# ARTICLE 42

# UNACCEPTABLE JUSTIFICATIONS FOR CRIMES, INCLUDING CRIMES COMMITTED IN THE NAME OF SO-CALLED 'HONOUR'

**Sital Kalantry and Shireen Moti**

1. *Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.*
2. *Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.*



## A. WHAT DOES ARTICLE 42 REQUIRE?

**42.01** Article 42 of the Istanbul Convention ('Convention'), unlike many of its other provisions, does not call for states to prohibit certain types of violence against women (VAW). Instead, it asks states to prevent the use of certain defences by defendants who have been accused of committing acts that are within the scope of the Convention. The acts covered by the Convention include VAW and domestic violence (DV).[1] In cases where a person has committed a crime amounting to VAW or DV, the Convention asks state parties to prohibit the defendant from

1 Council of Europe (CoE), *Council of Europe Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, Istanbul, 11 May 2011, entered into force on 1 August 2014; specifically, Article 2(1).

using 'culture, custom, religion, tradition or so-called honour' to justify his or her behaviour. The text does not clarify what 'justify' means. It could mean that the defendant should not be able to reduce his sentence or criminal liability, or it could mean that the defendant should not be able to completely absolve himself of the crime. We assume 'justification' at minimum means some sort of defence to a crime. The provision also states that if a minor has committed a crime, the adult who has encouraged the minor to commit the act should not be relieved of criminal penalties.[2]

Article 42 is notably silent on whether it seeks to address the behaviour of immigrants in Western countries or the behaviour of people in majority Muslim countries within the European Council. The Convention is open for signature to a broad range of countries: from the United Kingdom, where it is thought that immigrants commit crimes based on culture, to Turkey where 'honour crimes' are predominant.[3] Ideally, Article 42 should have been drafted to clarify that it is covering both types of countries. **42.02**

However, it is more likely that Article 42 was meant to address only the behaviour of immigrants to 'Western' countries. This is because in Pakistan a father accused of murdering his daughter for marrying someone against his wishes will not cite 'culture, custom, religion, tradition' since the entire legal system shares the same understanding of 'culture, custom, religion, or tradition' as him. In addition, by specifically referring to 'honour', which are crimes known to be committed in non-Western countries, Article 42 suggests that the provision is meant to address immigrants. Indeed, the European Parliament has specifically noted that in the EU 'honour crimes occur mainly in immigrant and ethnic minority communities'.[4] We will assume for purposes of this reading that Article 42 seeks to address only criminal proceedings against people who emigrate from one country, where there are certain customs, cultures, religion and traditions, to another country where those differ, and then commit a crime in the country to which they have migrated. **42.03**

## B. HOW DO THE DEFENDANTS USE 'CULTURE, CUSTOM, RELIGION, OR TRADITION'?

When someone is charged with a criminal offence, in most jurisdictions, they can raise defences to their actions. The defences prohibited by Article 42 are based on 'culture, custom, religion, tradition' or so-called 'honour'. While the 'culture, custom, religion, and tradition' are separate reasons to justify behaviour, 'honour' can be seen as being subsumed within those categories. **42.04**

2 It is interesting to note that, while the Convention that addresses violence against women in the Americas, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was adopted by the Organization of American States, it does not contain a similar provision. Francine Pickup *et al.*, *Ending Violence Against Women: A Challenge for Development and Humanitarian Work* (Oxfam GB, Practical Action Publishing 2001).

3 In the mid-2000s, Turkey had already dramatically revised its penal code and added new provisions imposing life sentences on murders committed in the name of honour. Ayla M Kremen, 'Suicide in the Name of Honor: Why and How U.S. Asylum Law Should Be Modified to Allow Greater Acceptance of Honour-Violence Victims to Prevent Honour Suicides' [2014] 21 *William & Mary Journal of Women & the Law* 213–21.

4 Martina Prpic (EPRS), 'Briefing: Combating Honour Crimes in the EU' [2015], <https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/573877/EPRS_BRI(2015)573877_EN.pdf> (last access August 2022).

