

Comparison of british and french systems of justice

Law, Common Law



Abstract

The law of murder is often subject to much critique because of its unfavourable treatment towards women. Although many changes have recently been made to this area to rectify the problems, questions are still being raised as to whether the pre-existing gender biases still exist. This study will review the current law in England and then compare it to the approach that is undertaken in France. This will allow a consideration to be made as to whether the changes have proven effective.

Introduction

The Coroners and Justice Act 2009 was introduced in order to remove the gender inequalities that existed under the old law and thus enable a better distinction to be made between revenge killings and those committed in the heat of the moment.[1] Nevertheless, much criticism still surrounds the new provisions and it has been said that the pre-existing genderdiscriminationis still present.[2] Conversely, the approach that is being adopted in France does appear to be more effective in eradicating the gender bias that exists, [3] though it is questionable whether this is more favourable. This study will critically discuss the current position in England with regards to the loss of self control defence and will then compare it to the position in France.

Loss of Control Defence under English Law

Previously, it was extremely difficult for women to establish a defence in circumstances where they committed a killing in the heat of the moment.

This type of defence, also known as provocation, required those seeking to rely on the defence to show that they had a sudden and temporary loss of control. This defence discriminated against women who suffered from a so-called 'slow-burn' effect because of the fact that an element of premeditation was often involved. In circumstances such as this, women were deemed to have committed a revenge killing, of a premeditated or calculated nature as opposed to a killing in the heat of the moment.[4] Much injustice arose as a result of the law in this area and it was evident that reform was needed. In 2010 a new 'loss of control' defence was introduced under the Coroners and Justice Act (CJA) 2009 and was intended to rectify the problems that existed. Under the new law, it now has to be shown that the defendant lost his or her self control as a result of some qualifying triggers. It must also be demonstrated that a person with a normal degree of tolerance and self restraint would have acted in the same way as the defendant. This objective test provides the courts with greater flexibility when deciding whether or not the defendant lost her self control as the comparator must be of the same age and sex as the defendant. This is beneficial to women who are likely to react differently in the situation to men and so it is important that they are being compared to people with the same characteristics.[5]

The new regime is thus similar to the position that was adopted in *R v Camplin*[6] where it was made clear that the reasonable person must have the same characteristics as the defendant. Whilst this seems as to be the fairest approach to employ in ensuring that a distinction can be made

between revenge killings with those committed in the heat of the moment, not all would agree. The Law Commission had originally opposed these changes for fear that women would still be discriminated against if sex was to be considered as a factor, though this was rejected by the Ministry of Justice.[7] It has since been argued that the inclusion of sex as a factor was a mistake on the part of the Ministry of Justice[8] and that it “unnecessarily refracts and reinforces stereotypes that men and women differ in their ability to control their behaviour.”[9] It has been argued that sex should be dealt with “under the partial defence of loss of control as part of the positioning of the hypothetical person within the wider ‘circumstances’ of D.”[10] It cannot be said that this would completely remove the opportunity to stereotype and it seems as though stereotypes will continue to be prevalent within this area of the law. Previously, the loss of self control was confined to a state of anger and rage and women who suffered the slow-burn effect could not rely on the defence. However, under section 55(3) of the CJA 2009 the first qualifying triggers have been defined as a “loss of self control attributable to the defendant’s fear of serious violence from the victim against the defendant or another identified person.”

