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**Ute Frevert**

## Honour and / or / as Passion: Historical trajectories of legal defenses

## Zusammenfassung

Werden westliche Gesellschaften mit sogenannten Ehrenmorden konfrontiert, folgen gemeinhin Distanznahme, Empörung und Verurteilung des dahinterstehenden (religiösen) Wertesystems auf dem Fuße. Was aus der europäischen Normativität hingegen ausgeblendet wird, ist die einheimische Rechtsgeschichte der Ehre und der von ihr motivierten »Affektat«. Am Beispiel französischer, angelsächsischer, deutscher und italienischer Strafrechtsgeschichte analysiert der Artikel die Bedeutung, die Gefühlen – allen voran dem männlichen Ehrgefühl (das zuweilen mit der Familienehre gleichgesetzt wurde) – bei der Klassifizierung einer Straftat sowie der Festsetzung des Strafmaßes beigemessen wurde. Auf der Oberfläche setzen sich die Kodifikationen lediglich mit Affekten und Leidenschaften auseinander. Die genauere und kontextualisierte Lektüre aber zeigt, dass sich dahinter oft, vor allem im Fall des Ehebruchs, die gekränkte Ehre des Ehemannes verbarg. Das galt sowohl für kontinentaleuropäische Rechtssysteme als auch für die Common-Law-Systeme Großbritanniens und der USA. Faschistische Rechtssysteme in Italien und Deutschland gingen sogar so weit, diese Ehre als Familienehre auszugeben und zu schützen. Erst in den 1970er Jahren, oft angestoßen durch feministische Kritik, verschwanden solche Konstruktionen und Argumentationen aus der gerichtlichen Praxis.



## Abstract

This article provides a historical perspective in a European context on the phenomenon that has become known as honour killings. A cause of outrage and disdain in today's (Western) societies, the notion of restoring honour through a violent act is, in fact, deeply rooted in European legal and cultural history. By examining French, Anglo-Saxon, German and Italian examples, it is revealed that to varying degrees emotions, and, in some cases honour in particular, were accommodated in legislation as granting the perpetrator extenuating circumstances. Adultery in particular was thought to compromise the honour of husbands, thus entrenching an inherently gendered conception of honour. However, leniency of the law was mostly dependent on ›heat of the moment‹ arguments, attempts to avenge the violation of one's honour, rather than premeditated, cold-blooded revenge killings restoring the collective honour of the family. By discriminating between notions of individual and collective (family) honour, examples from European history exhibit a qualitative difference compared to modern day honour killings. The full extent of hypocrisy in judging modern day (Muslim) honour killings, however, becomes apparent when considering that gendered concepts of emotions and honour only disappeared from European legal thought after the 1970s, partly following feminist criticism.



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## Honour and /or/ as Passion: Historical trajectories of legal defenses

### I. Cultural translation versus historical amnesia

This article revolves around a case of cultural translation, or rather non-translation, that is firmly placed in the contemporary world but builds on a longer history of European normativity. The case concerns so-called honour killings or Ehrenmorde, as they are called in German.

We have been hearing and reading about them since the late 1980s, when they started to make news headlines across Europe. The facts are quite similar: usually, a male member of a family kills a female member in order to restore the family honour. The woman is considered to have violated this honour by transgressing the boundaries of what is perceived as appropriate behaviour for women, mainly concerning the sexual and moral standards of her group of origin. Honour killings of this sort are carried out amidst migrant families all over Europe: families of Turkish (in Germany), Somali or Indonesian (in the Netherlands), North African (in France) or Pakistani origin (in Britain), mostly Muslim.<sup>1</sup>

The European public is outraged. Increasingly, and especially after 9/11, Europeans tend to view these honour killings with outright disdain and contempt. They attribute them to religious beliefs, and they are quick to draw a strict line between ›us‹ and ›them‹: We, civilized Europeans of mostly Christian faith, respect women and have come a long way to establish gender equality in the family and beyond. They, Muslims from other, less civilized parts of the world, are stuck in antiquated, patriarchal, women-hating practices that might even include the ruthless killings of sisters, daughters, and wives.

