

10 A Language of Hybridity

Honour and Otherness in Canadian Law and Shari'a

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Introduction

In Canada, as throughout most of the geopolitical West, honour crimes have recently been the object of growing hostility. The federal government sparked controversy when it indicated in a pamphlet given to immigrants upon application for citizenship, that 'Canada's openness and generosity do not extend to *barbaric* cultural practices that tolerate spousal abuse, "honour killings," female genital mutilation, forced marriage or other gender-based violence' (emphasis ours – PF and NR).² Similarly, a recent public policy report underlined that honour crimes are 'proliferating without regards to Canada's *Criminal Code* or Canadians' *deep cultural revulsion* from the very concept' (emphasis mine – PF).³ In many ways, this projection of a 'civilized' Canada simultaneously reifies the notion of shari'a as inherently contrary, even antithetical, to Canadian law. It also contributes to a dichotic, binary vision of law, culture and identity, through which West/East, secular/religious, or public/private are never mutually constitutive.

Perhaps due to this (mis)perception of law, the ancient notion of honour in law has sparked a perplexing resurgence in public debate in Canada and in the West generally, fuelled by an international campaign for women's rights,⁴ but also by the other great legal issue of the last decade: the widespread discussions on the limits of multiculturalism. Yet honour is no foreign notion to Western law, including Canadian law. Despite such vehement discourse around the otherness of honour crimes in seeming opposition to Canadian law, an examination of the latter reveals the existence of a defence of provocation, or 'passion,' that mirrors the very nature of honour crimes. However this defence – the roots of which may be found in the defence of honour of the French and British Penal Codes of the nineteenth century – is never confronted with the same apprehension, vehemence and perceived otherness as is the notion of honour crimes.

In this chapter, we outline how socio-legal 'hybridity'⁵ manifests itself in the notion of honour in law. By outlining the complex transplantation processes of Western notions of honour crimes onto Islamic legal norms, our aim is to provide a descriptive basis for normative discussions on cultural diversity. In addition to challenging the perceived otherness of various aspects of shari'a (versus the familiarity of Canadian law), the chapter attempts to illustrate the incoherence of the rigidly dichotic view of law and culture, all of which interact with, transplant into and impact one another. This chapter approaches the hybridity of both the East and the West and stresses that negating the similarity between Western and Eastern legal institutions has the potential to considerably impair our understanding of cultural and legal diversity.

Law, a Language of Hybridity?

Multiculturalism⁶ has guided Canadian policy throughout recent history so as to account for the hybridity of identity, born of the intersection and interaction of innumerable cultures in a country founded on immigration. Despite this reality, however, Canadian law is largely portrayed as minimally impacted by 'other' legal regimes;⁷ this portrayal is exemplified by, amongst other things, an editorial that appeared in the *National Post* in 2011, reporting that there have been twelve known honour killings in Canada since 2002 and calling for community action against minority 'brutal traditions,' stressing that honour killings are 'anathema to Western culture.'⁸ If Canadian law is depicted as Western, secular, *familiar*, it can do so by conveniently positing itself on one side of a binary, implicitly asserting that it is not Eastern, not religious, not like *other* legal systems. Such implicit assertions often become, with time and repetition, the unstated norms⁹ of the Canadian justice system.

Allowing the focus of this chapter to shift back to that of a critically comparative examination of legal regimes, it becomes apparent that without turning the 'ethnocentric gaze'¹⁰ back upon itself so as to perceive the unstated norms at the heart of Canadian law, 'other' law – in this case shari'a – cannot in turn be properly perceived. The self must recognize that, within itself, there is the other; only then can it recognize that in the other, so there is some self. Law is inherently hybrid, and Canadian law is no exception. It is hoped that the following examination of honour in both Canadian and Jordanian law may help to illustrate that 'the colonial binaries – of us/them, here/there, West/non-West, colonizer/colonized – have long been mutually constituting.'¹¹

Familiar Facts from West to East

In this section, an applied examination of the notion of honour is undertaken in two apparently disparate legal regimes: Canadian law (secular law)¹² and Jordanian law (shari'a).¹³ Ultimately, the purpose of this examination is to exemplify the hybridity of law, and the incoherence of a binary vision of law, according to which the East and West are irreconcilably separated, to the point of being defined in opposition to one another. We argue that only by looking inwards to recognize the otherness in Canadian law¹⁴ can one learn to see past the otherness of the other.