This takes into account situations involving the slow-burn effect and enables a distinction to be made between revenge killings and those committed in the heat of the moment. Whilst it remains the case under the new law that there must still be a loss of control, the jury are required to take all of the circumstances into account when deciding whether the defendant did in fact lose her self control as well as the nature of the conduct which constituted

the qualifying trigger. They should also consider the sensitivity of the defendant and the conditions in which the killing took place.[11] These provisions are clearly a lot more women friendly than they used to be since women are more likely to have an element of premeditation than men are. [12] This is largely due to the fact that women lack the same physical strength as men and so it would be much more difficult for them to act in a spontaneous manner. Instead they would have to wait for an opportunity to act when their partner would be least expecting. Nevertheless, as has been pointed out; “ the slow burn defence would still have a high threshold.”[13] Accordingly, it is important that the defence does not allow for “ cold, calculating killers to get away with it”[14] by widening the scope too far. The removal of the suddenness’ requirement in section 54(2) is another positive change since it had; “ long been a hindrance for women whose experience of provocation has been described as more akin to a ‘ boiling over’ than the male ‘ snap’ response.”[15]

As demonstrated in *R v Duffy*[16] and *R v Thornton*[17] it would be deemed unfavourable if there was a delay in responding to a situation as the loss of control would not have been “ sudden.” The removal of this requirement now accommodates those who act out of fear, yet there is still the additional qualifying triggers requirement. This is a subjective test that will be based upon the defendant’s own loss of self control, yet some difficulties still tend to arise. An example of which can be seen in the *R v Clinton, Parker, Evans*[18] case. Here, it was questioned whether the consideration of sexual infidelity should be excluded in a case that involves other qualifying triggers.

[19] It was stressed by the judge stressed that sexual infidelity could only be considered if other triggers were present and could not be relied upon singlehandedly. This demonstrates that the qualifying triggers still produce much uncertainty and because of this the distinction between revenge killings and those committed in the heat of the moment will remain complex.

[20] It is questionable why the 'loss of self control' phrase was kept under the new law since negative connotations are frequently associated with it. The current law does not appear to have removed the pre-existing discrimination that existed and women are still being treated unfavourably to a certain degree. Whilst the previous law was "inherently contradictory"[21] and in need of reform[22] the restrictions that exist as a result of the new 'qualifying triggers requirement' suggests that the new law has been unsuccessful.

The court's decision in *R v Clinton, Parker, Evans*[23] has been criticised for failing to "grasp the actual workings of the new law as sexual infidelity cannot be considered under any of the prongs of the new defence." [24] Whether the court erred in its decision is questionable, but it seems as though the decision does not help to put right the pre-existing discrimination and has been said to "completely ignore the feminist aims behind the legislation." [25] Consequently, it could be said that the two-limbed 'loss of control defence' is flawed on the basis that it does not remove the intended pre-existing discriminations. It is extremely difficult to correct the imbalance between men and women and illustrates that further reform may in fact be needed. This was recognised by Hill who pointed out that; Hill that; "Partial

and incremental reforms of this kind risk complicating the existing system when what is needed is comprehensive and coherent reform of the type suggested by the Law Commission.”[26] Because of the underlying problems that continue to surround this area it is difficult to tell whether the new loss of control defence is merely a justification or excuse for murder. The defence remains favourable to those who kill in the heat of the moment over those who kill with an element of premeditation and because sexual infidelity can be considered as one of the qualifying triggers, it has been said that the defence will be capable of being used as a means of excusing crimes of passion.[27] Conversely, as noted by Gerry; “ the new law makes it plain that where the killing arises in relation to sexual infidelity this is not a qualifying trigger that will allow a murder to be reduced to manslaughter.”[28]

Loss of Control Defence under French Law

Crimes of passion (crime passionnel) under French law referred to killings whereby the perpetrator had a sudden loss of self control as opposed to a premeditated one. Such crimes were considered to be a valid defence for murder in France during the early 19th Century, however this all ended in the 1970's when the Napoleonic Code was updated.[29] Prior to the Napoleonic Code being updated women were significantly discriminated against since due to the fact that this defence was a lot more favourable to men. This is similar to the position in England where men had greater control over women, yet when the code was updated “ a specific father's authority upon his wholefamilywas over.”[30] Prior to this, it was only husbands that were capable of establishing the crime passionnel defence according to the

Code Penal,[31] however, by the late 19th Century women were able to rely on the defence also.[32] An element of leniency was placed upon women in France much earlier than it was in England and it seems that attitudes towards women in England have only recently started to change. It was thought that one reason for the increasing acquittal rate for women committing crimes of passion in France was due to the change in attitude jurors had towards women. They felt that by “killing their unfaithful husbands or husband’s mistresses, they had committed justifiable homicides because they had acted to protect their wounded honour.”[33] This is a far cry from the position in England where women find it extremely difficult to establish a defence for crimes of passion and even though the reform to the law has attempted to rectify this, it is still evident that disparities exist.

