have relied on the defence, it has rather been misplaced and ineffective as demonstrated in the case of *RC v R*.<sup>186</sup> The issue raised in the case was whether the defence of provocation was available to the appellant in the circumstances of the case. On the onset, the court was quick to point out that, since the codification of the criminal law in 1948, courts had not dealt with any matter with a semblance of circumstances to the instant case. In this case, the appellant, a domestic worker, had been charged and convicted of murder by the trial court. The appellant had given evidence that the deceased was aggressive and abusive causing her to lose her self-control, upon which she strangled the deceased to death. It was held that the appellant had the presence of mind to tighten the string to kill the deceased, she had the presence of mind to conceal the string, and she had the presence of mind to conceal the trail of her conduct by lying about the whereabouts of the deceased. Accordingly,

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<sup>178</sup> *R v Fabiano Kinene s/o Karuon* 8 EACA 96.

<sup>179</sup> Collingwood (n 116 above) 166.

<sup>180</sup> *Gaboye s/o Parmat v R* 16 EACA 140.

<sup>181</sup> Penal Code (n 162 above) 208 (2). See also Collingwood (n 116 above) 166. The person in special relationship could be a person under his immediate care, or a person in a conjugal, parental, filial or fraternal relationship, or in the relationship of master and servant.

<sup>182</sup> The section reads ‘When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.’

<sup>183</sup> Penal Code (n 162 above) 208 provides for instances involving assault.

<sup>184</sup> *Ibid* s 17 reads ‘Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law’.

<sup>185</sup> For example, nearly all the Kenyan cases cited in this thesis, though randomly selected, involve male defendants.

<sup>186</sup> *RC v R* 2004 CA 199 (CA).

the appeal was dismissed. Nonetheless, the strict interpretation of the statute is still evident even in recent judgements. For example, in the case of *R v Genya Mwavuo Nyawa*,<sup>187</sup> the accused had gone to the bush to cut some building frames, and his wife had left to look after their cattle and goats. While leaving the bush he spotted his animals with others not belonging to him. On approaching the animals he found the deceased in flagrante delicto with his wife. Engulfed in blind rage, he pursued the deceased and killed him using a machete. Held that the fact that the love affair between the accused's wife and the deceased was common knowledge did not displace the fact that the accused was provoked and acted in the heat of passion before there was any time for his anger to die down. He was acquitted of the charge of murder and instead convicted of the offence of manslaughter.

The wording of the provisions relating to provocation also presupposes that the framers had in mind the accused's gender through the specific use of the pronouns such as 'his', 'he' and 'him', to the exclusion of the other gender.<sup>188</sup> Clearly, there has been no significant departure from the traditional application of the defence in the Kenyan courts. It would appear, at least for now that the courts are not eager to exercise their judicial discretion, and would rather conveniently sit behind the shroud of the legality clause. Indubitably, the current law does not favour the accused woman who kills in a non-confrontational situation.

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<sup>187</sup> *R v Genya Mwavuo Nyawa* 2009 CC 44 (HC).

<sup>188</sup> T Crofts and D Tyson 'Homicide Law Reform in Australia: Improving access to defences for women who kill their abusers' (2012) 39 MULR 864 at 870 view this gender-specific and/or abuse specific nature as one of the problems associated with the current law of provocation.

## CHAPTER 5

### Grounds for Reform

#### 5.1 Conventional and Constitutional Persuasion

The global community's concern regarding certain rights and duties for individuals and non-state actors has spurred a renaissance for the protection of human rights and fundamental freedoms of individuals.<sup>189</sup> The trend is noticeable both under the general<sup>190</sup> and regional<sup>191</sup> rules of international law. Both forms of international rules are customarily founded on similar principles.<sup>192</sup> However, the general recognition that states do not retain an absolute jurisdiction over their citizenry on matters of human rights is significant. Indeed, it is now a requirement under international law that all individuals are protected irrespective of their political, socio-economic, cultural or geographical disposition.<sup>193</sup> Accordingly, attempts have been made through numerous international instruments to articulate and guarantee equality (and gender equality).

The Universal Declaration of Human Rights (UDHR) of 1948 provides that all human beings are born free and equal in dignity and rights.<sup>194</sup> It further states that everyone is entitled to all rights and freedoms provided in the charter without discrimination of sex.<sup>195</sup> The International Covenant on Civil and Political Rights (ICCPR) of 1966 provides for non-discrimination and further stipulates that all persons are equal before the law and are entitled to equal protection of the law.<sup>196</sup> Section 18 (3) of the African Charter on Human and People's Rights (ACHPR) of 1986 calls for all member states to ensure the elimination of every form of discrimination against women and protection of their rights. The same provisions have been captured in most national statutes buttressing the strong global attention aimed at eliminating discrimination against women. The Constitutions of South Africa and Kenya expressly guarantee equality and freedom from discrimination.<sup>197</sup> They also provide that both gender (men and women) are equal before the law and have the right to equal protection and equal benefit of the law.<sup>198</sup> It is

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<sup>189</sup> JG Starke *Introduction to international law* (1989) at 3.

<sup>190</sup> Ibid 6 refers to general rules as rules of universal application.

<sup>191</sup> Ibid 6 refers to regional rules as rules developed between states in a particular region.

<sup>192</sup> In the Colombian-Peruvian Asylum Case 1950 ICJ Rep 266 it was held that regional rules are not necessarily subordinate to the general rules of international law. The court was of the opinion that the rules are complementary and correlated.