THE OTHER WITHIN: (DIS)HONOUR IN CANADIAN LAW

Turning the gaze back upon itself, the legitimacy of the perceived otherness of shari'a (and familiarity of Canadian law) must first be explored within a Canadian legal and socio-political context. After tracing the genesis of honour in medieval British law, this study exposes some of the Canadian legal system's concrete implications for honour, in the guise of passion and provocation, as a discursive practice. We will argue that this defence can be seen to amount, in some applications, to a form of Western 'honour'-tainted defence, and that it constitutes a worrying source of legitimization of gender violence.

The defence of provocation is a British legal institution which can be traced back at least to the seventeenth century,¹⁵ and whose pre-modern articulation was grounded in honour-permeated value codes. This defence was invoked when the accused, having been a witness to his wife's adultery, killed his paramour. Chief Lord Justice Holt worded the rationale behind the defence in 1707 thus: 'jealousy is the rage of a man, and adultery is the highest invasion of property.'¹⁶ As put by British criminal law scholar G.R. Sullivan, early provocation defence amounted to a 'hot-blooded yet controlled vindication of one's honour rather than spontaneous, uncontrolled fury.'¹⁷ The very foundations of this legal institution seem tainted with notions of male honour upheld by violence.

Contemporary forms of the defence of provocation in Canada have been presented as possessing a wholly different normative foundation. This defence was defined by the Supreme Court of Canada as compassion towards 'human frailties which sometimes lead people to act irrationally and impulsively.'¹⁸ The defence's modern *raison d'être* is thus said to have completely shifted from upholding a male-centric Western honour code to accounting for the universal human weakness of

momentary 'irrationality'.¹⁹ This is still defended by many scholars in the common law world as a valid justification for the maintenance of the partial defence today.²⁰ In keeping with this universal, individualistic rationale, Canada's *Criminal Code* outlines that murder may be reduced to manslaughter 'if the person who committed it did so in the heat of passion caused by sudden provocation.'²¹ The *Code* further establishes that '[a] wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.'²²

In Canada, a collective framework of honour such as that found in many countries of the East is hard to fathom, as the sociological organization of gender violence within the family seems to forbid it. For the period between 1978 and 1998 in Canada, 66 per cent of family femicides²³ were perpetrated by the woman's partner, while only 26 per cent were perpetrated by parents, siblings and other relatives.²⁴ That being said, Baker, Gregware and Cassidy note that 'in the English-speaking West, including the United States, the locus of honour has shifted from the traditional extended family to the individual man.'²⁵

This evidence of Canadian 'honour' seems to belie the claim that 'honour values are *exclusive* and *particularist* and stand in sharp contrast to the *universal* and *inclusive* values of the West.'²⁶ The otherness of honour crimes and shari'a may not be so foreign to Canadian values and legal practices as one would imagine; the private forms that honour takes and the West's cultural violence that is sometimes unleashed under the guise of universalistic passion must not be overlooked. It, too, is concerned with *some* form of honour, however unseen and pushed to the 'private' sphere. Intimate passion crimes – that is, crimes committed in the intimacy of one's private life – are thus a particularly important locus of public policy and gender equality concerns. After all, the often-denounced subjectivization of the defence in cases like Supreme Court of Canada in *R v Thibert*²⁷ arguably offers women no more protection than the honour codes of the British medieval provocation defence, as argued by Abu-Odeh.²⁸ Furthermore, Western 'crimes of passion' may sometimes be more dangerous than the traditional Oriental honour crime, as they draw legitimacy from unstated private honour codes.²⁹ If it is true that honour and passion are two different realities, it is only by acknowledging the West's own cultural demons that we will be able to begin to understand the ways in which both passion and honour have been mixed and articulated in myriad ways across the East/West divide.

FAMILIARITY OF THE OTHER: PERSPECTIVES FROM JORDAN

Jordan, 'the country most intensely under the international spotlight when issues of "honour" are discussed,'³⁰ is a most relevant case study, seeing as it has, according to some accounts, the highest honour crime rate per capita in the world.³¹ Furthermore, it underlines the partly Western origins of honour crimes, despite the latter being recently attacked as 'antithetical to fundamental Canadian values' by Ontario Court of Appeal Justice Doherty.³² Article 340 of the Jordanian Penal Code reads:

1. He who surprises his wife or one of his [female] *marhams* ('unlawfuls') in the act of committing unlawful sexual intercourse with somebody and kills, wounds or injures one or both of them, shall benefit from the exonerating/exempting excuse ('*udhr muhill*);
2. He who surprises his wife or one of his ascendants or descendants or siblings with another in an unlawful bed, and kills or wounds or injures one or both of them, shall benefit from the mitigating excuse ('*udhr mukhaffat*').³³

