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The Doctrine of Provocation Defence and a Murder Based on Jealousy

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The paper presents the essential characteristics of the qualification of murder motivated by a jealousy in modern comparative legislation. Since this topic causes special attention of legal theory, the author has conducted research which has shown that three approaches represent different doctrinal opinions.
Keywords: criminal law, partial defence, loss of control, jealousy, murder.

Provokacinės gynybos ir žmogžudystės, paskatintos pavydo, doktrina

Straipsnyje pateikiamos žmogžudystės, paskatintos pavydo, kvalifikavimo šiuolaikinėje lyginamojoje teisėje esminės charakteristikos. Kadangi šiai temai teisės teorijoje skiriamas ypatingas dėmesys, autorius atliko tyrimą, kuris parodė, kad trys požiūriai reprezentuoja skirtingas doktrinines nuomones.
Pagrindiniai žodžiai: baudžiamoji teisė, dalinė gynyba, kontrolės praradimas, pavydas, žmogžudystė.

> ‘The battle is fought in man himself: one of our vanity against one of our principles, or one of our excessive ambitions versus our weakness of will’.
>
> Jovan Dučić (Dučić, 2010, pp. 226–227)

Introduction

Interest in jealousy in law is boundless, so in judicial practice, because it is necessary for resolving the issues of responsibility for crimes committed on the basis of these motives and its prevention, for individualizing of a criminal responsibility and punishment, as well as for determining the circumstances that enable the commission of a crime (Slavković, 2020, p. 80).

The origins and development of the doctrine of provocation in *common law* dates back to Aristotle, who wrote: ‘Hence acts proceeding from anger are rightly judged not to be done of malice aforethought; for it is not the man who acts in anger but he who enraged him that starts the mischief. Again, the matter in dispute is not whether the thing happened or not, but its justice; for it is apparent injustice that occasions rage’ (Aristotle, 2009, pp. 94–95).

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The theory underlying provocation can be traced back to medieval times and the notion of morality and politics. Failure to treat a man of honour in high regard was considered offensive and as such merited retaliation in anger, so as to demonstrate that the man was not a coward. It was this concept of honour which informed the early *common law* relating to provocation (Horder, 1992, p. 137).

It was in the 17th century that Aristotelian reasoning first became a prominent defence in murder cases. The dominant reasoning then was that homicide, the act of one human being killing another, resulted from the premeditations of a wicked mind. During trial, if it could be shown that the victim had provoked the accused person, then 'the accused's conduct could therefore be attributed to weakness of control or human frailty rather than to true wickedness' (Ashworth, 1976, p. 295).

Since then, the doctrine of provocation has been available to persons accused of murder in *common law* jurisdictions. If accepted, the doctrine leads to the taking away of the presumption of malice from a person who kills another. For this reason, the charge of murder is reduced to one of manslaughter. The latter is a lesser charge with leeway for various types of sentences (Ralarala, Kaschula, Heydon, 2022, p. 209).

The partial defence to murder of provocation in comparative criminal law

In subsequent part of the paper are analysed the legislations regulating murder out of jealousy and its influence on the criminal accountability and punishment of the perpetrator. In English law, by virtue of reforms brought about by the *Coroners and Justice Act 2009*, murder will be reduced to manslaughter if the defence of 'loss of control' applies. Although the German law does not know of a concept of diminished responsibility in the meaning traditionally given to provocation in English law, Criminal code of Germany recognizes provocation as a partial defence to manslaughter. In Italy, the *Legge 69/2019* made the changes to the aggravating circumstances of the crime of murder.

1. England and Wales

Although the doctrine of provocation has much earlier roots, it emerged in recognisably modern form in the late 17th and early 18th centuries. Parliament of England passed statutes and there were judicial decisions which distinguished between murder and other forms of homicide and this distinction was based on the presence of malice aforethought (Excessive warranted emotional killing...).

The situations which were considered to be proper occasions for anger reflected the code of honour of the time. The first full judicial discussion dates from the reign of Queen Anne. In *Mawgridge* (1707) (*R v Mawgridge* 84 E.R. 1107), a guest of the Lieutenant of the Tower of London quarrelled with his host over a woman, threw a bottle of wine at his head and then ran him through with a sword. The case was described by Holt C.J. as being 'of great expectation' and was argued before all the judges. The court listed four categories of case which were 'by general consent' allowed to be sufficient provocations. The fourth was killing a man in the act of adultery with one's wife ('. . . when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property') (*Regina v. Smith*).