<sup>193</sup> Starke (n 189 above) 363.

<sup>194</sup> Art 1 of UDHR.

<sup>195</sup> Art 2 of UDHR.

<sup>196</sup> Art 2 & 26 of ICCPR.

<sup>197</sup> Section 9 of the Constitution of South Africa and article 27 of the Constitution of Kenya.

<sup>198</sup> S 9(1) and art 27 (3) of the Constitutions of South Africa and of Kenya respectively. This is important as both jurisdictions recognise the defence of provocation.

instructive therefore, that the law, and by extension provocation law, in the two countries conform to the dictates of the Constitution and international law. For example, in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>199</sup> gives effect to section 9 of the Constitution so as to prevent and prohibit unfair discrimination and promote equality.<sup>200</sup> Similarly, in Kenya, the ideals of equality are articulated in the National Gender and Equality Commission Act of 2011.<sup>201</sup>

### 5.1.2 Standard of equality

It is necessary therefore to address this concept of equality as envisioned in the aforesaid instruments. In law, the notion of equality espouses a prescriptive function. Prescriptive equality seeks to prescribe treatment for conditions which based on a specified standard, are perceived to be unequal. In contrast, descriptive equality is merely concerned with the perceptible disparities as between comparisons. It is restricted to a descriptive standard. Prescriptive equality therefore goes beyond descriptive equality to equalise circumstances based on a prescribed standard.<sup>202</sup> Under s 1 of PEPUDA, equality is defined to include ‘the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality of outcomes.’ The National Gender and Equality Commission Act of 2011 provides for gender mainstreaming which is defined as:

Ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres; so as to ensure that women and men benefit equally, and that inequality is not perpetuated.<sup>203</sup>

Further afield, the United Kingdom Equality Act of 2010 provides that:

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<sup>199</sup> PEPUDA Act 4 of 2000.

<sup>200</sup> S 8 of PEPUDA prohibits unfair discrimination on ground of gender.

<sup>201</sup> S 8 of the National Gender and Equality Commission Act of 2011.

<sup>202</sup> P Western ‘The meaning of equality in law, science, math and morals: A reply’ (1983) 81 (4) MLR 604 at 607-615 notes that prescriptive equality states circumstances ‘as they ought to be’ whereas descriptive equality states things ‘as they are.’

<sup>203</sup> S 2 of the National Gender and Equality Commission Act of 2011.



An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.<sup>204</sup>

In order to understand the concept of equality as stipulated in the three Acts, it would be necessary to analyse the causal theoretical underpinnings. Globally, there has been a gradual move towards deliberate state action aimed at taking positive steps and measures to eliminate discrimination, as opposed to the traditional and rather reactive role of simply prohibiting discrimination. This development has been occasioned by the increased acceptance of substantive equality over formal equality.<sup>205</sup> An in-depth analysis of the two concepts would suffice at this juncture.

#### 5.1.2.1 Formal equality

Formal equality is principally concerned with prohibition of unlawful discrimination.<sup>206</sup> This model of equality centres on the individual as the subject for justice, and holds that in the absence of a reasonable justification, individuals in similar circumstances should be treated alike and conversely, those in dissimilar situations should be treated differently.<sup>207</sup> It is status based and informed by the principle of equal treatment. The focus of this form of equality was aptly expressed by the European Court of Justice (ECJ) in the case of *A v Commission*<sup>208</sup> where it was held ‘The principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential differences are treated differently or where situations are different are treated in an identical manner.’

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<sup>204</sup> Equality Act of 2010 at s 1(1).

<sup>205</sup> C Albertyne et al ‘Introduction: Substantive equality, social rights and women: A comparative perspective’ (2007) 23 SAJHT 209 at 209.

<sup>206</sup> C McHugh ‘The equality principle in EU: Taking a human rights approach’ (2006) 14 ISLR 31 at 31 compares it to the Aristotelian maxim that ‘justice demands that equals be treated equally and unequals be treated unequally.’

<sup>207</sup> Ibid 32.

<sup>208</sup> *A v Commission* 1994 ECR II-179 at para 42.

The model completely rejects forms of positive action involving the use of criteria such as race and gender as a rationalisation for privileged treatment.<sup>209</sup> Therefore, under formal gender equality, where both genders are in similar circumstances or engaged in the same conduct, they are both subjected to identical legal rules.<sup>210</sup> The principle has attracted repeated criticism emanating from its inherent limitations particularly its inability to effectively manage institutional and structural forms of discrimination which are detrimental to defined groups. The inadequacies of the model are attributed to several factors:

- a. The question of the choice of the comparator is difficult and contentious as the comparator is the focal determinant as to whether or not a given fact has occasioned inequality. On this basis therefore, formal equality becomes a product of assimilation based on assumption of compliance to a given standard.<sup>211</sup>
- b. The principle of formal equality is rigid and only concerned with negative obligations of non-discrimination to the exclusion of other obligations that regulate institutional structures in recognition of the fact that varied circumstances need to be addressed differently.<sup>212</sup>
- c. Formal equality does not seek to address entrenched discrimination as it is exceedingly contingent on individual justice as a means of enforcing the right to equality. Accordingly, the individual victim of discrimination is only vindicated upon a successful claim.<sup>213</sup>

This formal approach to equality was manifest in much of ECJ's gender equality jurisprudence. For example in *Stadt Lengerich v Helmig*<sup>214</sup> where a group of part-time employees (mostly female) sought to be paid overtime pay although they had not surpassed the normal working hours for the full-time employees, it was held that there was no discrimination since the pay was pegged on the number of hours worked. The court's decision was criticized for failing to reflect on the implication added hours would have had on the part-

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<sup>209</sup> McHugh (n 206 above) 33-34 points out that formal equality is best understood as a procedural guarantee of fairness in decision-making whereby arbitrary factors such as sex and race are impermissible considerations.