However, it could be argued that the position in France is far too lenient than the position in England. Whilst France became much more tolerant to crimes of passion over the years, England became more intolerant, suggesting that England will be less likely to acquit persons accused of such crimes. As identified by Donovan; “British newspapers deplored the frequency with which French juries acquitted persons accused of crimes of passion and noted with satisfaction how much more civilised Britons were in not forgiving such crimes.”[34] Consequently, it could be said that violence is more excusable in France than it is in England and that women who commit killings will be viewed a lot more sympathetically. The differences that exist under English and French law demonstrate the importance to which cultural and social norms have in influencing the decision of juror’s. Thus, because

crimes of passion are given much more lenience in the French courts, these types of crimes are likely to occur much more frequently than they are in England. Whilst it could be said that less gender discrimination occurs in France as a result of this, the fact that crimes of passion are being justified so easily is actually a dangerous occurrence. Hence, women in France will not think twice about killing their husbands if they are found to have conducted infidelity as they will be aware of the high acquittal rates.[35] In England, on the other hand, infidelity will not be considered as a basis for establishing the loss of control defence and those who are found to have killed their partners under such circumstances will not be viewed favourably.

There is much critique surrounding the law that relates to crimes of passion in England since it is felt that women are discriminated against: “ difficulties are presented by the requirement that the capacity for self-control, now expressed as the ‘ tolerance’ and ‘ restraint’, required of the defendant, is to be decided on objective grounds.”[36] However, the law in France appears to have gone completely in the opposite direction, namely being too sympathetic towards women. Whilst both men and women should be treated the same when considering whether any defence to murder are available, it is important that the scope is not widened too much. Whether sexual infidelity should be included as a trigger for losing one’s self control in England is doubtful since this would lead to a trial being focused primarily upon the deceased’s behavior as opposed to the defendants. This would appear somewhat illogical and would be viewed as a travesty of injustice by the deceased relatives.[37] The deceased would not be able to defend

himself and the whole process would be distressing for the victim's family. Furthermore, concerns would also be raised about the leniency approaches that are taken in respect of crimes of passion and much focus would be on the sexist values that underpin the basis for such crimes. It has been said that the exclusion of sexual infidelity as a triggering factor was a "gesture of politics"[38] and that "its exclusion seems completely logical in modern society." [39] It has been said that the emphasis should be "placed upon the fear of serious violence and the necessity for self-preservation and the concept of a loss of control is simply a historical distraction." [40]

Conclusion

Overall, the law of murder in England was clearly in need of reform since too much gender discrimination existed. Whilst many of these injustices have been rectified by the Coroners and Justice Act (CJA) 2009, much discrepancy still exists. Accordingly, it has to be shown that the loss of control resulted from a serious fear of violence or that it was attributable to things that have been said or done which were considered grave in nature. Emphasis is now placed upon whether the loss of control image is one of anger and not fear, which again can be difficult for women to establish. Furthermore, because of the restrictive nature of the qualifying triggers, sexual infidelity cannot be considered alone. Nevertheless, this could actually be necessary in preventing crimes of passion from being excused, as is the position in France. Hence, those that are considered to have killed their partner as a result of sexual infidelity will be excused in France, which makes it a lot easier for women to establish a defence. Although this lenient approach

makes the process less discriminatory, it has actually been considered too broad given that crimes of passion are more frequent in France than they are in England. It is important that a balance is struck so that women are not being discriminated against on the one hand, and that too much lenience is not being given on the other.

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