There is scholarly consensus that this legislation was directly inspired by the French Penal Code of 1810.³⁴ As put by Janin and Kahlmeyer, this provision 'springs from French, i.e., Napoleonic, penal law, not from shari'a itself.'³⁵ Article 340 of the Jordanian Penal Code received the influence of French Napoleonic law through various channels, notably through the regional influence of French Lebanese and Syrian penal codes' honour crime excuses, from which article 340 'derived most of its language.'³⁶ As a result, the similarities between French honour crimes law and the Jordanian provision were glaring. Article 324 of the French Penal Code of 1810 reads:

Whoever catches his spouse, female ascendant, descendant or his sister red-handed in the act of adultery or in an illegitimate sexual encounter with another person and commits homicide or causes injury can benefit from an excuse of exemption. The author of the homicide or injury can benefit from an excuse of reduction if he catches red-handed his spouse, female ascendant, descendant, or his sister in an 'attitude équivoque.'³⁷

This direct transfer of one legal institution from the West to the East can be analysed as a form of 'legal transplant' which has contributed to

the 'globalizations of law and legal thought' described by Duncan Kennedy.³⁸ Jordanian law also contains elements of 'crimes of passion,' such as article 98 of the Jordanian Penal Code, which excuses murders committed in a 'fit of fury.'³⁹ This provision is said to have been 'much more useful'⁴⁰ to the accused than article 340, though it has attracted less media attention than the latter provision. Jordanian courts 'frequently apply article 98 of the Penal Code to honour killings,'⁴¹ effectively treating them as a form of 'crime of passion.' Thus, Jordan appears to have crafted its 'appalling' honour crimes legislation at the confluence of Western and Oriental traditions.

Fear and Marginalization of the 'Other' in Canadian Society

In this section, we attempt to illustrate how the combined unawareness of unstated norms within Canadian law and overstated otherness of shari'a have given rise to differential treatment in Canadian courts based on the otherness of the accused, seen as foreign to Canadian values and law. It is important to note that this section in no way condones gender inequality and gendered violence, too often justified by a defence of 'honour,' 'passion' or provocation. However, without considering the very unstated norms at the heart of Canadian law that inflate the perceived otherness of shari'a, the discrimination caused by such a dichotic vision of law and culture will continue, and the internal flaws of Canadian law will remain occulted.

A study undertaken by Pascale Fournier, Pascal McDougal and Anna Dekker⁴² collected and analysed a series of Canadian cases, between 1990 and 2010, of intimate femicide where the male accused (the victim's husband,⁴³ brother or father) raised the provocation defence.⁴⁴ Fifty-six cases were classified according to the ethnicity of the accused and the success or failure of the defence claim,⁴⁵ so as to examine the sensitivity of Canadian courts to the legal hybridity heretofore discussed in this chapter.⁴⁶ Disconcertingly, this study revealed that the success rate is differentiated and significantly higher for an accused identifiable as 'Western' (25 per cent); indeed, it is nearly twice as high as that of 'other' (*sic!*) accused (11 per cent). This study thus concurs with Côté, Sheehy and Majury that there seems to be among Canadian courts 'a pattern of withholding "compassion" for a certain category of accused.'⁴⁷

A differential treatment such as that seen above surely impacts Muslim Canadians not only in the administration of justice in Canada, but also throughout society. Katherine Bullock and Gul Joya Jafri point at the potentially insidious influence of unstated norms upon society –

particularly as these norms are ignored by the very individuals and institutions that perpetuate them – observing that ‘non-Muslim Canadians are often not conscious of the general media bias against Islam and Muslims, often having, in fact, their opinions of Muslim women shaped by the negative stereotypes [...]’.⁴⁸ The overstated otherness attributed to Islam, and specifically the notion of honour as it is perceived within Islam, can be seen to be a symptom of a broader, subtle denigration of Muslim identity within Canadian society, in turn furthering differential treatment within and beyond the administration of justice.⁴⁹

One of the cases analysed in the above study, *R v Humaid*,⁵⁰ offers interesting insight into the possible explanations for this differential treatment. Adi Humaid, an Emirati, killed his wife Aysar Abbas by stabbing her ‘at least 19 times’ after she had made a comment which he interpreted as meaning that she had committed adultery. Humaid assigned Dr Ayoub, an ‘an expert on the Islamic religion and culture,’⁵¹ to support his provocation claim. Dr Ayoub ‘testified that the Islamic culture was male dominated and placed great significance on the concept of family honour’⁵² and that this contributed to provoking Mr Humaid’s violent outburst. The Court of Appeal found that there was no air of reality to the defence and maintained the verdict of murder, refusing to grant consideration to the appellants’ ‘beliefs’ to reduce the verdict to manslaughter. As put by Ontario Court of Appeal Justice Doherty: ‘The difficult problem, as I see it, is that the alleged beliefs which give the insult added gravity are premised on the notion that women are inferior to men and that violence against women is in some circumstances accepted, if not encouraged. These beliefs are antithetical to fundamental Canadian values, including gender equality.’⁵³