<sup>210</sup> C Forell 'Gender equality, social values and provocation law in the United States, Canada and Australia' (2006) 14 AUJGSP 27 at 29. She opines that this approach to equality is problematic when used to justify the retention of certain laws and expanding their application to the detriment of either gender.

<sup>211</sup> McHugh (n 206 above) 33. A comparator is a person in similar circumstances but not falling within the alleged ground of discrimination, whom the courts uses to assess whether the complainant did indeed receive unequal treatment. For example, in a claim for unequal pay based on gender, the appropriate comparator is a person of the opposite sex doing same or like work.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid 34 refers to formal equality as the symmetrical or formal approach.

<sup>214</sup> *Stadt Lengerich v Helmig* 1994 ECR I-5727.

time workers.<sup>215</sup> Nonetheless, it has been pointed out that the equality of treatment is an effective means of breaking down typecasting grounded on gender.<sup>216</sup>

### 5.1.2.2 Substantive equality

Substantive equality entails positive measures by the state upon an appraisal of the entirety of a situation with special emphasis on the context and intervening variances. It seeks to enhance social inclusion and redistributive justice by redressing inequalities based on opportunities and outcomes occasioned by the differences.<sup>217</sup> It confers an obligation on all arms of the state to move beyond formal equality through application of positive actions.<sup>218</sup> Positive action involves use of specific measures to actively guarantee enhanced equality.<sup>219</sup> It is founded on the recognition that equal treatment is not a panacea for varying situations hence the need for a proactive approach.<sup>220</sup>

Substantive equality is also referred to as the group justice model because it seeks to address discrimination afflicting individuals as members of a specified group due to structural inadequacies and embedded forms of disadvantages.<sup>221</sup> It seeks to accommodate the diverse needs and realities of disadvantaged individuals towards the attainment of equal human dignity and full enjoyment of benefits associated with membership to a given group. Hence, with regard to gender equality, this approach would require that law be cognisant and responsive to the varied effect a given rule would have on both genders when clustered together.<sup>222</sup> Most substantive equality models comprise two elements, namely, equality of opportunity and equality of results.

#### 5.1.2.2.1 Equality of opportunity

Equality of opportunity approach involves the application of special measures for the disadvantaged category to level the playing ground. It seeks to ensure that all the actors,

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<sup>215</sup> McHugh (n 206 above) 34.

<sup>216</sup> Ibid.

<sup>217</sup> Albertyne (n 205 above) 209 notes substantive equality introduces ideas of economic inequality and redistribution into the status based (formal) anti-discrimination laws.

<sup>218</sup> Ibid 212.

<sup>219</sup> McHugh (n 206 above) 33.

<sup>220</sup> Ibid 31.

<sup>221</sup> Ibid 34.

<sup>222</sup> Forell (n 210 above) 29.

including members of a particular group, proceed from an equal position unconstrained by concomitant disadvantages.<sup>223</sup>

#### 5.1.2.2.2 Equality of results (outcomes)

Equality of outcomes adapts a redistributive posture to equal treatment aimed at levelling the outcome of a process. It goes beyond the application of special measures to achieve equality of opportunities. Examples may include setting obligations to observe composition in accordance with diversity or positive obligation to uphold equality. It is contentious as it counteracts the principle of equal treatment by applying arbitrary factors.<sup>224</sup> It remains a contentious subject since it seeks to embed the very differences that traditional anti-discrimination laws, and in this case the formal equality approach, attempt to disregard.<sup>225</sup> Moreover, as it introduces notions of economic inequality and the attendant restructuring, it presents pecuniary implications. However, the courts approach the question of substantive equality in two ways. Firstly, by deferring to the state where financial difficulties hinder the realisation of equality obligations; and secondly, by taking positive steps through legal concepts and judicial processes to ensconce separation of powers and institutional competences.<sup>226</sup> Furthermore, the Bill of Rights as enshrined in many a Constitution, has tremendously reinforced the recognition of substantive equality as a constitutional right and the growth of related jurisprudence founded on context and difference.<sup>227</sup>

#### 5.1.2.2.3 Application of substantive equality on the defence of provocation

Application of substantive equality on the defence of provocation would imply that the law recognises the prevailing gendered reality, that and accordingly, the grounds upon which the defence of provocation is relied on are sex-segregated. This suggests that the accused's conduct is to be predicated upon the conduct associated with the gender to which the accused belongs. It calls for consideration of all factors including affective functions, leading to the accused's conduct beyond the traditional factors of rage and jealousy. The law would then be

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<sup>223</sup> McHugh (n 206 above) 34.

<sup>224</sup> Ibid 35.

<sup>225</sup> Ibid 33. An example of equality of results from a positive action would be a statutory adoption of a quota to ensure a greater representation of either gender in elective posts thus addressing imbalances in policy making which may appear to disadvantage the underrepresented group.

<sup>226</sup> Albertyne (n 205 above) 211.