The article will question such narratives and perceptions – without, however, aiming to cast a

more positive light on so-called honour killings. What needs to be highlighted, instead, is the sense of hypocrisy that prevails among many Europeans who comment on those crimes and use them to distance themselves from anything ›Muslim‹. Their narrative is based on juxtaposing an enlightened European culture against a deeply flawed Muslim culture that degrades women. This juxtaposition rests on a sense of historical amnesia and an inherent inclination to employ double standards of evaluation and judgment.

By radically ›othering‹ so-called honour killings, the European public (the legal profession included) adheres to a politics of cultural non-translation defying the modern history of European penal law. Legal tradition in countries like Britain, France, Italy and Germany, diverse as it might be, has been more familiar with, and sympathetic to, honour killings than legal experts are generally willing to admit. In fact, what Europeans have come to understand, acknowledge, and excuse as a crime of passion, *crime passionnel*, *Affektat*, had often (and until very recently) been considered and partly justified as a crime of honour. It was mainly due to a wave of feminist criticism from the 1970s onwards that the glow of those crimes, which were deeply rooted in European culture and society, has faded. The fact that it faded into total oblivion, however, is noteworthy, for it allows ›us‹ Europeans to stage ourselves as superior, advanced, progressive, and civilized compared to ›them‹.

To engage in the work of cultural translation thus means to draw attention to the role European legal codes and practices played in initially legitimizing and eventually discarding practices of honour killings. This will be achieved by examining French, British, German, and Italian legal codes and practices from, roughly, the early nineteenth to the late twentieth century.

1 AGEL (2013); OBERWITTLER/KASSEL (2011); EWING (2008); VAN ECK (2003).

## II. Crimes of honour and passion in European legislation

To historians interested in emotions and the role they play in modern societies, the law offers exciting insights and venues.<sup>2</sup> In the effort to understand when and why penal codes refer to ›affects‹ or ›passions‹ and how they influence criminal acts, historians encounter a striking detail: When they accepted passions as potential motives for criminal action, all modern legal codifications mentioned one situation in particular: a husband finding his wife in bed with another man and, in a fit of fury and jealousy, killing the other man (and/or the wife) on the spot.

### 1. France

The French Penal Code of 1810 was a bold stroke of Napoleonic legislation that was widely acclaimed for its clarity and consistency (but also criticized for its harshness). As such and to a certain degree it influenced most of the European legal codifications that ensued during the nineteenth century. Moreover, it had an impact on non-European lawmaking. Japan adopted it during the Meiji reforms, and so did Turkey in 1858. By way of France's imperial and colonial policy, the *Code pénal* became influential in countries such as Holland, Belgium as well as in the southern German states and the occupied Rhineland.<sup>3</sup> It was also introduced in many regions of Muslim faith, mainly in North Africa and the Middle East.<sup>4</sup>

Regarding defense based on honour-related argumentation, the Code kept it short and statutory. Those who drafted it were not concerned with investigating individual motive, and they were not interested in fine or not-so-fine social distinctions. Instead, they tried to be as abstract and general as possible. So the Code simply stated that ›homicide«, if ›committed willfully, is denominated murder« and ›shall be punished with death«.

Yet, there were excuses, and a major excuse was provided in advance: ›In the case of adultery [...] murder committed upon the wife as well as upon her accomplice, at the moment when the husband shall have caught them in the fact, in the house where the husband and wife dwell, is excusable.« Under such circumstances, the death penalty ›shall be reduced to an imprisonment, of from one year to five years«.<sup>5</sup>

What resonated here was ancient Roman law, but somewhat softened. Under the auspices of absolute paternal power, a Roman father could have killed the violator of his daughter and the daughter herself without being punishable for his action. It was mostly an issue of property: a daughter belonged to her father's household, and the violator was perceived as a thief who had broken in and stolen her virginity. The same logic applied to the husband of an adulterous wife – but, obviously, not to the wife of an adulterous husband.

When the French legislators considered a wife's infidelity as a husband's excuse for killing her and/or the other man, they revived the Roman tradition without, however, letting the killing go unpunished. It was still considered a crime – but one that was committed under extenuating circumstances. Those circumstances were not explained any further, by referring, for instance, to concepts of honour or passion.