Preserving honour is one reason that someone might commit a crime, while a crime that is justified on the basis of 'culture, custom, religion and tradition' is broader. We discuss 'honour crimes' in more detail in Part C and focus on the other broader categories here.

**42.05** In common law systems, there are two components to almost every crime: the first is physical, the *actus reus*, and the second is mental, the *mens rea*.[5] The *actus reus* is 'best defined' as the guilty act and the *mens rea* is defined as a 'culpable state of mind or the guilty mind'.[6] One could understand cultural defences as legal strategies used by defendants in an attempt to either 'excuse criminal behaviour or mitigate culpability' based on the requisite *mens rea*.[7] A cultural defence would go to 'the culpability of a defendant's state of mind in committing the forbidden act'.[8] The rationale behind allowing cultural evidence is that, in order to determine whether the defendant had the necessary *mens rea*, '[a]n understanding of the defendant's mental state is incomplete without an understanding of his or her cultural context'.[9]

**42.06** Examples of where an immigrant uses 'cultural defences' date back more than one hundred years.[10] In 1836, the defence was acknowledged and later dismissed by the English courts. The case of *Rex v Esop*[11] concerned a native of Baghdad, who was convicted for committing an 'unnatural offence'. The defendant contended that his act was not criminal in his native land. However, this contention was dismissed by the court of law. As a consequence of this early decision, it became clear that 'alien custom did not negate criminal intent and alien law could not be used to gauge a defendant's criminal culpability'.[12] In the same time frame, US courts took similar positions.[13]

**42.07** More recently, in the UK criminal courts, Muslim perpetrators have claimed that they were following the tenets of Islam, which call for female modesty, in committing honour killings. Sharia law, or Islamic law, however, has strict guidelines forbidding the use of VAW, whether or not it is motivated in relation to honour. For example, four witnesses 'must testify that they have seen a woman in the act of committing adultery before retribution may be taken'.[14]

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5 Malek-Mithra Sheybani, 'Cultural Defense: One Person's Culture Is Another's Crime' [1987] 9 *Loyola of Los Angeles International & Comparative Law Review* 751–2.

6 *Ibid.*, 753.

7 Leti Volpp, '(Mis)Identifying Culture: Asian Women and the Cultural Defense' in Jean Yu-Wen, Shen Wu, & Min Song (eds) *Asian American Studies: A Reader* (Rutgers, The State University 2000) 391.

8 Carolyn Choi, 'Application of a Cultural Defense in Criminal Proceedings' [1990] 8 *UCLA Pacific Basin Law Journal* 80–6.

9 Alexa L. Davis, 'In Defense of Cultural "Insanity": Using Insanity as a Proxy for Culture in Criminal Cases' [2016] 49(3) *Columbia Journal of Law & Social Problems* 387–9 (quoting Nancy S. Kim, 'Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants' [2006] 17 *University of Florida Journal of Law & Public Policy* 199–203).

10 John C. Lyman, 'Cultural Defense: Viable Doctrine or Wishful Thinking?' [1986] 9 *Criminal Justice Journal* 87–9.

11 *Rex v Esop*, App No 175 Eng. Rep. 203 (High Court of England and Wales, 1836).

12 Lyman (n 10).

13 *Ibid.*

14 Aisha Gill, 'Honor Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom' [2009] 20 *Criminal Justice Policy Review* 475–80.