<sup>227</sup> Ibid 212.

required to be cognisant to the predicament of the battered woman who kills out of fear or desperation, and of the man who kills in the heat of passion. Substantive gender equality would therefore mean that the law recognises that men and women are different and when they kill arising from provocation, they do so in varying contexts.<sup>228</sup> This approach is noticeable in many jurisdictions such as South Africa and Australia. The application of substantive equality on the law of provocation would also imply the slackening or total exclusion of the traditional requirements of the defence. It has been an insistent contention that some of these requirements such as ‘there was no time to cool between the provocation and the killing’, ‘suddenness’ and ‘presence of triggering instances’ tend to favour certain groups while ignoring the realities of others. Varying or removing these traditional requirements would invariably allow for the defence to be applicable in different settings. Such restructuring would allow the law to be effectively responsive to the myriad of rationales on which the defence is grounded. This would disregard the limited application of the defence to a particular set of circumstances through consideration based on context and differences. Thus, as much as the defence would be available to the woman who kills in non-confrontational situation, it will just be as available to the accused who kills in a moment of rage. This approach has been recognized in some American and many Australian jurisdictions.<sup>229</sup> Nonetheless, the restructured approach must be limited by criminal law. Thus, the accused who relies on the defence must point to an existing criminal wrong and not merely a commonly shared moral standard. For example, the defence would not be available to a man who kills his lover arising from adultery because even if the act itself is morally reprehensible, it is not a crime in many jurisdictions.<sup>230</sup>

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<sup>228</sup> Forell (n 210 above) 32. She is of the opinion that recent developments such as expanding provocation’s rationales to mitigate the punishment of battered women who kill their abusers, rather than exonerating them through self-defence, amounts to only partial progress towards realisation of full substantive equality.

<sup>229</sup> Ibid 32-33.

<sup>230</sup> J Dressler ‘Why keep the provocation defence? : Some reflections on a difficult subject’ (2001) 86 MLR 959 at 979. This view is also shared by Forell (n 210 above) 30. Applying substantive equality would mean that killing in a heat of passion out of sexual possessiveness would no longer be an acceptable basis for a claim of provocation because everyone has a right to sexual and physical autonomy. Similarly, applying substantive equality would also mean that killing one’s batterer out of fear would be permissible because everyone has a right to defend him or herself from physical harm.

## 5.2 Arguments by women rights advocates and activists

Women rights advocates, activists and legal scholars have advanced various reasons for the reformation of the traditional defence of provocation. The three broad heads precipitating the clamour for reform of the defence are briefly discussed.

### 5.2.1 The defence is patriarchal

The traditional defence of provocation has long been viewed as male-centred and subjugated defence. It is contended that since the doctrine was designed to control the conduct of men out of concern for their inherent anger, it continues to advance the same patriarchal interests. The defence is perceived to function as a greatly sexed excuse for men who kill to escape a conviction for murder<sup>231</sup> and accordingly, is of limited use to women since its criteria are measured against male standards of behaviour and responses.<sup>232</sup> Although the defence is founded on concern for human weakness, it is really a legal masquerade for the propagation of male chauvinism through legitimisation of male aggression especially against women, their natural prey. The principal objective of the defence is to safeguard man's sense of self-worth which requires unqualified control of the woman's sexual fidelity, effort, presence, affection, and devotion. Where this self-esteem is threatened, he feels provoked. The defence is therefore, a recognition that he is entitled to retaliate in the face of such provocation.<sup>233</sup>

### 5.2.2 The Defence lacks a moral foundation

Critics of the traditional defence of provocation argue that the defence lacks a moral foundation as it conveniently elevates certain human emotions, and deliberately excludes others. In this case, the emotion of sudden anger or rage has been identified as a contemptible recipient of the exclusive right of preferential treatment in criminal law while other human emotions such as despondency, fear and compassion are totally disregarded. The critics also argue that while an array of emotions can interfere with a person's ability to exercise his or her psychosomatic functions, there is no moral validation why rage alone ought to assume a privileged position in criminal law. Recognition of the emotion of anger as the only justifiable

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<sup>231</sup> Crofts (n 188 above) 866.

<sup>232</sup> Bradfield (n 23 above) 5-6.

<sup>233</sup> Dressler (n 230 above) 975-976. Brown (n 235 above) 138 notes that the defence is based on notions of male proprietary power and control over spouses and this profoundly gendered nature of the defence is the cause of homophobic fatal violence. See also Crofts (n 188 above) 867 where they are of the view that the main function of the defence was and still is, to normalise male violence as a natural characteristic of masculinity and where the woman victim's performance depends on her perceived conformance as a woman.

or excusable cause for killing of another is tantamount to elevating the status of short-tempered men over other persons of virtuous temperament. Indeed, it amounts to accentuating as permissible conduct where the short-tempered man kills because he was unable to control himself and conversely, as unacceptable conduct where a person who exercises reasonable restraint but eventually kills upon being overwhelmed by a more credible emotion such as fear.<sup>234</sup> This lack of well-founded moral justification renders the traditional defence of provocation ignorant of the context and reality of the accused woman who kills in a non-confrontational situation.<sup>235</sup> It manifestly ignores the fact that men and women kill for different reasons and under varying contexts.<sup>236</sup> Similarly, the defence, due to this lack of a clear moral underpinning, is a persistent source of travesty of justice by encouraging a culture of focussing on the role of the deceased rather than on the accused. It presupposes that the deceased's conduct is more instrumental to his or her own demise while disregarding the contribution of the accused. This is especially the case given that the deceased cannot be afforded with an opportunity to defend his position. Accordingly, the trial process can be quite a traumatic experience for the deceased's dependants and relatives.<sup>237</sup>