The Ontario Court of Appeal’s decision to unequivocally condemn gendered violence is commendable; however, the way in which the message is conveyed, and particularly the reasoning behind this judgement, contrasts discerningly with cases such as *Thibert* and *Stone*.⁵⁴ Isabel Grant, law professor at the University of British Columbia, makes a similar argument:

The Court of Appeal in *Humaid* is recognizing the importance of gender equality in attributing qualities and characteristics to the ordinary person. One would be hard pressed to argue that the kind of stereotypical misogyny, depicted in *Humaid*’s evidence as ordinary in his culture, should be incorporated into an objective test in order to excuse spousal murder. What is not mentioned, however, is how courts assume the ordinariness of the values demonstrated in cases like *Thibert* and *Stone*.⁵⁵

The unstated norm – that is, the ‘ordinary person’ so ambiguously referred to above – would therefore appear to be grounded in cultural notions of male dominion. Ironically, this same notion is what led the Ontario Court of Appeal to so vehemently dismiss Humaid’s defence plea, denouncing such a notion as ‘antithetical to fundamental Canadian values.’⁵⁶ Indeed, the objective ‘ordinary person’ component of the defence is nothing but an ‘anthropomorphic expression of the standard of conduct that our society expects of its members.’⁵⁷ This ‘ordinary person,’ the determination of which is inherently subjective, underscores the courts’ role as ‘cultural apparatus[es],’⁵⁸ for the definition and determination of such a person presents courts with the imperative of giving substance to their legal conception of ‘ordinary.’

This is not to say that it is unfair to ‘punish a member of a minority culture under laws or norms reflecting those of the majority culture.’⁵⁹ Such a defence in the context of honour/passion-related violence would not only endorse essentialist views on the barbarism supposedly inherent to ‘other’ cultures,⁶⁰ it would equally condone acts of gendered violence. Rather, the argument made here is that courts should treat femicides committed by Westerners with the same scrutiny as those committed by foreigners of ‘Oriental’ origin (the imperfect category of ‘Other(ed)’ in our study) generally; this is why we very consciously abstain from entering into the debate on the consideration of a defendant’s culture in the case of a provocation defence as part of the objective standard test.⁶¹

It remains necessary, however, to distinguish between condoning gendered violence and denigrating or alienating a culture as a whole. In the context of an inclusive and diverse Canada, respect and dialogue between disparate groups are fundamental principles. Yet to condemn the ‘other’(ed) as antithetical to Canadian values is to effectively ostracize and silence this group, undermining the very values such a condemnation would seek to protect.⁶²

Conclusion

In this chapter, we have attempted to illustrate that ‘culture’ and ‘honour’ are not monolithic notions but rather historical hybrid constructs. Recent debates on legal transplantation have focused on whether the process leads to ‘a convergence of social orders and uniformisation of law’⁶³ or, inversely, to a ‘double-fragmentation of world-society ... and a multiplicity of global cultures.’⁶⁴ In fact, law is becoming more homogeneous *as well as* more fragmented as a result of legal transplantation.⁶⁵ A

form of exchange between legal regimes has led to the return of Western transplants, now 'other'(ed) in a sense, ready to intertwine themselves subtly yet profoundly into Western societies. With this in view, Leti Volpp's assertion that 'monoculturalism of transcendent values with a "we" or "us" at an unwavering center of rationality [is] historically inaccurate, relying upon distortions and marginalizations for its narrative coherence'⁶⁶ proves very relevant; this very misperception would nonetheless seem to lie at the heart of Canadian courts' reasoning relative to the notion of honour. Recently, in *R. v. Tran*, the Supreme Court of Canada indicated that the defence of provocation must be informed by 'contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*.'⁶⁷ The Court unanimously established a newfound stringency for the objective part of the provocation test:

[The] criminal law is concerned with setting standards of human behaviour. ... It follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. ... [T]here can be no place in this objective standard for antiquated beliefs such as 'adultery is the highest invasion of property' nor indeed for any form of killing based on such inappropriate conceptualizations of 'honour.'⁶⁸