Property she may have been, but in an oft-overlooked footnote, the Court stated that at law 'a man is not justifiable "in killing a man he 'taketh in adultery with his wife" for this 'savours more of sudden revenge, than of self-preservation', adding however, that this law 'hath been executed with great benignity'. Even so, a doubt had been registered about a vengeful motive in such cases right from the start (Howe, 2013, p. 419).

In the leading case of *Maddy* (1671) (*R v Maddy* 2 Keb 829), where a husband returned home to find his wife in the act of adultery and killed her paramour, the jury were asked to find whether Maddy had precedent malice, in the form of a prior determination to take revenge. So even where the provocation was of the highest degree, the element of sudden passion had to be established. If he had known of the association and had declared his intention to take revenge, not even discovery *in flagrante delicto* would have reduced his offence from murder to manslaughter (Ashworth, 1976, p. 294).

In modern times, provocation was developed in *Duffy* (1949) (*R v Duffy* 1 All E.R. 932), which provided the definition of provocation adopted by the *Homicide Act 1957* (5 & 6 Eliz.2 c.11). This Act reformed the defence and clarified that a successful plea of provocation will reduce a charge of murder to voluntary manslaughter. This is beneficial for the defendant as it results in a lesser sentence and allows them to avoid the social stigma of being known as a murderer (Blockley, 2014, p. 127).

After a profound consideration of the *Model Penal Code*[1] version of provocation conceptualised as the actor's 'extreme mental or emotional disturbance' (EMED), the Law Commission of England and Wales has rejected it.[2] Instead, the Law Commission proposed to frame provocation as a partial defence to a killing committed in response to either gross provocation which caused the defendant to have a justifiable sense of being seriously wronged or fear of serious violence (or both).[3] The law, as enacted by the *Coroners and Justice Act 2009* (c 25), differed from the Law Commission's proposal in that it replaced the defence of provocation with the defence of 'loss of control' in the circumstances very similar to those recommended by the Law Commission for the defence of provocation but, as the name of the defence suggests, retained the requirement of loss of self-control rejected by the Law Commission (Bergelson, 2021, p. 365).

In October 2010, the UK Parliament brought into effect law that replaced the partial defence to murder of provocation with a new partial defence of 'loss of control', applicable to England, Wales and Northern Ireland. In English law, by virtue of reforms brought about by the 2009 Act, murder will be reduced to manslaughter if the partial defence of 'loss of control' applies.[4] To have this effect, Section 54 of the 2009 Act requires amongst other things that the defendant's loss of control at the relevant time must have had one of two qualifying triggers. A qualifying trigger has two elements to it. Under Section 55, the trigger can be a fear of serious violence from the victim, an extension beyond the scope of the old law which dealt only in the currency of provoked anger at something already said or done,

[1] The *Model Penal Code* treats as manslaughter any intentional killing under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be (Article 210.3, Section 1, Clause b.). According to Section 2 of this Article, manslaughter is a felony of the second degree. A fairly significant minority of states have enacted manslaughter statutes similar to that proposed by the American Law Institute in its *Model Penal Code*. As a result, these states have effectuated a significant departure from *common law.* Nevertheless, statutory drafting of the heat of passion defence has not generally affected the law of the states of the USA. A number of states do not define the crime of manslaughter, relying instead on *common law* interpretation. Other jurisdictions define manslaughter as 'heat of passion' but do not substantially define it further. Still other states have been more specific but only by expressly codifying *common law* principles or only slightly expanding upon them. Even in the latter states, however, there is no evidence that legislators carefully scrutinized the underlying rationale of their legislation (Slavković, 2020, p. 82).

[2] Law Commission No 290, paragraph 3.59: 'We would not recommend importing a defense based on EMED. We think that it is too vague and indiscriminate'. (Partial Defences to Murder report...).

[3] Law Commission No 304, paragraph 5.11. (Murder, Manslaughter and Infanticide...).