### 5.2.3 Other defences are not suitable

Many women rights advocates, activists and legal scholars concur that the defence of provocation is a fundamental part of criminal law and it represents the most appropriate defence for the accused woman who kills in a non-confrontational situation.<sup>238</sup> The defence symbolises the inadequacies of human conduct and more so in relation to the aspect of self-control. It recognises the fact that, in certain circumstances, an individual can be overcome by emotions to the extent that he or she is unable or finds it difficult to regulate his or her conduct.<sup>239</sup> Since the defence is associated with human affective functions or emotions, it represents a flexible option for the accused who upon being engulfed by intense emotions, has lost the power of self-control. A liberal approach to provocation therefore has the effect of widening the scope of rationales upon which the defence can be relied on. This would

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<sup>234</sup> C Elliot 'What future for voluntary manslaughter?' (2004) 68 JCL 253 at 254. She wonders why a bad-tempered man should be entitled to a verdict of manslaughter while a good tempered one is convicted of murder. Similarly, why a person should be accorded a partial defence to murder when he kills out anger but someone who kills with a more credible emotion such as compassion has no defence.

<sup>235</sup> H Brown 'Provocation as a defence to murder: To abolish or reform?' (1999) 12 AFLJ 137 at 138.

<sup>236</sup> Forell (n 210 above) 33 for example, opines that men exclusively kill arising from heat of passion based on jealousy while women almost exclusively kill from fear.

<sup>237</sup> Elliot (n 234 above) 255.

<sup>238</sup> Dressler (n 230 above) 977 is of the opinion that the defence represents the best defence to murder for the battered women who kill their abusers.

<sup>239</sup> Ibid 978.

ultimately capture the range of emotional dynamics which has caused the accused, and in particular the accused woman who has killed her passive abuser, to kill.<sup>240</sup> This distinctive ability of the defence to rope in cumulative emotions is already recognised in many jurisdictions such as UK, Australia, and South Africa.

By the same token, other defences, especially self-defence, have been faulted for their inability to adequately cater for the realities of the accused. For example, women who rely on the traditional defence of private defence seldom succeed because of the insurmountable hurdles characteristic of the defence.<sup>241</sup> Accordingly, there is consensus that although the defence of provocation in the traditional sense is manifest with profound shortcomings, abolishing it, especially in the face of the harsh regime for murder, would adversely affect the accused who has killed her passive abuser.<sup>242</sup> However, it may be necessary through legislative reform, to restructure the defence away from the traditional sense, so that it exhibits gender neutrality and accords to modern judicial thinking.<sup>243</sup>

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<sup>240</sup> BM Baker 'Provocation as a defence for abused women who kill' (1998) 11 CJLJ 193 at 195-196. At 195 she notes that a plea of provocation is superlatively able to cover not only single, stand-on-their own provoking events but also the cumulative effects of a pattern of objectionable provocative behaviour.

<sup>241</sup> Brown H (n 235 above) 138-139 is of the opinion that the law of self-defence is profoundly gendered in ways that prevent women from successfully arguing that they killed to prevent an imminent risk of death or serious injury. In many a case, the defence does not even bother to raise the defence even when the facts squarely raise the issue. See also Krause (n 7 above) 558 notes that the chief obstacle in such situations is proving harm was imminent in the absence of any on-going physical attack. The unsuccessful reliance on private in *S v Engelbrecht* (n 18 above) and *Norman v State* (n 24 above) exemplify the difficulties faced by women.

<sup>242</sup> Dressler (n 230 above) 978. See also Brown (n 235 above) 138.

<sup>243</sup> Brown H (n 235 above) 140-141.



### 5.3. Impetus of change in other jurisdictions

#### 5.3.1 England and Wales

In England and Wales (United Kingdom), the law of provocation (now referred to as the defence of loss of control) is to be found in the Coroners and Justice Act of 2009.<sup>244</sup> The new partial defence to murder replaced the previous defence of provocation in the repealed s 3 of Homicide Act of 1957.<sup>245</sup> Under the new law, for the accused to make a successful claim, it must be proved that he or she lost self-control which is accompanied by a qualifying trigger, and that, objectively assessed; a person of the same sex and age would react similarly in the circumstances.<sup>246</sup>

The new legislation differs from the abolished defence of provocation in several aspects. Firstly, the element of suddenness in the loss of self-control is not a requirement in the new defence.<sup>247</sup> Secondly, the new legislation requires that the loss of self-control must be accompanied by a qualifying trigger. This is defined as fear of serious violence from the deceased against the accused or any identified person<sup>248</sup> and, something said or done (or both) of an exceptionally severe nature that occasions the accused to have a justifiable sense of being seriously wronged. Under the abolished defence of provocation, fear was not regarded as an adequate ground for provocation. In *R v Martin*<sup>249</sup> where the defendant shot two intruders at his home, killing one and seriously injuring the other, it was held that a fear for violence was not sufficient to warrant his conduct.