In a 2002 case in the UK, Faqir Mohammed killed Shaida, his twenty-four-year-old daughter, with a knife, following his discovery of her fully-clothed boyfriend in her bedroom. In this case, Mohammed submitted a plea of provocation and the claimed 'provocation' revolved around his religious beliefs. Jury members were 'instructed to take into account Mohammed's depression' and his 'strongly held religious and cultural beliefs' as they considered his plea. The jury instruction shows that judge accepted 'that Mohammed could legitimately cite his belief that a daughter should not have a boyfriend without his consent, and his strong conviction that sex outside marriage was a grave sin, as possible causes of his loss of self-control'. However, jury members were also instructed that 'a man may not rely on his own violent disposition, by way of excuse' and thus had to weigh Mohammed's depression and religious beliefs against evidence from six of his surviving children that he was a man with a tendency to violence greater than was 'reasonably normal' towards his wife and children. In this case, the jury came to the conclusion that Mohammed was guilty of murder and sentenced him to life imprisonment.[15] **42.08**

There are cases, however, wherein evidence of culture is actually taken into account at trial. In one such case, in 1995 in the UK, Shabir Hussain, was convicted of murdering his sister-in-law, Tasleem Begum, by driving into her while she waited on a pavement for her lover and then reversing the car over her body. At the initial trial, Hussain denied his involvement, and was convicted for murder and sentenced to life imprisonment. He successfully appealed against this conviction on the grounds of false identification; in 1998, at his retrial, he introduced a plea of guilty to manslaughter by reason of provocation. Tasleem Begum had defaulted on a marriage arranged for her in Pakistan when she was sixteen, refused to sign the documents that would have enabled her husband to get a UK entry visa, and later embarked on an affair with a married man. The provocation argument would not have stood if not for cultural factors: in his judgment, the judge acknowledged that Tasleem's illicit affair 'would be deeply offensive to someone with her background and her religious beliefs' and sentenced Hussain 'on the basis that something blew up in his head that caused him a complete and sudden loss of self-control'. Hussain's original life sentence was cut to six and a half years.[16] **42.09**

## C. WHAT ARE 'HONOUR CRIMES'?

The Convention does not define 'so-called honour'. We assume that 'honour' in Article 42 refers to 'honour crimes'. Korteweg, a Canadian-based sociology professor, defines 'honour-related violence' as 'family-initiated, planned violent response to the perception that a woman, as wife or daughter, has violated the honour of her family by crossing a boundary of sexual appropriateness'.[17] In one recent quantitative study of honour crimes, one author argues that the most typical case of an honour crime is one where a father or brother kills a daughter or **42.10**

15 Anne Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' [2003] 66 *Modern Law Review* 510–26.

16 *Ibid.*, 526–7.

17 Sital Kalantry, *Women Human Rights and Migration: Sex Selective Abortions Laws in the United States and India* (University of Pennsylvania Press 2017) 26; Anna C. Korteweg, '"Honour Killings" in the Immigration Context: Multiculturalism and the Realization of Violence Against Women' in Amanda Gouws and Daiva Stasiulis (eds), *Gender and Multiculturalism: North-South Perspectives* (Routledge 2014) 228.

sister, who chooses a boyfriend or husband that is unacceptable to the family.[18] The perpetrator might claim that the woman or girl has violated a norm in their society, which has caused his family to lose honour. The only way to restore honour would then be to kill or harm her.

**42.11** In almost every country in the world, murder is a criminal offence punishable by a long imprisonment or with the death penalty when permitted under domestic law. Yet in many countries, if a perpetrator is acting to preserve honour, it might reduce his criminal penalty or absolve him completely. In some cases, the perpetrators may never be brought to trial; if the perpetrators appear before judges, their cases will be dismissed, because their actions are thought to be justified. In other cases, even where murder charges are brought against the defendant, the type of crime or sentence might eventually be reduced. The reason behind this is that, in some societies, the killing of one woman or girl ensures that other women and girls do not act to violate codes set in place to control them.