### 2. Anglo-Saxon countries

In English law, manslaughter was introduced as a crime category in the early modern period in order to spare offenders with diminished responsibility the death penalty. Courts that had to decide whether a perpetrator had had little to no control over his actions tried to establish the subjective degree of his rage. Starting in the eighteenth century, rage was increasingly objectified by introducing the concept of the ›reasonable man‹. This

2 BANDES (ed.) (1999) 1–15.

3 WACHENFELD (1890) passim.

4 It has even been claimed that the honour defense was not the product of Islamic law but introduced to Islamic countries through the French Penal Code (SPAIZ [1991] 600). See also COULSON (1964) 152: ›Criminal law and procedure are almost completely Westernised, though the last

few decades have witnessed a movement away from the French Codes towards other sources. In 1926 Turkey promulgated a Criminal Code based on Italian law, and her Code of Criminal Procedure which followed two years later was of Germanic inspiration. Italian law was also directly adopted by Egypt in her Criminal Code of 1937, is the predominant

influence in the current Lebanese Criminal Code, and has been amalgamated with French law in the Criminal Code now operative in Libya.«

5 French Penal Code of 1810, accessed at: [www.napoleon-series.org/research/government/france/penalcode](http://www.napoleon-series.org/research/government/france/penalcode) (19 May 2014).

concept served as a benchmark against which the adequacy of provocation could be measured. As case law taught, insulting words or the sight of an unfaithful fiancée were not considered sufficient to provoke manslaughter, unlike witnessing adultery and physical assault.<sup>6</sup> As stated in a 1707 case: »Jealousy is the rage of man and adultery is the highest invasion of property.«<sup>7</sup>

»Jealousy is the rage of a man«: this was what Daniel Sickles' lawyers repeatedly quoted throughout the trial against their client, 150 years later. Sickles, a well-known New York Congressman, had shot and killed US District Attorney Philip Barton Key after learning of the latter's ongoing affair with his wife. Lawyer James Brady convinced the jury to acquit Sickles by arguing that he had only »yielded to an instinct which the Almighty has implanted in every animal or creature that crawls the earth«. No man who found before him »in full view, the adulterer of his wife«, could be asked to be »cool and collected«; instead »jealousy will be the rage of that man, and he will not spare in the day of vengeance«.<sup>8</sup>

Sickles had killed Key shortly after learning of his wife's infidelity. It could thus be argued that he had acted »in the heat of passion«, which granted him leniency. This is what became known as an »unwritten law« in American jurisprudence. Francis Wharton, one of the country's leading legal commentators, explained in 1855 that »a man smarting under a sense of dishonour« (by finding »another in the act of adultery with his wife«) and killing the adulterer »in the first transport of passion« was only guilty of manslaughter and »entitled to the lowest degree of punishment«. Dishonouring acts such as adultery were thus considered as »grievous« provocation to which a husband might »instinctively« react in a passionate and vengeful way.<sup>9</sup>

This kind of »honour defense« usually encountered a favourable reception on the part of jurors. Juries, composed of »average laymen«, felt sympathetic to the claim made in 1907 that »every man who has a family« knew how he would feel about an adulterous wife and the man who »invades the sanctity« of his home. To the »legalistic mind«, however, as a 1934 article in the Yale Law Journal

claimed, the recognition of honour motives condoned private justice and »encourages a general disregard for all law«.<sup>10</sup>

The rift between public opinion and »all law« became particularly obvious in those cases where the »heat of passion« argument was not effective. There were »honor killings« (as the Yale Law Journal called them) that took place long after »the first transport of passion« (Wharton), like the one that happened in New York on 25<sup>th</sup> June 1906. At 11 pm in the rooftop theatre of Madison Square Garden, 35-year-old Harry Kendall Thaw, son and heir of a Pittsburgh coal and railway baron, shot and killed Stanford White, a well-known New York architect. In this case, the heat-of-passion defense did not apply, and there had been no actual adultery involved: Thaw's wife had not yet been his »property« when she met White. Yet Thaw's lawyer tried to present the murder as a crime of honour: his honour was supposed to have been insulted by the architect's disdainful treatment of the woman who had later become Thaw's wife. In his closing statement, the defense lawyer's strategy was to plead for insanity related to an honour issue: His client's action was supposed to have been motivated by »that species of insanity which, if you desire [...] to give it a name, I ask you to label *dementia Americana*. It is that species of insanity which makes every American believe that his home is sacred. [...] It is that species of insanity which makes him believe that the honor of his wife is sacred. It is that species of insanity which makes him believe that whoever invades the sanctity of that home, whoever brings pollution upon that daughter, whoever stains the virtue of that wife, has forfeited the protection of human laws and must appeal to the eternal justice and mercy of God.«<sup>11</sup>