[4] Under ss 54–56 of the *Coroners and Justice Act 2009*, the defence of provocation was abolished (with effect from Monday 4 October 2010) and replaced by a new partial defence to murder involving loss of control. The loss of control defence is partial because, if successful, the defendant will be convicted of manslaughter, thus avoiding the mandatory life sentence for murder and giving the judge discretion as to sentence. (Parsons, 2015, p. 94).

and not fear of something anticipated. The inclusion of 'fear of serious violence' as a qualifying trigger in the new loss of control defence sought to cater primarily for circumstances in which an abused woman kills, by recognising, 'the close connection between the emotions of anger and fear and thus between provocation and self-defense'.[5]

Alternatively, the trigger can be something 'done or said' (or a mixture of actions and words) that constituted 'circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged'. So far as this second trigger is concerned, the 2009 Act adopts a special position in relation to what it calls 'sexual infidelity' as a potential source of something 'done or said' that might meet the qualifying trigger condition (Horder, Fitz-Gibbon, 2015, p. 3–4).

According to Section 54 (1) of the *Coroners and Justice Act 2009* ('Partial defence to murder: loss of control') Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if –

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
(b) the loss of self-control had a qualifying trigger, and
(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

According to Section 54 (7) 'A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter' (Coroners and Justice Act 2009...).

By the time of the launch of the reform, the partial defence of provocation had expanded greatly since it first entered the statute books in the *Homicide Act 1957*. The Law Commission, in a series or Consultation Papers, commented that the law of provocation no longer had clear boundaries or moral basis; that courts were in disagreement about the scope of the defence; and that legal scholars were highly critical of the defence's logic and moral foundation. These developments have made it necessary to rethink the very essence of the defence. The most fundamental question the Law Commission had to address involved the rationale for the defence: what makes intentional killing under provocation less reprehensible than murder? (Bergelson, 2021, p. 363–364).

According to Section 56 (6) ('Meaning of qualifying trigger') In determining whether a loss of self-control had a qualifying trigger –

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded (Coroners and Justice Act 2009...).

In justifying the inclusion of exclusionary Section 55 (6)(c) in the new partial defence, and in distancing the new law from the problems associated with its predecessor (the provocation defence), at the time of its introduction the Ministry of Justice commented: 'The Government does not accept that sexual infidelity should ever provide the basis for a partial defence to murder. We therefore remain committed to making it clear – on the face of statute – that sexual infidelity should not provide an excuse for killing' (Ministry of Justice, *Murder, Manslaughter*..., 2009, p. 14).

[5] The reforms sought to address a long-standing criticism that the English law of homicide had failed adequately to accommodate the contexts in which women kill an abusive male partner, whilst simultaneously all too readily accommodating the excuses of jealous and controlling men who kill a female intimate partner.

The defendant must produce evidence that at the time he killed his victim, he was reacting to something said or done which was of an extremely grave character that caused him to have a justifiable sense of being seriously wronged, or that the victim did something that caused defendant to fear serious violence from victim against himself or another. Crucially, as a result of one (or a combination) of these *objective* triggers, the defendant must provide evidence that at the time he killed the victim with intent to kill or cause serious bodily harm, he was in a mental state that amounted to a *subjective* loss of self-control (Sullivan, Crombag, Child, 2021, p. 201).

According to S. Edwards, the *Coroners and Justice Act 2009* s. 55(3), 'loss of self-control' manslaughter, acknowledges 'fear of serious violence' as a 'qualifying trigger' which may 'cause' a defendant to lose self-control and kill another. This new provision is the result of both public and legal recognition that the former defence of manslaughter-provocation, in relying on the presence of anger to precipitate loss of self-control, and in requiring an immediate response to provocation, excluded the delayed and chronic 'passion' of fear of further violence so often experienced by women victims of intimate partner violence which could 'cause' them to kill the violent partner. The law also recognises that fear, which includes heightened anxiety and anticipation of future violence, may cause women victims of domestic abuse to kill the abusive partner in circumstances where their 'reaction' to the deceased's last act is delayed. Notwithstanding the introduction of fear as a qualifying trigger, the legal and everyday construction of loss of self-control continues to contemplate and interpret this behaviour within an anger template (Edwards, 2019, p. 82).

Traditionally, we have attributed the loss of self-control to a state of indignation or anger, quite possibly because these emotions spurn external signs of loss of self-control which are easily detectable, whereas emotions such as fear do not (Clough, 2010, p. 120). Loss of self-control in anger is traditionally characterised by external signs of rage and, in particular, the extremity of the violent response. Fear might be associated with external signs which are not easily detectable; perhaps being characterised more typically by paralysis and submission, while retaining the ability to respond with a single act of homicidal violence (Horder, 2005, p. 129).