Under the Act, instances of revenge<sup>250</sup> and sexual infidelity<sup>251</sup> that might otherwise give rise to claims of loss of self-control have been explicitly excluded. Under the abolished law, requirement of suddenness in the accused's loss of self-control was intended to make the defence unavailable to one who killed out of a desire for revenge. In *R v Ibrams and Gregory*<sup>252</sup> the deceased, a released convict, was a source of continuous harassment and

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<sup>244</sup> Coroners and Justice Act of 2009 at s 54-56.

<sup>245</sup> S 56(1) of the Coroners and Justice Act of 2009 abolished the common law defence of provocation while see s 56 (2) repealed s 3 of the Homicide Act of 1957.

<sup>246</sup> Coroners and Justice Act (n 244 above) 54(1).

<sup>247</sup> Ibid 54(2). This was not the case in the abolished law. For example, in *R v Ahluwalia* 1993 (96) Cr App R 133 (CA), the defendant killed her sleeping husband by pouring caustic soda on him and then setting him ablaze. She was suffering from Battered Woman's Syndrome, after being subjected to many years of abuse. At the trial court she was found guilty of murder. The Court of Appeal did not allow her appeal on the basis of provocation as there was no sudden loss of control, highlighting the longer the delay the more likely the act had been deliberate. However, the court did allow her appeal on the grounds of diminished responsibility.

<sup>248</sup> Coroners and Justice Act (n 244 above) 55(3).

<sup>249</sup> *R v Martin* 2002 (2) WLR 1 (CA).

<sup>250</sup> Coroners and Justice (n 244 above) 54 (4).

<sup>251</sup> Ibid 55 (6).

<sup>252</sup> *R v Ibrams and Gregory* 1982 (74) Cr App R 154 (CA).

intimidation for the two appellants. The harassment continued even after they reported the matter to the police, upon which they decided to take matters into their hands. Consequently, they beat the deceased to death. At the trial court, they claimed they lost their control once they started beating him. The court was of a contrary view and they were both convicted of murder. On appeal the conviction was upheld as there was no sudden loss of control. By virtue of s 55 (6),<sup>253</sup> the new law appears to have put to rest the contention that the abolished defence of provocation conferred an unfair advantage on men who killed their lovers out of jealousy as was the case in *R v Humes*.<sup>254</sup> In this case the defendant killed his wife upon discovering that she had been sleeping with another man. He was not put on trial as he pleaded guilty to manslaughter. Provocation was accepted by the trial judge and the prosecution and he was sentenced to 7 years. The Attorney General appealed the sentence. The Court of Appeal confirmed the defence of provocation and the seven-year sentence.

S 54(1) (c) provides that ‘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.’ This is an import of the principles of provocation developed at common law. The application of this principle is illustrated in *DPP v Camplin*<sup>255</sup> where Lord Diplock held that ‘[...] the reasonable man [...] is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused [...].’ Similarly, in *Attorney General for Jersey v Holley*<sup>256</sup> where the accused had killed his girlfriend with an axe, it was held that in objectively assessing the accused’s loss of self-control, sex and age were the only relevant characteristics of the accused. The objective nature of the inquiry into the circumstances leading to the accused’s conduct was also a consistent feature in the common law defence of provocation. This was evident in *Regina v Darren Andrew Gregson*<sup>257</sup> and *R v Hill*.<sup>258</sup>

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<sup>253</sup> Reads ‘the fact that a thing done or said constituted sexual infidelity is to be disregarded.’

<sup>254</sup> *R v Humes* Attorney General’s Reference No. 95 (2002) EWCA 2982.

<sup>255</sup> *DPP v Camplin* 1978 AC 705.

<sup>256</sup> *Attorney General for Jersey v Holley* 2005 3 WLR 29.

<sup>257</sup> *Regina v Darren Andrew Gregson* 2006 EWCA Crim 3364 where it was held that accused’s bouts of epilepsy and depression coupled with unemployment could be considered in relation to the gravity of provocation but not in relation to the standard of self-control expected.

<sup>258</sup> *R v Hill* 2008 EWCA Crim 76 where the accused’s history of sexual abuse as a child was considered in his successful claim of defence of provocation.

### 5.3.2 Australia

The defence of provocation has been the subject of intense scrutiny in four of the eight jurisdictions in Australia.<sup>259</sup>In the mid-1990s, the Model Criminal Code Officers Committee (MCCOC) was established by a Standing Committee of the Attorneys-General (SCAG) for the purpose of developing a national model criminal code for Australian Jurisdictions. Consequently, the MCCOC published a Discussion Paper in June 1998.<sup>260</sup>In the discussion paper, the MCCOC concluded that:

- a. the partial defence of provocation was profoundly in favour of men and should be abolished;<sup>261</sup>
- b. matters of culpability be determined during sentencing;<sup>262</sup>
- c. owing to the nature of the doctrine, the inherent gender-bias could not be remedied by superficial alterations such as relaxing the requirements.<sup>263</sup>

Subsequently, informed by the need to enhance gender balance in line with substantive equality principles, the State of Victoria set up the Victorian Law Reform Commission (VLRC) in 2001 to review the defences to homicide.<sup>264</sup>The VLRC established that, in addition to being unfavourable, provocation was ineffective as a defence to women.<sup>265</sup>Following its recommendations, the defence was abolished vide the Crimes (Homicide) Act of 2005.<sup>266</sup>The same position was adopted by the State of Western Australia through the Law Reform Commission of Western Australia (LRCWA) which was commissioned in 2006 to review and report on the law of homicide.<sup>267</sup>As a result, mandatory life sentence and provocation were abolished in Western Australia in 2008.<sup>268</sup>Another review of the defence was undertaken by the Queensland Law Reform Commission (QLRC) in 2008 against a backdrop of public resentment emanating from court pronouncements.<sup>269</sup>In departure from the stance taken by preceding commissions, the QLRC was of the view that in the face of a mandatory death

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<sup>259</sup> States of Queensland, Tasmania, Victoria and Western Australia.