The defense lawyer's speech was noteworthy for two reasons: first, he translated the legal concept of insanity into the language of honour, thus trying to depict the killing as an act of chivalry. Second, he deliberately blurred the lines of distinction between adultery (»staining the virtue of a wife«) and treating a single, unmarried woman disrespectfully. In both ways, he extended the notion of male honour to encompass issues that went beyond narrow property rights (»invading the sanctity of

6 DRESSLER (1982) 426–428.

7 EDWARDS (2010) 230.

8 KEETLEY (2008) 285.

9 WHARTON (1855) 33, 177.

10 Recognition of the Honor Defense under the Insanity Plea (1934) 813.

11 New York Times, 10 April 1907; cfr. UMPHREY (1999) 417.

the home«) extending to wider and allegedly nobler moral concerns.

In ›legalistic‹ terms, the defense could not hold water. The jury, too, although usually sensitive to honour defenses, was hung. What stood in the way of granting Thaw a mild sentence was the long time between knowing about his wife's former liaison and carrying out an attack against White. Legal experts framed this as a ›cooling period‹ allowing for ›immediate passion‹ to be succeeded by ›sober reflection‹. »However great the provocation may have been«, homicide committed after ›cooling time‹ would be murder and punished accordingly.<sup>12</sup>

But did slandered honour know cooling periods? Was the insult perceived and felt with lower intensity after a day or two had passed? This was the question that Thaw's clever lawyer had asked and answered in the negative. And it was one of the questions that continued to haunt ›legalistic‹ minds when they, time and again, tried to make criminal justice less ›inchoate‹ and ›distorted‹.<sup>13</sup> Criticism was voiced not only by psychologists and psychiatrists whose expertise was increasingly sought from the late eighteenth century onwards.<sup>14</sup> In the 1970s, feminists launched a major attack against the discriminatory bias of the heat-of-passion doctrine. In their view, it privileged male behavioural patterns while putting women at a disadvantage: Battered wives, for example, who after a long period of suffering killed their abusive husbands, normally could not make use of the doctrine's extenuating circumstances.<sup>15</sup>

This criticism notwithstanding, the heat-of-passion doctrine is still recognized in the US.<sup>16</sup> In Britain, it became limited so as to explicitly exclude what, for a long time, had been its major justification: adultery. In 2000, Leonard Hoffmann, Lord of Appeal in Ordinary and Life Peer of the House of Lords, resumed that ›male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted on the woman herself or on her new lover«. In 2003, the Law Commission followed his

recommendation, and the 2009 Coroners and Justice Act ruled out sexual infidelity as a qualifying trigger.<sup>17</sup>

### 3. Germany

Prior to 1872, there was no German law, but Bavarian, Hanoverian, Saxon etc. laws. Bavaria had been the first state to compile a radically new penal code. From the mid-nineteenth century, Prussia led the way, which, even before the unification, more states were prepared to follow.

In contrast to older codes such as the sixteenth century Carolina, the Prussian General Law of 1794 (ALR) did not mention affects, passions, or provocation as extenuating circumstances in homicide cases. Although the legislators were aware that those passions did exist, they were unwilling to accept them as justification of offences. Instead, their ambition was to punish offenders, thus teaching citizens that they should fight those passions and not let them take over. Consequently, the ALR no longer allowed the kind of private justice that husbands delivered against adulterers.<sup>18</sup>

From the 1820s onwards, Prussia started to revise its penal law; after ten drafts, the new code eventually came into effect in 1851 (and, in its general structure, is still valid today). Legal experts, ministries, as well as the representatives of the *Stände* went to great lengths to debate major differences between murder and manslaughter, discussing the notion of ›just affect‹ and passion and negotiating the concepts of provocation, premeditation, and deliberation. In the end, they agreed to define murder based on the criterion of premeditation. Homicides that were not committed upon deliberate thought (*Überlegung*) qualified as manslaughter, which ruled out the death penalty. The law further allowed ›just affect‹ (*gerechter Affekt*) as an extenuating circumstance: If a person had been unjustifiably (*ohne eigene Schuld*) provoked into rage (*zum Zorne gereizt*) by another's abuse or grave insult (*schwere Beleidigung*) directed against the person himself or members of his family, and acted