This development does not indicate a bright future for the provocation defence. Hopefully, this judgement echoes the paradigmatic shift of incorporating equality in the law of criminal responsibility advocated by scholars such as Rosemary Cairns Way. On a deeper level, perhaps it can also help us come to terms with the dark sides of 'Western culture.' Without perceiving the subtle yet inherent historical intertwining of honour and provocation, it is hard to imagine how those (mis)perceptions that result in differential treatment may be overcome. Less difficult to imagine is the normative impact that such differential treatment has on Canadian society as a whole. Whether such discrimination in the administration of justice is symptomatic of a more deeply rooted fear of the Other, or a catalyst of this, it likely remains indicative of a troubling ostracism of minority citizens in Canadian society, including Muslims. Let us hope that the trend towards equality reinforced by the *Tran* ruling allows Canadian courts to better 'turn the gaze back on itself' and to grasp the far-reaching implications that globalization, colonialism, and socio-legal *métissage* may have for the Western Self and its many 'Others.'

Notes

- 1 We thank Pascal McDougall and Anna Dekker: our co-authored article, 'Dis-honour, Provocation and Culture: Through the Beholder's Eye?', *Canadian Criminal Law Review*, 2012 (Vol. 16) was a great inspiration for this chapter.
- 2 *Study Guide – Discover Canada: The Rights and Responsibilities of Citizenship*, available online at <http://www.cic.gc.ca/english/resources/publications/discover/section-04.asp>. See also: Bryn Weese, 'Honour killings term angers Trudeau', *The Toronto Sun*, 14 March 2011.
- 3 Aruna Papp, 'Culturally Driven Violence Against Women: A Growing Problem in Canada's Immigrant Communities', *Frontier Centre for Public Policy*, 2010, p. 10 [emphasis added].
- 4 Yolanda Asamoah-Wade, 'Women's Human Rights and "Honor Killings" in Islamic Cultures', *Buffalo Women's Law Journal*, 1999-2000 (Vol. 8, No. 21).
- 5 Used in this context to describe the transplantation of legal institutions into one another, thus shaping new hybrid legal and social mores. See: Homi K. Bhabha, *The Location of Culture* (London/New York: Routledge, 1994) for an analysis of the concept.
- 6 See: Canadian Charter of Rights and Freedoms, art. 27.
- 7 See: Pascale Fournier, Aida Setrakian and Pascal McDougall, 'No-Fault Talaq: Islamic Divorce in Canadian Immigration and Family Law', in: Rubya Mehdi & Jørgen S. Nielsen (eds.), *Anthology on Gender Equality and Muslim Law of Divorce*, Copenhagen: DJØF Publishing, 2012.
- 8 Barbara Kay, 'Communities Must Speak Out Against Brutal Traditions', *National Post*, 26 January 2011. This echoes the dominant media coverage of European Muslim minorities and 'honour' violence: see: Anna Korteweg & Gökçe Yurdakul, 'Islam, Gender, and Immigrant Integration: Boundary Drawing in Discourses on Honour Killing in the Netherlands and Germany', *Ethnic and Racial Studies*, 2009 (Vol. 32, No. 2), p. 218.
- 9 Brenda Cossman elaborates on the importance of unstated norms as she writes that 'the geopolitical location of the author becomes the unstated norm against which the exotic "other" is viewed. It is a project that is perhaps inherently ethnocentric – there is no way to escape or transcend the ethnocentric gaze.' Brenda Cossman, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial', *Utah Law Review*, 1997 (Vol. 2), p. 525.
- 10 Cossman, 'Turning the Gaze Back on Itself', 1997, p. 526.
- 11 Cossman, 'Turning the Gaze Back on Itself', 1997, p. 526.
- 12 Despite often being defined in stark contrast to any form of religious law, Canadian 'secular' law has not only been greatly influenced by religion in the past – more predominantly Christianity – it furthermore continues to be impacted and in some ways shaped by current-day practices of various religious legal regimes. See: Fournier, Setrakian & McDougall, 'No-Fault Talaq', 2012.
- 13 It is important to note that this chapter refers specifically to Jordanian family law when speaking of the shari'a legal regime in Jordan, as not the entire Jordanian legal regime is Islamic.