**42.12** Honour crimes that follow the script above are more common in some countries than in others. Some of those countries have also modified their criminal and penal codes to address 'honour' crimes but many have not gone far enough.[19] For example, Syria, a non-Council of Europe member, amended Article 548 of its national code, which had 'waived any punishment for a male who committed an honour killing against a female family member for inappropriate sexual behavior'.[20] In 2009, this waiver was eliminated. However, a new provision in the national code states that a judge could use discretion to reduce the punishment for an honour killing if he believes the killing was committed with 'honourable intent'.[21]

**42.13** In another example, Jordan modified its penal code, which now states: 'He who commits a crime in a fit of fury resulting from a wrongful and dangerous act on the part of the victim shall benefit from a reduced penalty'.[22] Similarly, in Egypt although the law condemns honour killings, Article 17 of the Egyptian Penal Code 'permits judges to use their discretion in determining the punishments for those convicted of honour killings'.[23]

**42.14** On 11 January 2005, Pakistan modified its criminal law, to deter murder 'in the name or pretext of honour'.[24] Yet despite this, incidents of murders of women and girls continued after the law was enacted, suggesting lax enforcement or failure of laws to impact societal norms. Most honour killings are not classified as such, and are rarely prosecuted, or, when prosecuted in the Muslim world, result in relatively light sentences.[25] The 'laws of various jurisdictions' make suc-

18 Robert Paul Churchill, *Women in the Crossfire: Understanding and Ending Honor Killing* (OUP 2018).

19 Kremen (n 3), 219–20.

20 Kremen (n 3), 220.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 Moeen H. Cheema, 'Judicial Patronage of Honour Killings in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation' [2008] 14 *Buffalo Human Rights Law Review* 51–2.

25 Phyllis Chesler, 'The Difference between Honour Killings and Domestic Violence' in Lisa Idzikowski (ed), *Honour Killings* (Greenhaven Publishing LLC 2018) 18.

cessful prosecution of honour killings very difficult.[26] State authorities often allow the offenders to go unpunished, implicitly supporting honour killings.[27] Even when the men are convicted, the judiciary ensures that they receive a lighter sentence, reinforcing the view that men can kill their female relatives with virtual impunity.[28]

The modern use of 'honour crimes' typically refers to acts that occur in non-Western countries, such as those in the Middle East or South Asia. Honour is rarely seen as a reason that people in Western countries might commit crimes. We challenge that assumption in Part E below. **42.15**

## D. WHAT ARE THE ARGUMENTS FOR AND AGAINST THE USE OF CULTURE IN TRIALS FOR IMMIGRANTS?

In the early 1990s, debates about the 'cultural defence' erupted in the US. The core question in feminist literature at the time was what standards Asian Americans should be judged against, the standards of the dominant (American) culture or the standards of the people of the country from which they have come. For example, if a Hmong man kidnapped and raped a woman as a way of marrying her – a practice undertaken in his country of origin – should he be able to refer to that in his criminal trial?[29] Doriane Coleman argued against the introduction of culture in criminal trials. She contended that the behaviour of immigrants in the US should be judged against American standards and not by the standards of the immigrant's country of origin.[30] Leti Volpp, on the other hand, argued that while it is a problem for feminists if men use 'culture' as an excuse for causing physical or mental harm to women, immigrant women may also want to introduce evidence of their culture to explain their 'behaviour'.[31] **42.16**

Other scholars have also argued that the legal system should establish a formal cultural defence. They argue that the 'existence of a formal cultural defence would ensure that evidence which pertains to the defendant's cultural background is admissible in court'.[32] Furthermore, granting formal recognition to the cultural defence would 'bring greater clarity and coherence to the existing law', and would promote the cause of equal application of the law to all defendants, irrespective of them being immigrants or non-immigrants.[33] They continue that recognizing a formal cultural defence 'implicates two basic fundamental tenets of the rule of law: the **42.17**

26 John Alan Cohan, 'Honour Killings and the Cultural Defence' [2010] 40 *California Western International Law Journal* 177–206.

27 Yolanda Asamoah-Wade, 'Women's Human Rights and "Honour Killings" in Islamic Cultures' [2000] 8 *Buffalo Women's Law Journal* 21.

28 John Azumah, *My Neighbour's Faith: Islam Explained for African Christians* (Hippo Books 2008) 83.

29 See, e.g. Choi (n 8); See also Kalantry (n 17) 27.

30 Kalantry (n 17) 27–8; Doriane Lambelet Coleman, 'Individualising Justice Through Multiculturalism: The Liberal's Dilemma' [1996] 96 *Columbia Law Review* 1093, 1166–7.