12 Recognition of the Honor Defense (1934) 810; WHARTON (1855) 179.

13 Recognition of the Honor Defense (1934) 810, 813; DRESSLER (1982).

14 KLEIN (1799) 28; DIEZ (1834); FRIEDREICH (1835); Recognition of the Honor Defense (1934) 814.

15 SPATZ (1991); EDWARDS (2010).

16 FONTAINE (2009) 72.

17 EDWARDS (2010) 230; FITZ-GIBBON (2013).

18 GÜNTHER (1895) 77–79; WACHENFELD (1890) 149; STÖLZEL (1888) 229.

having lost his temper, he would be mildly sentenced: Instead of a life sentence, he would get away with two years in prison. The law did not specify what was meant by »abuse« or »grave insult«, but legal commentators explained that it included physical as well as emotional abuse. They also clarified that adultery figured prominently and »notably« amongst the latter as »deeply hurting« the husband's »sense of honour«. <sup>19</sup>

This continued well into the twentieth century with a dramatic peak in the 1930s. Although the National Socialist regime failed to create its own penal code, as had been originally planned, courts eagerly complied with the regime's emphasis on honour. To quote from a 1936 Reichsgericht decision: »Anyone who infringes on a woman's honour – even with her consent and thus not subject to prosecution –, injures the honour of her husband. This opinion is rooted in the German notion of family.« While liberal legal practice had increasingly distanced itself from the remote party concept and privileged the honour of the single person rather than the honour of the family, *völkisch* and Nazi ideas considered the convictions of the people as an »authoritative source of law«. And for the German people, the honour of the husband was regarded as marred should his wife's honour be insulted, through adultery or other »indecent« acts. <sup>20</sup>

This opinion, shared both by »the people« and legal experts, remained unaltered until the 1970s. It was only then that courts became increasingly reluctant to apply the law and classify adultery as a grave insult justifying homicide. <sup>21</sup> Feminist criticism was partly responsible for this, and so were changing attitudes towards marriage and gender equality in society at large.

#### 4. Italy

In Italy, as in Germany, the (much longer) period of fascist rule had favoured the »causa di

honore«. While the 1889 liberal Codice Zanardelli 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 new Codice Rocco of 1931 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«. <sup>22</sup>

Three things are noteworthy about this article. First, it deliberately talked about »family honour«, a concept that was not mentioned in the French penal code or in German legislation before the Nazi era. Second, it held not only husbands but also fathers and brothers responsible for protecting the family honour. Third, family honour could obviously be violated only by female members of the family as the concept of »unlawful sexual relations« seemed to refer exclusively to women.

As late as 1972, the Cassation Court called the honour defence »anachronistic«. A decade earlier, the film *Divorce Italian Style* (1961) had zoomed in on what, in the absence of legal divorce, could be a convenient way of getting rid of an unwanted wife. Finally in 1981, article 587 was repealed, despite maintaining sexual infidelity as a serious provocation and »unjust act« that could lead to an act of homicide »in a fit of fury«. <sup>23</sup>

What does this short review of legal history contribute to issues of cultural translation or non-translation? What can be learnt from it about European normativities and non-European perspectives? Three suggestions:

**First:** From a legal perspective, »honour killings«, crimes of honour, *Ehrenmorde*, which are

19 BESELER (1851) 351 f.; RÜDORFF (1881) 499; EBERMAYER et. al. (1925) 638.

20 Entscheidungen des Reichsgerichts in Strafsachen 70 (1936) 97 f.; SCHWARZ (1935) 317 (called adultery a »harsh personal offense«, schwere Kränkung, of the husband). See also GÜRTNER (ed.) (1935) 286; GÜRTNER (ed.) (1936) 411.

21 TELLENBACH (2007) 787; a commentary from the 1960s still named adultery as a prominent (and the only) example of insult: KOHLRAUSCH / LANGE (1961) 480; see also GRÜNEWALD (2010) 243: quoting the 1962 draft of a revision of the Penal Code that explicitly mentioned adultery as an extenuating circumstance and referred to »frequent« cases that it

deemed »tragic«. For criticism of the heavily gendered model of spontaneous affect, see *ibid.* 340 f.