<sup>260</sup> Model Criminal Code - Chapter 5 - Fatal Offences against the Person.

<sup>261</sup> Ibid 87, 89, 91.

<sup>262</sup> Ibid 89 and 105.

<sup>263</sup> Ibid.

<sup>264</sup> VLRC, Defences to Homicide, Final Report (2004).

<sup>265</sup> Ibid 56-58.

<sup>266</sup> The Act came into effect in 2006. This closely followed the abolition of provocation in Tasmania in 2003 by the Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas) which was not preceded by a formal review. See Crofts (n 188 above) 870.

<sup>267</sup> LRCWA, Review of the Law of Homicide, Final Report, Project No 97 of 2007.

<sup>268</sup> Vide Criminal Law Amendment (Homicide) Act of 2008 (WA).

<sup>269</sup> QLRC, A Review of the Excuse of Accident and the Defence of Provocation, Report No 64 of 2008. See also Crofts (n 188 above) 870.

sentence, leniency was permissible for deserving cases. Thus it recommended for the retention of provocation, albeit with a reduced scope.<sup>270</sup> However, judicial intervention has been manifest even in jurisdictions where provocation is still applied. This has resulted in the refinement of the requirements thereby placating the concerns of the critics. The courts are now willing to consider the context of provocation including the notion of cumulative provocation.<sup>271</sup>

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<sup>270</sup> QLRC (n 269 above) 474.

<sup>271</sup> Crofts (n 188 above) 867. For example, this was evident in *Muy Ky Chhay* 1994 (72) ACR 1, *Mehmet Ali v The Queen* 1957 (59) WALR 28 and *R v R* 1981 (28) SASR 321.

### 5.3.3 Canada

In Canada the partial defence of provocation is to be found at Article 232 of the Criminal Code of 1985, which provides that:

- a. Culpable homicide amounting to murder may be reduced to manslaughter if occasioned by sudden provocation.<sup>272</sup>
- b. A wrongful act or insult amounts to provocation if it is sufficient to deprive an ordinary person of the power of self-control, and if such person to whom the act or insult is done reacts suddenly within the short moment of passion.<sup>273</sup>
- c. Questions relating to the provocative act and whether the accused was deprived of the ability of self-control are questions of fact.<sup>274</sup>
- d. A legal act is not a basis for provocation.<sup>275</sup>
- e. An act by a third person on the accused that arises from the conduct of another person induced by the accused to incite the said third person to do the act on the accused, is not an excuse for provocation where the accused causes grievous bodily harm or death.<sup>276</sup>
- f. Where an illegal arrest on the accused results in the death of a person, prior knowledge by the accused of the illegality of the arrest may be used to support a claim of provocation.<sup>277</sup>

Prior to the current provisions, the law was governed by the common law doctrine of provocation developed in the seventeenth century.<sup>278</sup> Under the current law, provocation is a partial defence, and a successful claim has the effect of attracting a conviction of the lesser charge of manslaughter as opposed to murder. Despite the fact that the code is fairly recent, at a glance, the provisions of the article appear remarkably similar to those of s 207-208 of the Kenyan Penal Code 81 of 1948. In both jurisdictions, the purpose of provocation is to reduce a conviction of murder to manslaughter.<sup>279</sup> Additionally, the structure of the provisions is

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<sup>272</sup> Criminal Code of 1985 at art 232(1).

<sup>273</sup> Ibid 232(2).

<sup>274</sup> Ibid 232(3) (a)-(b).

<sup>275</sup> Ibid 232(3).

<sup>276</sup> Ibid 232(3).

<sup>277</sup> Ibid 232(4).

<sup>278</sup> M Da Silva 'Quantifying desert prior to the rightful condition: Towards a theoretical understanding of the provocation defence' (2013) 26 CAJLJ 49 at 51.

<sup>279</sup> S 207 of Penal Code (n 162 above), art 232(1) of the Criminal Code (n 272 above).

similar<sup>280</sup> and the ingredients<sup>281</sup> and the exceptions<sup>282</sup> of the defence are more or less the same. However, in Canada unlike in Kenya, judicial intervention has attempted to place the law in line with modern judicial thinking. The active role of the courts in the development of the law of provocation has been witnessed in several court decisions. For example, the Supreme Court of Canada (SCC) sought to settle the question of what constitutes ‘an ordinary person’ in the case of *R v Hill*<sup>283</sup> where a sixteen year old boy, who was relying on the defence of provocation, was convicted for murder after he fatally stabbed the deceased for making unsolicited homosexual advances. The court held that in gauging the accused’s conduct against that of an ordinary person, the trial court had erred for disregarding his age and sex. Accordingly, it ordered a fresh trial.<sup>284</sup> In this case, the SCC developed a two-stage test for the defence. The first stage entails an objective assessment of the accused’s conduct against that of an ordinary person in relation to provocation, while the second stage seeks to subjectively inquire whether the accused’s conduct was caused by sudden provocation.<sup>285</sup> The approach was confirmed in the subsequent case of *R v Thibert*<sup>286</sup> where the court held that ‘[...] this threshold test can be readily met, so long as there is some evidence that the objective and subjective elements may be satisfied. If there is, the defence must then be left with the jury.’<sup>287</sup> However, it seems the law of provocation in Canada in its current form is still problematic if the copious dissenting opinions to judicial pronouncements are anything to go by.<sup>288</sup>

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<sup>280</sup> For example, the expression of the accused is gender-specific through the use of the gender-specific pronouns such as ‘his’, ‘he’ and ‘him’ to the exclusion of the other gender.