According to A. Clough, the Section. 55(6)(c) of the *Coroners and Justice Act 2009* means that when considering if the loss of self-control had a qualifying trigger, one must disregard things done or said which constituted sexual infidelity. The report of the Law Commission preceding this change to the law eventually formulated by the government did not mention an exclusion of this kind. A sole confession of sexual infidelity and subsequent killing from anger and jealousy should not partially excuse such actions (Clough, 2012, p. 382).

Williams case (*R v Williams* (Sanchez) Attorney General's Reference...) was an appeal, in June 2011, on the ground of undue leniency against a man's sentence for murder of life imprisonment with a minimum specified term of fifteen years. Entering the home of his former partner in the middle of the night, he had killed her in a prolonged beating in front of their three-year-old daughter while shouting: 'Have you slept with him?' His sentence was increased to twenty years. Its attention drawn to Section 55(6)(c) of the *Coroners and Justice Act 2009* (i.e., the sexual infidelity exclusion clause), the Court stated that Section 55 was concerned with the substantive criminal offence of murder, not with the determination of the minimum term for murder (A. Howe, 2013, p. 426).

2. Germany

German law does not know of a concept of partial defences in the meaning traditionally given to provocation, now loss of control, and diminished responsibility in English law. Diminished respon-

sibility as a sentencing factor exists (Absatz 21)[6] and is applicable to all offences, not just to murder. Loss of control as such is not a recognised separate defence at all but may form the basis of a number of recognised defences or sentencing options. In fact, German law would appear to put both loss of control and diminished responsibility in the same conceptual drawer as far as their defining mental characteristics are concerned and the two concepts may overlap in the individual case. While certain provisions recognise the impact of provocation on the sentencing frame (Absatz 213), the fact that someone was provoked can under the general sentencing provision of §46 also apply in the sentencing stage of any offence (Reed, Bohlander, 2011, p. 391).

Strong emotions like anger, hate or fear, however, may under certain circumstances result in a profound consciousness disorder, which excludes or reduces the defendant's ability to control his action, i.e., that loss of control can lead to lack of criminal responsibility due to mental illness (insanity in terms of Absatz 20) or a diminished responsibility (Absatz 21). In practice, courts are very reluctant to accept affects as a (partial) defence. The high threshold of a profound consciousness disorder is seldom met because—as the Federal Supreme Court has pointed out—all mentally sane people can be expected to control themselves even in emotionally disturbed situations.

According to Absatz 211 of the German criminal code (*Mord*) 'A murderer is someone who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence. Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life'.

Absatz 212 (1) (*Totschlag*) states that 'Whosoever kills a person without being a murderer under Absatz 211 shall be convicted of murder and be liable to imprisonment of not less than five years'. In especially serious cases the penalty shall be imprisonment for life (Paragraph 2) (Strafgesetzbuch (StGB) – dejure.org...).

Like other legal systems, German law divides intentional homicide into a more serious offence, *Mord,* and a less serious one, *Totschlag.* In the German criminal code, *Mord* is not the basic crime which may be reduced to *Totschlag* by certain extenuating circumstances, but the less serious offence, *Totschlag,* is the unqualified case of intentional killing which is raised to the more serious one, *Mord*, either if committed with deliberation or from a specific criminal motive; murderous lust, sexual lust, greed, or for the purpose of committing another offence (Grunhut, 1961, p. 174).

According to Absatz 213 (*Minder schwerer Fall des Totschlags*) 'Whoever kills a person under the conditions of Absatz 212 without any fault on their own part on account of being provoked to rage by ill-treatment of or serious insult to themselves or a relative by the person killed and being immediately carried away by that rage to commit the offence, or in the event of an otherwise less serious case, the penalty is imprisonment for a term of between one year and 10 years' (StGB...).

Absatz 213 regulates the less serious case of manslaughter if the victim inflicted a serious insult on the perpetrator and the perpetrator was thereby provoked to anger and carried away an action (Kindhäuser, Neumann, Paeffgen, 2005). In the context of homicide offences, Absatz 213 recognizes provocation as a partial defence to voluntary manslaughter (Absatz 212 – 'Totschlag'). It applies if the defendant kills the victim out of justified anger, which presupposes that he was provoked to rage by a physical or psychological mistreatment or an (objectively) serious insult. Notably, Absatz 213 is excluded if the defendant has culpably caused the provocation in such a way that it can be regarded as proportional reaction to his previous behaviour. If the defendant's loss of control results from a

[6] Strafgesetzbuch in der Fassung der Bekanntmachung vom 13.11.1998 (BGBl. I S. 3322) zuletzt geändert durch Gesetz vom 04.12.2022 (BGBl. I S. 2146) m.W.v. 09.12.2022.

profound consciousness disorder, the general provision of insanity (Absatz 20) or a diminished responsibility (Absatz 21) apply. The partial defence of provocation (Absatz 213) reduces the standard sentencing range for voluntary manslaughter of imprisonment of not less than five years (Absatz 212) to imprisonment from one to 10 years (Ambos, Bock, 2022).