- 14 This is to say, the transplantation of elements of foreign or 'other' legal regimes in present-day Canadian law. The term 'legal transplant' was first proposed by Alan Watson in the 1970s to describe what he saw as the migration of legal rules or practices 'from one country to another, or from one people to another.' Alan Watson, *Legal Transplants*, 2nd ed, Atlanta: University of Georgia Press, 1993, p. 21.
- 15 United Kingdom Law Commission, *Partial Defences to Murder*, Consultation Paper No. 173, London: Her Majesty's Stationery Office, 2003, p. 6.
- 16 Regina v. Mawgridge (1708), Sir John Kelyng's Reports of Crown Cases, No. 119, pp. 1107ff at p. 1115, available online at <http://www.commonlii.org/uk/cases/EngR/1708/24.pdf>.
- 17 G.R. Sullivan, 'Anger and Excuse: Reassessing Provocation' *Oxford Journal of Legal Studies*, 1993 (Vol. 13), p. 422; see also: Bernard J. Brown, 'The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law', *American J of Legal History*, 1963 (Vol. 7, No. 4), p. 312.
- 18 *R v Thibert*, Supreme Court of Canada (SCR), 1996, paragraph 4.
- 19 Joshua Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' *Journal of Criminal Law & Criminology* (Vol. 73, No. 2), 1982, p. 459; see also: Graeme Coss, "'God is a righteous judge, strong and patient: and God is provoked every day.'" A Brief History of the Doctrine of Provocation in England', *Sydney Law Review*, 1991 (Vol. 13, No. 4), p. 604.
- 20 Wayne N. Renke, 'Calm Like a Bomb: An assessment of the Partial Defence of Provocation', *Alberta Law Review*, 2010 (Vol. 47, No. 3), p. 729; see also: Jeremy Horder, 'Reshaping the Subjective Element in the Provocation Defence', *Oxford Journal Legal Studies*, 2005 (Vol. 25, No. 1) p. 126-127; Richard Holton & Stephen Shute, 'Self-Control in the Modern Provocation Defence', *Oxford Journal of Legal Studies*, 2007 (Vol. 27, No. 1), p. 49.
- 21 *Canadian Criminal Code*, 1985, s. 232(1).
- 22 *Canadian Criminal Code*, 1985, s. 232(2).
- 23 This chapter uses the term 'femicide' to broadly refer to the 'killing of women, regardless of motive or perpetrator status' (Jacquelyn Campbell & Carol W. Runyan, 'Femicide: Guest Editors' Introduction', *Homicide Studies*, 1998 (Vol. 2, No. 4), p. 348.) Though many feminist scholars have linked this term to a specific discriminatory intent, the killing of a woman because she is a woman, we propose to suspend this otherwise important discussion to examine the continuum of gendered homicides and the variety of cultural motives it can accommodate.
- 24 Daisy Locke & Valerie Pottie Bunge (eds.), *Family Violence in Canada: A Statistical Profile*, a publication by Canadian Center for Justice Statistics, Ottawa: Minister of Industry, 2000, p. 39, available online at <http://www.statcan.gc.ca/pub/85-224-x/85-224-x2000000-eng.pdf>.
- 25 N.V. Baker, P.R. Gregware & M.A. Cassidy, 'Family Killing Fields: Honour Rationales in the Murder of Women', *Violence Against Women*, 1999 (Vol. 5, No. 2), p. 166. See also: Sharon K. Araji, *Crimes of Honor and Shame: Violence against Women in Non-Western and Western Societies*, Anchorage: University of Alaska Press, 2000.