31 Kalantry (n 17) 28. See also Volpp (n 7).

32 Alison Dundes Renteln, 'A Justification of the Cultural Defense as Partial Excuse' [1993] 2 *Southern California Review of Law & Women's Studies* 437–502.

33 Linda Friedman Ramirez, 'The Virtues of the Cultural Defense' [2009] 92 *Judicature* 207–9.

assumption that a defendant knew (or reasonably should have known) the law; and the assumption that the defendant could have conformed their conduct to said law'.[34]

**42.18** Others argue against the introduction of culture for a number of reasons. First, there are other traditional defences available to immigrants to assert their cultural differences as a defence of crimes.[35] While these defences do not afford the same protection as a formal cultural defence, they would be 'adequate in light of the remaining reasons for disallowing the cultural defence'.[36] The second reason for refusing to recognize the cultural defence is the difficulty in defining the group of defendants who may use it.[37] The third reason for excluding the cultural defence is the 'unfair policy that it would promote towards the majority who cannot not use it'. Immigrants should not be afforded a special exception to following the requirements of law 'at the expense of other citizens who must strictly obey the rule'.[38]

**42.19** It is not clear whether Article 42 would prohibit the introduction of any evidence of 'culture, custom, religion, tradition' or whether it would just forbid it from being used solely as a reason to absolve the defendant of guilt and any criminal sanctions. If interpreted as a broad prohibition, then Article 42 would prohibit an immigrant defendant or prosecutor from the introduction of any background factors that could be a motive for a defendant's behaviour. A jury consisting largely of non-immigrants may not understand the motives for a defendant's behaviour. For example, one of the authors (Sital Kalantry) testified as an expert witness in a criminal trial in New York State on behalf of the prosecution who sought to explain the behaviour of the victim. Both perpetrator and victim were from India, where acid attacks are a way to control women's behaviour and punish them. Without knowledge of the context of India, a jury in New York might not understand why the victim simply did not escape the apartment after he threatened to throw acid on her. He kidnapped her and raped her. She feared he would kill or permanently disfigure her with acid if she did not comply. In that case, the context of the violence of acid attacks in India was relevant for the jury to understand both the perpetrator's and victim's behaviour. But that information would not have relieved the defendant of responsibility, but rather was aimed at achieving a conviction.

**42.20** We argue that, rather than refusing to admit culture in all cases, a court should include culture only if it is proven that the defendant actually holds those cultural views; if the defendant holds those views, then the views could be admitted. But admitting information about culture does not mean that the sentence or guilt adjudication would change. Including culture in a trial, does not necessarily mean that it should serve to reduce the penalty or completely absolve the defendant, but rather it is just one factor for the judge and jury to consider. Indeed, immigrant-defendants may also use 'cultural defences' to present evidence relating to the state

34 *Ibid.*

35 Julia P. Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior' [1986] 16 *Georgia Journal of International & Comparative Law* 335, 352–3.

36 *Ibid.*, 353.

37 *Ibid.*

38 *Ibid.*

of mind, when arguing self-defence or mistake of fact.[39] The cultural defence can also include religious and spiritual activities and beliefs.[40]

## E. WHY IS IT PROBLEMATIC THAT THE CONVENTION ALSO FAILS TO INCLUDE A DISCUSSION OF OFFENCES THAT ARE NOT THOUGHT TO BE COMMITTED IN THE NAME OF CULTURE?