22 BETTIGA-BOUKERBOUT (2005) 234 f.; Codice Penale (1908) art. 377.

23 BETTIGA-BOUKERBOUT (2005) 236 f., 243; CARACCIOLI (1988).

supposed to be encountered solely within non-European traditions and values, are neither alien nor new to European law in its many national versions. What nowadays is considered as an antiquated, predominantly ›Muslim‹ practice, had been, in one way or another, popular in Europe (and North America) until most recently. Concepts of family honour that were considered irrelevant in liberal, individualistic legal practice had openly entered legal codes during the Fascist era, but they had had a hidden presence in earlier codifications as well. When in the 1840s, in total agreement with contemporary opinion in Germany, Russia, France, and Spain, Prussian lawyers stated that a wife's infidelity was much more harmful to the family than a man's, they not only justified its being punished much more harshly.<sup>24</sup> They also excused a husband whose rage about his wife's adultery had driven him to kill the other man (and the wife).

**Second:** Looking back at the long and twisted history of European legal codifications, it is striking how closely intertwined defenses based on heat-of-passion and honour-related argumentations have been. What earlier codifications used to call ›heat of passion‹, ›fit of fury‹, ›aufflammende Leidenschaft‹, ›Gemüthsbewegung‹ or ›Erregung‹, very often, if not always, seemed to have been caused by an offense against honour. Up until very recently, legal codes or commentaries preferred to use the example of adultery to shed light on how passions could overwhelm a person and prompt him – and it was always a he – to kill. At the same time, adultery was defined as an offense against a husband's honour. Everyone, including judges, juries (where they existed) and the public, seemed to agree that even ›reasonable men‹ – as they were referred to in the British Common Law – could lose their temper and self-control under such circumstances. Legally, the killing was still considered a crime; culturally and socially, however, it was justifiable, to say the least. In places with a very strong tradition of clan and family power such as southern Italy, a cuckolded husband who failed to attack his opponent would

have been socially ostracized as a coward, unworthy of his head-of-family status.

**Third,** it is worth pointing out that modern legal codifications mostly refrained from openly addressing the honour issue. Instead, they chose to focus on emotional states that might or might not be connected to honour. Passion, affect and agitation mattered and counted as potential extenuating circumstances for homicides committed without premeditation. The reasons why legal codes became so interested in emotions are manifold and need further elaboration. Firstly, law increasingly conceived of crimes not only as ›external facts‹, actions and their consequences, but also took account of their motivational structure. This required psychological expertise and, concomitantly, the study of emotions.<sup>25</sup> Even those legal traditions that, like the Common Law, did not address the issue of motive, increasingly referred to emotions as factors impinging on intentionality. As much as legal theory and practice became evermore concerned with individual responsibility and culpability, emotions were re-evaluated as interferences that could permanently or temporarily hinder the use of reason and free will.

In addition, emotions appeared somewhat more ›objective‹ than honour: everyone seemed to possess them and know how they felt. In the age of medical science and physiology, anger, rage, fury, jealousy – i. e. those emotions that were usually evoked in heat-of-passion defenses – were deemed to be universal and obvious. Only recently, in the last decades of the twentieth century, were those self-evident truths questioned, mostly with regard to their gender bias, but also because of the exclusion of emotions such as fear, despair, and compassion.<sup>26</sup> Furthermore, historical research has started to reveal the extent to which passions and emotions are social rather than biological facts. As a consequence, the concept of emotions that underlay legal codifications and was used in court proceedings turns out to be spatially, temporally, and socially specific as well as limited in scope and meaning. The so-called loss of self-control due to emotional overwhelm is as much a historical

24 SCHUBERT (ed.) (1994) 135.

25 KLEIN (1799) 28, 107.

26 EDWARDS (2010) 227 quoting the British Law Commission's 2003 paper on ›Partial defences to murder‹.



construction as the notion of male or female honour. Those legal theories that avoided speaking about honour (since it was supposed to be too subjective and socially fraught) and instead referred to passions or affects (as more objective and ›natural‹) were thus barking up the wrong tree. Honour was often lurking behind that tree, anyway.