- 26 Halvor Moxnes (ed.), 'Honor and Shame', in: Richard Rohrbaugh, *The Social Sciences and New Testament Interpretation*, Peabody: Hendrickson Publishers, 1996, p. 28.
- 27 See: Rajvinder Sahni, 'Crossing the Line: R. v. Thibert and the Defence of Provocation', *University of Toronto Faculty of Law Review*, 1997 (Vol. 55, No. 1), p. 143.
- 28 Abu-Odeh, 'Honor Killings and the Construction of Gender in Arab Societies' *American Journal of Comparative Law*, 2010 (Vol. 58).
- 29 See: footnote 14.
- 30 Reem Abu-Hassan & Lynn Welchman, 'Changing the rules? Developments on "crimes of honour" in Jordan', in: Sara Hossain & Lynn Welchman (eds.), *'Honour': Crimes, Paradigms and Violence Against Women*, London: Zed Books, 2005, p. 199.
- 31 Kathryn Christine Arnold, 'Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed under the Convention on the Elimination of All Forms of Discrimination against Women', *American University International Law Review*, 2001 (Vol. 16, No. 5), p. 1347.
- 32 *R. v. Hamid*, Ontario Court of Appeal (OJ No 1507/2006), 2006, paragraph 456.
- 33 Cited and translated in Abu-Hassan & Welchman, 'Changing the rules?', 2005, p. 201.
- 34 Abu-Odeh, 'Honor Killings and the Construction of Gender in Arab Societies', 2010, p. 914; see also: Fadia Faqir, 'Intrafamily Femicide in Defence of Honour: The Case of Jordan', *Third World Quarterly*, 2001 (Vol. 22, No. 1), p. 73; Anahid Devartanian Kulwicki, 'The Practice of Honor Crimes: A Glimpse of Domestic Violence in the Arab World', *Issues in Mental Health Nursing*, 2002 (Vol. 23, No. 1), p. 83. The Lebanese honour crimes provision also comes from the French Penal Code; see: Women Living Under Muslim Laws, *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, Nottingham, UK: The Russell Press, 2006, p. 17.
- 35 Hunt Janin & André Kahlmeyer, *Sharia: The Sharia from Muhammad's Time to Present*, Jefferson, NC: McFarland, 2007, p. 146.
- 36 Ferris K. Nesheiwat, 'Honor Crimes in Jordan: Their Treatment under Islamic and Jordanian Criminal Laws', *Penn State International Law Review*, 2004 (Vol. 23, No. 2), p. 274.
- 37 Émile Garçon, *Code pénal annoté*, Paris: Librairie du Recueil Sirey, 1951, p. 151; cited and translated in Abu-Odeh, 'Honor Killings and the Construction of Gender in Arab Societies', 2010, p. 914. It should be noted that this provision of the French Penal Code was repealed only in 1975; see: Danielle Hoyek, Rafif Rida Sidawi & Amira Abou Mrad, 'Murders of women in Lebanon: "crimes of honour" between reality and the law', in: Hossain & Welchman (eds.), *'Honour': Crimes, Paradigms and Violence Against Women*, 2005, p. 115.
- 38 Duncan Kennedy, 'Two Globalizations of Law and Legal Thought: 1850-1869', *Suffolk University Law Review*, 2003 (Vol. 36, No. 3), p. 631.
- 39 Rana Lehr-Lehnardt, 'Treat your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters', *Southern Illinois University Law Journal*, 2002 (Vol. 26), p. 420.

- 40 Catherine Warrick, 'The Vanishing Victim: Criminal Law and Gender in Jordan', *Law & Society Review*, 2005 (Vol. 39, No. 2), p. 337. See also: Lehr-Lehnardt, p. 420.
- 41 Christina Madek, 'Killing Dishonor: Effective Eradication of Honor Killing', *Suffolk Transnational Law Review*, 2005 (Vol. 29, No. 1), p. 62.
- 42 See: Fournier, McDougall & Dekker, 'Dishonour, Provocation and Culture', 2012, p. 183.
- 43 A large definition of 'spouse' was adopted, including men who killed not only their wives but also their common law partners and even their girlfriends. The many cases in which an angry/dishonoured man kills his paramour, or any other man for that matter, were not included. However, this was neither due to lack of interest nor of relevance to the ideas of honour and passion. As mentioned above, the phenomenon of men killing other men over the body of a woman was at the core of Canadian provocation law, most notably in the seminal *Thibert* case. A study that incorporates these killings, while falling outside the ambit of this chapter, is necessary.
- 44 Reference to these cases is included in Appendix A to Fournier, McDougall & Dekker, 'Dishonour, Provocation and Culture', 2012. Cases were researched using Quicklaw, Westlaw Canada and CanLII databases.
- 45 Cases where the accused raised not the provocation defence but only the *anger defence* were not included. The latter was accepted by courts to negate the criminal intent for murder until the Supreme Court rejected it in 2001's *R v Parent*, 1 SCR 761. See: Gary T. Trotter, 'Anger, Provocation, and the Intent for Murder: A Comment on R. v. Parent', *McGill Law Journal*, 2002 (Vol. 47), p. 669.
- 46 See Christina Madek, 'Killing Dishonor', 2005.
- 47 Andrée Côté, Elizabeth Sheehy & Diana Majury, *Stop Excusing Violence Against Women*, p. 16, available online at: National Association of Women and the Law, http://www.nawl.ca/ns/en/documents/Pub_Report_Provocoo_en.pdf.
- 48 Katherine H. Bullock and Gul Joya Jafri, 'Media (Mis)Representations: Muslim Women in the Canadian Nation', *Canadian Woman Studies*, 2000 (Vol. 20, No. 2), p. 38.
- 49 Shahrzad Mojab observes this denigration of Muslim / Arab identity, illustrated through the ascription of characteristics such as patriarchal male honour to racial groups, thus becoming racism. Mojab, a professor at the University of Toronto who acted as expert witness at the Shafia 'honour killing' trial in Canada, notably wrote that '[t]he court case is about Canadians of Afghan – not Arab – origin and I find mass media resort to Arabs and Islam as more than an oversight or error of judgment. Is it by accident that most media coverage "racialized" a crime allegedly perpetrated by Canadian citizens and has given it a distinct Islamic and Arab character?' See: Shahrzad Mojab, 'The mass media in Canada have rushed to ascribe the "honour" killing phenomenon to Arabs and Muslims rather than recognize it as a product of patriarchy', *The Mark*, 19 December 2011, available online at The Mark News, <http://www.themarknews.com/articles/7884-honour-killings-and-the-myth-of-arabness>.
- 50 *R. v. Hamid*, Ontario Court of Appeal (OJ No 1507/2006), 2006, paragraph 456.
- 51 *R. v. Hamid*, 2006, paragraph 67.