**42.21** As noted above, it is likely that Article 42 only intends to regulate the behaviour of people who had lived in one country with certain traditions and culture, but then emigrated to another country. As a result, Article 42 does not include within its ambit a situation where a person who was born in the UK (i.e., a non-immigrant) and whose family has lived there for generations. Assume further that he kills his wife when he witnesses her having an affair. These crimes are often called 'crimes of passion'. For example, in the UK, William Cranston stabbed Kay Morton, his partner and Paul Wilkins, his best friend, to death, when he found out that the two were having an affair. In 2009, the Reading Crown Court in Berkshire cleared William Cranston of murder, but convicted him of manslaughter by reason of provocation. He was sentenced to 12 years of jail.[41]

**42.22** In another case in the UK, Jon-Jacques Clinton attacked his wife, Dawn, with a lump of wood and strangled her with a rope for sexual infidelity. Mr. Clinton was found guilty of murdering his wife. The judge reduced Mr. Clinton's sentence from murder charge to manslaughter. In doing so, he observed that sexual infidelity leading to a 'loss of control' was considered acceptable as a defence. Lord Judge said the law was unequivocal: loss of control triggered by sexual infidelity cannot, 'on its own', qualify as a trigger for the purposes of the defence.[42] Mr. Clinton, and others like him, could not claim 'culture' as a basis to justify his actions, since he is from the mainstream culture. However, other defences available to him, such as such as insanity or provocation, reduce responsibility for his 'crime of passion'. The Convention, however, fails to specifically prohibit the perpetrator from using these defences to his criminal act.

**42.23** In a study comparing 'honour crimes' in Arab countries with 'crimes of passion' in the US, one author found that while in Arab countries men kill daughters and sisters, in the US men kill wives and girlfriends.[43] The author concludes that 'honour is based on ideas of kin, status, honour, and collectivity, while passion is based on ideas of individualism, romantic fusion, and sexual jealousy'.[44]

**42.24** Both a crime of passion and an honour crime equally involve VAW that should be prohibited and not justified. Crimes of passion are thought to occur in a fit of rage so they are justifiable,

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39 See generally Volpp (n 7).

40 *Ibid.*

41 Katie Hodge, '12 Years for Man Who Killed Partner and Lover' [2009] *The Independent.*

42 Tom Whitehead and Andrew Hought, 'Murder Can be "Crime of Passion" Says Top Judge' [2012] *Telegraph.*

43 Lama Abu-Odeh, 'Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"' [1997] *Utah Law Review* 287–90.

44 *Ibid.*, 293–4.

but even the so-called 'honour' crimes might also be committed in rage. Moreover, when a man kills his wife for adultery that arguably is done to preserve his 'honour', but Western societies do not view that as an 'honour' crime.

**42.25** Scholars have argued that 'honour' is seen by the Western countries as something that binds 'Third World' countries and communities.[45] As a result, 'honour' and 'honour killings' are not thought to exist in the West, unless they are committed by a cultural minority – for example, an immigrant family.[46] One author argued that in the context of the US, women are regularly murdered by their domestic partners but that is simply called 'DV' but when these murders occur in India, they are given a special and more horrific name, 'dowry deaths'.[47] Indeed, Korteweg points out that discussions of honour violence stigmatize immigrant communities, while holding that non-immigrant communities are free of barbaric violence.[48]

**42.26** The Convention should have gone further beyond just focusing on 'cultural defences'. Culture is often attributed to the 'other' or the immigrant, and not attributed to the person from the mainstream. Immigrants' practices are deemed to be rooted in culture, but negative practices in the mainstream group are not attributed to culture. However, non-cultural defences are still utilized in Western countries to absolve men in the mainstream groups for committing crimes that constitute VAW. By focusing only on 'cultural defences', Article 42 exposes a common blind spot in Western feminist thinking. It fails to consider the ways in which patriarchy operates in Western countries.[49]

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45 Rebecca Meharchand, 'A Western Concept of Honour: Understanding Cultural Differences, Realizing Patriarchal Similarities' [2016] *Undergraduate Awards* 1–6.

46 *Ibid.*

47 Kalantry (n 17) 24; Uma Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminism* (Routledge 1997) 81–117.

48 Kalantry (n 17); Korteweg (n 17) 229.

49 See generally Meharchand (n 45).