### III. The limits of the honour defense

What was problematic about honour? Why did it prove to be a difficult concept for legal theorists and practitioners who subscribed to liberal legal anthropologies? The reason can be found in its sociological texture. Honour was not a concept that lent itself to clear definitions and universal application. Historically, it had been associated with distinct social groups, classes, and estates that claimed to own and guard particular, self-described dispositions and attitudes. Honour figured as a social and moral code linked to a person's family and class, which in turn demanded from its members to fully comply with, and adhere to, specific rules of honourable conduct. According to Georg Simmel, honour was a central instrument of social self-preservation that stabilized a group through its internal cohesion and external prestige. Through this crucial role, honour was translated from corporate norms into personal action, from »social duty« into »individual salvation and well-being«. Although regulated by strong social expectations, individuals usually accepted these as their own interest and acted accordingly.<sup>27</sup>

Furthermore, honour was perceived as being subject to social hierarchy. In this vein, members of the aristocracy traditionally expected to be treated more honourably than members of the middle or lower classes. Honour offences were regarded (and sentenced) unequally, depending on who had insulted whom. In a similar fashion, insults were held to matter differently to different people. The same slur or slight was supposed to bear more or less weight depending on who had uttered it and to whom it was addressed.<sup>28</sup> Such a vertical concept

of honour clearly violated the notion of equal rights and justice and, consequently, attracted growing criticism from liberal-minded jurists and politicians. The French Code Pénal of 1810 eradicated it completely, while the new Prussian code of 1851 still considered »crimes against honour«, without, though, allowing for socially graded differences of punishment.<sup>29</sup>

What remained, however, was the gendered notion of honour. To men and women, honour and shame meant completely different things. While male honour was closely associated with courage and steadfastness, female honour depended on sexual restraint, purity, and decency. A ›fallen woman‹ who had given herself to a man who was not her husband was condemned as dishonourable. General opinion held that she had not only brought shame on herself, but also on her husband, or her father or brother should she be unmarried. According to a widely held belief in nineteenth-century society, male honour largely depended on managing to control a wife's (or daughter's, or sister's) sexuality. If this control failed, honour was lost, for men and women alike.

The actions that brought dishonour thus clearly differed between men and women. While wives, daughters or sisters dishonoured themselves by engaging in illegitimate sexual conduct, husbands, fathers or brothers were dishonoured by the men who had engaged in inappropriate relationships. The latter humiliated the legal and legitimate guardians of female sexuality and challenged their masculine prowess. Such an assault demanded strong action and could not go unpunished. During the long nineteenth century, polite society in many European countries considered it a *point d'honneur* to call the offender out and challenge him to a duel, as the archetypical crime of honour. It was forbidden by law (for different reasons), but, at the same time, deemed utterly honourable behaviour both because of its ›noble‹ motives and the way it was practiced: restrained, in cold blood, on equal terms. The outcome did not really matter; wounding or killing the opponent was not what the duel was ultimately about. As much as violence was necessary in order to prove a man's determi-

27 SIMMEL (1968) 403–406; WEBER (1972) 635 ff., 722; WEBER (1958) 270 ff.; BOURDIEU (1974) 60 ff.

28 KLEIN (1799) 193.

29 FREVERT (1995) 28–35.

nation to stand up for his honour at the risk of his own life, physical harm was neither *movens* nor final goal. Duels rarely ended fatally, and were not meant to do so.<sup>30</sup>

Duets were not about female honour, but about male honour, as late nineteenth-century feminists were quick to point out. While those who praised the duel as an act of chivalry stressed men's altruism and generosity in defending women against male assault, critics described it as a practice confirming patriarchal attitudes and male rights. Such criticism might have found further evidence in the way in which the law treated adultery. Well into the twentieth century, legal opinions and commentaries supported the idea that adultery meant and functioned as a strong insult against the husband whose wife had had a sexual encounter with another man. Although the French Penal Code made no open reference to honour, contemporaries knew that honour was at stake when a husband caught his wife and her accomplice »in the fact, in the house where the husband and wife dwell«. <sup>31</sup> German legal discourse was more outspoken. Throughout the nineteenth century, adultery was portrayed as a »grave insult« (*schwere Beleidigung*) to the husband. He might thus feel deeply offended (*innerliche Kränkung*) and humiliated in his sense of honour, and consequently his fury might drive him to commit a spontaneous act of manslaughter, i. e. to kill the other man and even his own wife.<sup>32</sup>

