

Why Honour Killings are Legally Problematic under Shariah and Criminal Jurisprudence

This Legal Opinion is submitted to the members of the Criminal Law Reform Working Group in Afghanistan for discussions on the elimination of the honour defence and mitigation under the Penal Code.

Introduction

Criminal law, while upholding the principles of punishment, deterrence and justice, provides for mitigating circumstances in some cases. In family dishonour cases, courts have considered the background of such dishonour to determine the culpability of a defendant. Honour killings are typically perpetrated upon women by male members of their family. Such killings are reported in a wide number of countries according to a [2002 UN report](#).

Why Honour Killings are legally problematic

Honour killings are often equated to the defence of ‘sudden and grave provocation’, meaning the subject was suddenly and gravely provoked such that any reasonable man would have reacted the same way. The problem with equating honour killings with provocation is that they are both significantly different. Mitigation for honour killings cannot be determined based on what is “reasonable” conduct because it is heavily infused with cultural, social and emotional feelings, which are driven by male desires to avenge the dalliance of a female.

Whilst some conducts that are reasonable, or even sympathetic, can or should be mitigated - the very foundations and existence of criminal law is to protect victims, to protect the vulnerable and to guard public safety. Therefore, even where the rights or predicaments of the defendant is concerned, there must be an objective balancing test between “reasonableness” of criminal conduct on the one hand, and the integrity of life and human dignity on the other.

Why honour killings violate the fundamental precepts of Shariah Law

The question we pose to drafters of the new criminal code is: how do you strike an objective and fair balance of “interests” between victim and perpetrator, within the constraints of the Afghanistan Constitution?

In other words, if murder is excused on the basis of honour, how do we reconcile it with Article 23 of the Afghan Constitution, as well as, Islam. In both Article 23 of the Constitution and Islam, the default state of law is to preserve human life and dignity.

It is only in very few exceptions that a human life *may* be taken away or excused (for e.g. death penalty executed by the State in accordance with the law).

The point we are pushing is: not only should any reason that diminishes the value of a person's life and dignity be overwhelmingly convincing on its own, but it must also prove itself against the Afghanistan Constitution and underlying Quranic law on human life and dignity. Reasons such as loss of self-control and heat of passion, anger, betrayal and jealousy cannot dismantle the very rights that Islam intended to protect by the advent of the Holy Quran. That means to say, it is not the duty of human rights activists and lawyers to convince the legislature why the murder of a woman should not be excused through a defence of honour. The default state of every individual is preservation of life and dignity. It is for those who propose the honour defence who must convince us as to why it should supersede the foundations of criminal law, protections under the Constitution, and, the basic principles of Shariah.

To take one unique example: Article 397(1) of the Afghan Penal Code specifies that “a person who instigates another to suicide or, one way or another, *assists someone in an act of suicide*, shall be imprisoned...” This presumes that *even on compassionate and humanitarian grounds*, and even with the consent of the victim, doctors and the family of a dying person simply cannot kill. If ‘mercy killings’ cannot be mitigated, why should ‘honor killings’ be accorded a different treatment in law?

Assisted suicide - however sympathetic and desirable under certain circumstances - cannot supersede the integrity of life and the supreme sovereignty of God over life. Considering the primacy of this principle even in compassionate cases of assisted suicides, why is ‘honour’ - an abstract cultural notion which is susceptible to abuse - legally superior to ‘compassion’, i.e. when one person ends someone's life purely on compassionate grounds? Why do we invoke God's sovereignty over life in cases of ‘assisted suicides’ but not in ‘honour killings’? Surely life still remains within the exclusive jurisdiction of God and laws designed by men cannot delegate such powers upon the hands of family members on their subjective assessment of ‘honour’.

Why honour killings fall short of standards required in criminal law

Having considered the violations of the defence honour on the basic precepts of Shariah, let us now take a look at honour killings mitigation through the lens of criminal jurisprudence.

What is the purpose of criminal law? Apart from abstract notions of crime and punishment, the process must be fair and justiciable. Mitigation is a small element in the judicial toolkit acknowledging the frailties of human nature. While intent (*mens rea*) bears criminal liability, the law adopts a softer view on impulsive reactions. But this is not a boundless discretion bestowed upon courts.

Honour killings are tantamount to encouraging summary executions by private individuals based on communal and/or personal affronts. The defence of Provocation is different. An essential ingredient of ‘provocation’ is loss of self-control. In most legal systems, the standard is higher where provocation requires *immediacy and intensity*. There are temporal and proportionality constraints built into it. This means the defence of provocation is limited by proximity of time between the provoking incident and reaction; the reaction must be immediate. It is also limited in terms of proportionality: the reaction must be proportional to the provoking incident. These concepts are by no means new to the Afghan legal system.

Legal safeguards are necessary for people who do not, or cannot understand the implications of their actions on account of mental incompetence generally (eg. insanity) or within a given period (eg. inebriation). Similarly, provocation defence assumes that reasonable and deliberate choices would have been made, but for, a sudden lapse in judgment in the moment of intense emotions. That is to say, mitigation is only permitted to a moment and context, where an otherwise non-criminal mind disintegrates enough to perform a criminal act. Implied in this reasoning is that the Court has to find that:

- a) there was a change of state from a sound mind to an unsound mind;
- b) that the change occurred immediately;
- c) that the change resulted from a serious provocation;
- d) that the response was proportional to the provocation;
- e) and failing which, the subject would be held criminally liable.

However in an honour killing defence, mitigation is not premised on points (a)-(e). The mitigation applies regardless, i.e. even a man of sound mind possesses a default right to kill in the event dishonour, whether perceived or real.



The threshold of ‘sudden and grave provocation’ differs on a case-to-case basis. But the defence of honour is fundamentally different in nature. It rests on cultural norms while the perpetrator is fully aware of his actions. Just as personal prejudices are not permitted as a valid legal defence, communal or tribal tradition cannot be entertained by law if they infringe upon others’ lives and safety. Such a localized and regressive legal system will defeat the purpose of generally accepted principles of human behaviour. In addition, honour killings are never precipitated by provocation (as required by law) to constitute an adequate defence. Instead they are premeditated acts of homicide committed by conscious minds that calculate the consequences of ‘dishonour’, analyse its subjective effects upon themselves and then proceed to inflict a deliberate loss of life upon a member of the family.

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A legal and academic initiative that develops court-room and advocacy arguments to defend the rights of women under Islamic and International law.