- 52 *R. v. Hamid*, 2006, paragraph 67.
- 53 *R. v. Hamid*, 2006, paragraph 93.
- 54 The Supreme Court of Canada has confirmed in *R. v. Stone* that provocation may be used as a sentencing mitigating factor in addition to having served to reduce the verdict. See 1999 CarswellBC 1064, 1999 CarswellBC 1065, *R. v. Stone*, SCR, 1999, paragraph 237.
- 55 Isabel Grant, 'Intimate Femicide: A Study of Sentencing Trends for Men who Kill their Intimate Partners', *Alberta Law Review*, 2010 (Vol. 47, No. 3), p. 813.
- 56 Locke & Bunge, *Family Violence in Canada*, 2000, p. 39.
- 57 Timothy Macklem, 'Provocation and the Ordinary Person', *Dalhousie Law Journal*, 1987 (11), p. 135.
- 58 John L. Caughey, 'The Anthropologist as Expert Witness: The Case of a Murder in Maine', in: Marie Claire Foblets & Alison Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence*, Oxford: Hart Publishing, 2009, p. 323.
- 59 Kumaralingam Amirthalingam, 'Culture, Crime and Culpability: Perspectives on the Defence of Provocation', in Marie Claire Foblets & Alison Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence*, 2009, p. 36.
- 60 For a still accurate if perhaps slightly dated argument on the essentialism promoted by this defence, see: Pascale Fournier, 'The Ghettoization of Difference in Canada: "Rape by Culture" or the Danger of a Cultural Defence in Criminal Law Trials', *Manitoba Law Journal*, 2002 (Vol. 29, No. 81). See also: Daina Chiu, 'The Cultural Defence: Beyond Exclusion, Assimilation, and Guilty Liberalism', *California Law Review*, 1995 (Vol. 82), p. 1053.
- 61 See: David M. Paciocco, 'Subjective and Objective Standards of Fault for Offences and Defences', *Saskatchewan Law Review*, 1995 (Vol. 59, No. 2), p. 300; Wayne N. Renke, 'Calm Like a Bomb', 2010, p. 747; Peter Westen, 'Individualizing the Reasonable Person in Criminal Law' *Criminal Law & Philosophy*, 2008 (Vol. 2, No. 2), p. 137.
- 62 Homa Hoodfar, a Canadian Muslim woman and professor at the Department of Sociology and Anthropology at Concordia University, exemplifies this: 'my conversants listened to me, but they did not hear, and at the end of the conversation they would reiterate their earlier views as if our discussion were irrelevant. More recently, however, they treat me as an Islamic apologetic, which in fact silences me so that I can no longer argue.' See: Homa Hoodfar, 'The Veil in Their Minds and On Our Heads: The Persistence of Colonial Images of Muslim Women', *Resources for Feminist Research*, 1998 (Vol. 22, No. 3/4), p. 5.
- 63 Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern Law Review*, 1998 (Vol. 61, No. 11), p. 13.
- 64 Gunther Teubner, 'Legal Irritants', 1998, p. 13.
- 65 In this regard, we agree that transplantation does not present an empirically observable 'linear path'; see: James Clifford, 'Notes on Travel and Theory', *Inscriptions*, 1989 (Vol. 5), p. 184. On the 'travelling' of ideas, see: Edward W. Said, 'Travelling Theory', in: *The World, the Text and the Critic*, Cambridge:

Harvard University Press, 1983, p. 226; Edward W. Said, 'Travelling theory reconsidered', in: *Reflection on Exile and Other Essays*, Cambridge: Harvard University Press, 2000, p. 436.

66 Leti Volpp, 'Blaming Culture for Bad Behaviour', *Yale Journal of Law & the Humanities*, 2000 (Vol. 12, No. 89), p. 112.

67 *R v Tran*, SCR (58/2010), 2010, paragraph 34.

68 *R v Tran*, SCR (58/2010), 2010, paragraph 34.

SECTION III

THE NEED FOR ACCOMMODATION