The difference in German law, however, is that the existence of sufficient provocation to warrant a conviction in accordance with Absatz 213 is not properly characterised as a partial 'defence' as English law regulate that notion. It is not understood as something that is essentially for the defendant to raise and for the prosecution to disprove beyond doubt. The sufficiency of the provocation is something for the court to investigate *ex officio* (Horder, 2007, p. 14).

T. Oppenhoff has emphasized that 'infidelity is a serious insult to the other spouse' ('Der Ehebruch ist eine schwere Beleidigung des anderen Ehegatten') (T. Oppenhoff, F. Oppenhoff, 1888, p. 494). This understanding of honour is outdated today and hardly imaginable in Germany. Adultery was an example of a grave insult (Kohlrausch, Lange, 1961, p. 480) until the judiciary became increasingly reluctant to classify infidelity in that manner (Frevert, 2014, p. 249). The courts might accept a serious insult in the case of adultery (Kindhäuser, Neumann, Paeffgen, 2005), but since the late 1970s, Absatz 213 has been rejected in these cases (Tellenbach, 2007, p. 787). According to S. Tellenbach, regardless of the reduced sentence for manslaughter, adultery in some cases constituted a grave insult to the betrayed spouse because of the 'rival' (Thomas, 2007, p. 136).

3. Italy

By the Great War, a complex body of penal laws, institutions, and reform initiatives had taken shape, including Italy's first national criminal code in 1889; two codes of penal procedure (1865 and 1913); national prison regulations in 1891; two sets of public-security (or police) statutes (1865 and 1889) (Garfinkel, 2016, p. 2).

While the 1889 *Codice penale italiano* (GU n.153 del 30-06-1889) did not explicitly mention honour issues as extenuating circumstances in those homicides where the perpetrator had caught his wife in the act of adultery (*in flagrante adulterio*), the *Codice penale* of 1931 (GU n.251 del 26-10-1930...) openly acknowledged and vastly expanded the applicability of the 'honour cause'. The relevant Article 587 read: 'Whoever discovers unlawful sexual relations on the part of their spouse, daughter or sister and in the fit of fury occasioned by the offence to their or their family's honour causes their death, shall be punished with a prison term from three to seven years. Whoever, under the same circumstances, causes the death of the paramour of their spouse, daughter or sister shall be subjected to the same punishment' (Bettiga-Boukerbout, 2005, p. 234).

There are two important aspects in the rules introduced by the *Codice penale* of 1931: the fact that the penalties, ranging from three to seven years, are linked to an autonomous case of indictment and the fact that, unlike the 1889 Code, the discovery of the victims in blazing offence (*in flagrante delicto* or *in ipsis rebus venereis*) is not required. In fact, the norm indicates a generic 'fit of fury' which can also be determined by the indirect discovery—founded letters, a confession—of an extra-marital relationship (De Cristofaro, 2018, p. 3).

Finally in 1981, Article 587 of the 1931 Code was repealed when honour was dropped as an extenuating circumstance. The *Legge 442/1981* (Legge 5 agosto 1981, n. 442...) abolished all attenuating factors regarding motives of honour and therefore all the provisions that had contemplated it were abrogated or altered (Guarnieri, 2009, p. 47). These cases included: 'honour-related homicide' (Art. 587), 'honour-related infanticide' (Art. 578), 'honour-related abandonment of a newborn' (Art. 592) (Verso un nuovo codice penale...).

According to Title XII of the Italian criminal code ('Crimes against the person'), Part I ('Crimes against life and personal safety'), Article 575 (Homicide – Omicidio), 'Anybody who causes the death of a person is liable to imprisonment for a term not less than twenty-one years'. It is the general norm concerning murder.