<sup>281</sup> For example, in both jurisdictions there is a requirement of suddenness at s 207 of Penal Code (n 162 above) and Art 232(1) of the Criminal Code (n 272 above).

<sup>282</sup> Art 232(3) of the Criminal Code (n 272 above) and s 208(3)-(4) of the Penal Code (n 162 above).

<sup>283</sup> *R v Hill* 1986 (1) SCR 313.

<sup>284</sup> Da Silva (n 278 above) 52 notes that the consideration of personal characteristics in the test was a new addition to the law of provocation in Canada.

<sup>285</sup> *Ibid* 52.

<sup>286</sup> *R v Thibert* 1996 (1) SCR 37.

<sup>287</sup> *Ibid* para 6.

<sup>288</sup> Da Silva (n 278 above) 56 for example, is of the view that the persistent disharmony in the judicial pronouncements may be an indication of the need to re-evaluate the theoretical underpinnings of the defence. Wayne Gorman ‘The jealous husband defence’ (1999) 42 CLQ 478 at 478-479 is of the opinion that the SCC has turned the simple and obviously rare defence into a cumbersome and complicated formulation that is no longer even recognisable as defence of provocation. Forell (n 2100 47 is disturbed by the SCC’s continued excuse to male rage and jealousy by retaining its expansive reading of heat of passion to cover situations well beyond those called for by the statute’s language.

## CHAPTER 6

### Conclusion

From the preceding chapters, it is evident that the defence of non-pathological incapacity based on provocation invariably occupies a unique position in criminal law. It is innately expandable and thus, capable of accommodating diverse instances where killing is prompted by emotional travails. It is submitted therefore, that reform, rather than abolition is preferable. However, in order for the defence to serve the case of the accused woman who kills in a non-confrontational situation, it must be anchored on modern legal principles and capable of satisfying the test of equality before the law. The defence must therefore be founded on substantive equality. It must entail moving beyond mere prohibition of inequality to taking into account the context under which the accused kills. Likewise, the defence must not be shrouded in any gender / abuse-specific permutations and exclusionary clauses that are based on gender difference or otherwise.

Various concerns must be addressed, it is submitted, for the realisation of such of the ideal defence of provocation. Firstly, the raison d'être of separation of powers must come into play through the enactment of a well-defined codified law that is aligned to the common law principles. This would ensure that the law is restricted within more predictable and stable parameters thereby reducing unnecessary uncertainties associated with dissonant interpretations. The current law of provocation in England and Wales presents a good case. Secondly, there is need to recognise and bolster the competencies of other related institutions. For example, there may be a need to strengthen psychiatric functions with the aim of giving the courts an enhanced understanding of the varied conducts of the accused. In the case of *S v Eadie* the courts reliance on psychiatric opinion was highly evident invariably highlighting the important role played by other institutions in enhancing the interests of justice. Thirdly, the interests of justice must prevail. Accordingly, a balance must be struck between practical demands of the society (policy demands) and the interests of the accused (theoretical demands). While it is evident that some jurisdictions such as UK and Canada have accepted a compromise position that incorporates both subjectivism and objectivism, South African courts are still grappling with the question.

Proceeding from the aforesaid, an amalgam of the current law of provocation in UK<sup>289</sup> and South Africa<sup>290</sup> is recommended to read as follows:

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<sup>289</sup> S 54 of the coroners and Justice Act (n 244 above).

## Defence of Provocation

### Section 1

- (1) Where a person who commits an act or omission which constitutes an offence and who at the time of such commission or omission suffers from emotional stress which makes him or her incapable-
- (a) of appreciating the wrongfulness of his or her act or omission; or
  - (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission provided that a person of the accused's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the accused might have reacted in the same or in a similar way to the accused.
- (2) For the purposes of subsection (1), 'emotional stress' may relate to sudden or the gradual loss of self-control.
- (3) Subsection (2) applies if the accused's loss of self-control was attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the accused to have a justifiable sense of being seriously wronged.
- (4) In establishing the circumstances in subsection (3), evidence of expert opinion may be adduced in addition to any other evidence which may be of relevance.
- (5) In subsection (1) (b), the reference to 'the circumstances of the accused' is a reference to all of accused's circumstances other than those whose only relevance to accused's conduct is that they bear on the accused's general capacity for tolerance or self-restraint.
- (6) Subsection (1) does not apply if-
- (a) in doing or being a party to the killing, the accused acted in a considered desire for revenge; or
  - (b) the accused's conduct was caused by a thing which the accused incited to be done or said for the purpose of providing an excuse to use violence; or

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<sup>290</sup> S 78(1) of the Criminal Procedure Act (n 37 above).



- (c) if the accused incited the thing to be done or said for the purpose of providing an excuse to use violence; or
- (d) if the thing done or said constituted sexual infidelity.

(7) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), it must be assumed that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(8) For the purposes of subsection (7), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the court, could reasonably conclude that the defence might apply.

(9) 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.