Article 576 (Aggravating circumstances) states that 'Life imprisonment is applied if the action referred to in the previous article has been committed: (1) when one of the circumstances indicated in Point two of Article 61 occurs; (2) against an ascendant or descendant, when one of the circumstances indicated in Points 1 and 4 of Article 61 occurs or when poison or other insidious means have been applied or in case of premeditation; (3) by a fugitive escaping from the arrest, the capture or the imprisonment, or in order to procure means of subsistence during the furtiveness; (4) by associate committing a crime, escaping from the arrest, from the capture or the imprisonment; (5) during an action commissioned in order to commit one of the crimes mentioned in Articles 519, 520, and 521.

The fugitive is, to the effects of the criminal law, anybody who is in the conditions listed in Point 6 of Article 61 (Codice Penale...).

Article 577 regulates 'Other aggravating circumstances'. The penalty of life imprisonment is applied if the action mentioned in Article 575 is committed: (1) against an ascendant or descendant; (2) with means of poisonous substances, that is as well with other insidious means; (3) with premeditation; (4) when occur any of the circumstances given in Points 1) and 4) of Article 61.

The crime is punishable by an imprisonment for a term from twenty-four to thirty years if the act is committed against the spouse, the brother or sister, adoptive father or mother, or the adopted son, or against anyone similar in the direct line.

On 1 March 2017, the Chamber of Deputies approved Bill n. 2719 ('Modifiche al codice civile, al codice penale, al codice di procedura penale e altre disposizioni in favore degli orfani per crimini domestici').

The following modifications are made to Article 577 of the penal code:

(a) in the first Section, Point 1), after the words: 'the descendant' the following are added: 'or against the spouse, even if legally separated, against the civil union partner or against the person living permanently with the perpetrator or related to him by affective relationship'.

(b) in the second Section, after the words: 'the spouse' the following are inserted: 'divorced, the other partner in the civil union, which is ceased' (Legislatura 17ª – Disegno di legge n. 2719...).

On 9 August 2019, came to effect the *Legge 69/2019* ('Modifiche al codice penale, al codice di procedura penale e altre disposizioni in materia di tutela delle vittime di violenza domestica e di genere').[7] The so-called *Codice Rosso* has increased the protections of victims by criminalization of the murder of a person living permanently with the perpetrator or related to him by affective relationship. Furthermore, the article 11 of the *Legge* 69/2019 made the following changes to the aggravating circumstances of the crime of murder. In the first Section of the Article 577 of the Italian criminal code, the murder against the spouse, even if legally separated, against the civil union partner, or the person living permanently with the perpetrator or related to him by affective relationship is punished with life imprisonment.

The amendments to the second Section of the Article 577 are focused on increasing the severity of punishment, by an imprisonment for a term from twenty-four to thirty years if the act is committed against the divorced spouse; the other partner in the civil union, which is ceased; person linked to the

[7] On 3 April 2019, the Chamber of Deputies passed *Legge 69/2019*. It was approved by the Senate on 17 July 2019 and came to effect on 9August 2019.

perpetrator by stable cohabitation or emotional relationship, which is ceased (Disposizioni in materia di tutela...).

The sentence could only be reduced if certain specified mitigating circumstances are proved: commission of the act from a motive of special moral or social value (Article 62, Section 1, Point 1); partial defect of mind (Article 89); minors (Article 98); mitigating circumstances set out in Article 114, related to participant with minimum importance in the preparation or perpetration of a criminal offence.

Consequently, the generic mitigating circumstances (Article 62-bis) or the so-called 'provocation' (Article 62, Section 1, Point 2), which are usually used by the court to reduce the sentence, are no longer applicable to homicides committed within the family context or which derive from emotional relationships.

Conclusion

The three approaches—the Coroners and Justice Act, German criminal code and Italian penal code—represent different doctrinal visions of the defence. The German law divides intentional homicide in the circumstances very similar to those regulated by Italian legislation. *Mord* is not the basic crime which may be reduced to *Totschlag* by certain extenuating circumstances, but the less serious offence, *Totschlag,* is the unqualified case of intentional killing which is raised to the more serious one, *Mord*, if it is committed from a specific criminal motive.

German law does not know of a concept of partial defences in the meaning traditionally given to provocation, now loss of control, and diminished responsibility in English law. In the context of homicide offences, German criminal code recognizes provocation as a partial defence to voluntary manslaughter. It applies if the defendant kills the victim out of justified anger, which presupposes that he was provoked to rage by a physical or psychological mistreatment or an (objectively) serious insult.

The difference in German law is that the existence of sufficient provocation to warrant a conviction in accordance with Absatz 213 is not properly characterised as a partial 'defence' as English law regulate that notion. It is not understood as something that is essentially for the defendant to raise and for the prosecution to disprove beyond doubt. The sufficiency of the provocation is something for the court to investigate *ex officio*.

The *Coroners and Justice Act 2009* does not accept that sexual infidelity should ever provide the basis for a partial defence to murder. In Germany, adultery was an example of a grave insult until the judiciary became increasingly reluctant to classify infidelity in that manner. The courts might accept a serious insult in the case of adultery, but since the late 1970s, Absatz 213 StGB has been rejected in these cases.

The *Codice penale Italiano 1931* openly acknowledged and vastly expanded the applicability of the 'honour cause', but the *Legge 442/1981* abolished all attenuating factors regarding motives of honour and therefore all the provisions that had contemplated it were abrogated or altered. The *Legge* 69/2019 has increased the protections of victims by changes to the aggravating circumstances of the crime of murder.

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The Doctrine of Provocation Defence and a Murder Based on Jealousy

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S u m m a r y

The paper presents the essential characteristics of the qualification of murder motivated by a jealousy in modern comparative legislation. Since this topic causes special attention of legal theory, the author has conducted research which has shown that three approaches represent different doctrinal opinions. By virtue of reforms brought about by the *Coroners and Justice Act 2009*, murder will be reduced to manslaughter if the partial defence of 'loss of control' applies. In the context of homicide offences, *German criminal code* recognizes provocation as a partial defence, but German law does not know of that concept in the meaning traditionally given to diminished responsibility in English law. The *Codice penale Italiano* of 1931 openly acknowledged and vastly expanded the applicability of the ›honour cause‹, but the *Legge 442/1981* abolished all attenuating factors regarding motives of honour and therefore all the provisions that had contemplated it were abrogated or altered. The so-called *Codice Rosso* of 2019 has increased the protections of victims by changes to the aggravating circumstances of the crime of murder.

Provokacinės gynybos ir žmogžudystės, paskatintos pavydo, doktrina

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S a n t r a u k a

Straipsnyje pateikiamos žmogžudystės, paskatintos pavydo, kvalifikavimo šiuolaikinėje lyginamojoje teisėje esminės charakteristikos. Kadangi šiai temai teisės teorijoje skiriamas ypatingas dėmesys, autorius atliko tyrimą, kuris parodė, kad trys požiūriai reprezentuoja skirtingas doktrinines nuomones. Remiantis 2009 m. Koronerių ir teisingumo įstatymu įvykdytomis reformomis, atsakomybė už žmogžudystę bus sumažinta iki atsakomybės už netyčinį nužudymą, jei taikoma dalinė „kontrolės praradimo" gynyba. Žmogžudystės nusikaltimų kontekste Vokietijos baudžiamajame kodekse provokacija pripažįstama kaip dalinė gynyba, tačiau Vokietijos teisėje ši sąvoka nėra tokia, už kurią Anglijos teisėje tradiciškai skiriama sumažinta atsakomybė. 1931 m. *Codice penale Italiano* atvirai pripažino ir labai išplėtė „garbės reikalo" taikymą,

tačiau *Legge 442/1981* panaikino visus švelninančius veiksnius, susijusius su garbės motyvais, todėl buvo panaikintos arba pakeistos visos nuostatos, kurios buvo tai numačusios. 2019 m. *Codice Rosso* padidino aukų apsaugą, pakeisdamas sunkinančias nužudymo nusikaltimo aplinkybes.

Vukan Slavković graduated from University of Belgrade Faculty of Law in April 2007. He defended PhD thesis at the University of Nis entitled 'The attempt in criminal law' (2014). Since December 2014 he has been working as a professor of criminal law and criminal procedural law at the College of Criminalistic and Security in Nis. In 2016, he was appointed as an assistant professor at the Faculty of Law for Commerce and Judiciary in Novi Sad, where he was also appointed as an associate professor in 2021. His area of interest includes legal-theoretical analysis of legal norms and qualification of actions realized within the unfinished criminal activity. Since 2018/19 he is hired as a visiting professor at the Faculty of tourism and hotel management in Kotor. His main areas of teaching and research are: Tourism law, Business law in tourism, Tourism law of European Union.

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