Fury as affect or passion was thus aroused by a man's feeling that his honour had been attacked and violated. In this vein, a crime of passion could ultimately be linked to issues of honour. Yet it was not cast in stone that a man's honour depended on his wife's faithfulness and had to be respected by other men. By the turn of the century, legal opinions had started to differ. In 1902, a German

regional appeals court stated that adultery could not by itself be considered an offense against the husband. Although it destroyed the fiduciary relationship between husband and wife, this was not sufficient to qualify the act as a personal insult. Only if the other man treated the husband with disrespect and contempt should the latter sue him in private action.<sup>33</sup>

Stressing the need to examine the relationship between a husband and the other man at an individual level was in sync with liberal legal theory that strongly disapproved of collective notions of honour. As early as 1901, the German Supreme Court declared that honour as a legally protected good was only due to individuals. Under these auspices, family honour was a concept unknown to German penal law and could not be appealed to by parents who felt insulted by someone claiming that their daughter had given birth to an illegitimate child.<sup>34</sup> This opinion, however, attracted severe criticism after 1933. In 1936, the Supreme Court (that had by now been purged of its liberal and Jewish members) took an altogether different stance. It reinstated the notion of family honour which, at closer sight, was identical with that of the husband who, as head of family, was directly targeted by any attack that violated the honour of his wife or other family members. As the Minister of Justice Franz Gürtner emphasized, the National Socialist sense of justice (*Rechtsempfinden*) not only held honour to be the most precious property of Germans, but also believed strongly in the honour of communities or corporations rather than individuals.<sup>35</sup>

Even after 1945, such concepts were not altogether discarded. As late as 1961, a major commentary still considered adultery a »grave personal offense« to the husband, thus invoking long-familial notions of male (and, consequently, family)

30 FREVERT (1995) 150–171.

31 French Penal Code art. 324; MAINARDI (2003) 24.

32 Berathungs-Protokolle der zur Revision des Strafrechts ernannten Kommission des Staatsraths, den Zweiten Theil des Entwurfs des Strafgesetzbuchs Tit. 1–16 betreffend (1841) 190; SCHUBERT (ed.) (1994) 611; BESELER (1851) 352; STENGLIN (1869) 328; RÜDORFF (1881) 499; OLSHAUSEN (1886) 776; GÜNTHER (1895) 77.

33 Archiv für Strafrecht und Strafprozeß 49 (1903) 324 f. Those signs were found when an adulterer had continuously and for a long time met the wife in her husband's house or apartment. Such behaviour was considered contemptuous of the husband's »personality« and his rights as head of family and household (»als Familienoberhaupt und als Hausherr«). See, for a similar opinion, *ibid.* 63 [1917] 469 f. A personal offense was even more at stake when husband

and adulterer had been old friends (Sächsisches Archiv für Rechtspflege 8 (1913) 449).

34 Archiv für Strafrecht und Strafprozeß 48 (1901) 441; see also *ibid.* 57 (1910) 209; Juristische Wochenschrift 41 (1912) 934.

35 Entscheidungen des Reichsgerichts in Strafsachen 70 (1936) 94–100; GÜRTNER (ed.) (1936) 400, 411 f., 419.

honour.<sup>36</sup> In post-fascist Italy, such notions were discussed even more openly. Here as in West Germany, it was not until the 1970s and 1980s that these provisions and paragraphs were either discretely forgotten or officially repealed.

Following on from this discussion, we might be prompted to reconsider the allegedly deep and essential rift between European and non-European, ›Muslim‹ ways of dealing with women's illegitimate (sexual) behaviour. In both cases, honour has played a huge role, albeit in different respects. In both cases, male family members could and would feel offended by women's ›indecent‹ conduct and take violent action. For a long time European legal traditions had condoned such violence as driven by justified affect; crimes of passion usually attracted a high degree of public attention and sympathy. If taken to court, men who had murdered their adulterous wives or/and competitors could count on understanding and compassion.<sup>37</sup> People would empathize with those men's feelings of humiliation and dishonour. At the same time, however, the law insisted on the immediacy of emotional stress. Only when an act of homicide had been committed in the heat of passion, driven by spontaneous rage, fury or despair, did it deserve lenient treatment.

This distinguishes crimes of passion from the kind of honour killings that happen in contemporary Muslim communities and countries. These killings are generally not of a spontaneous and passionate nature. ›Affect‹ is not involved when brothers, fathers or husbands contemplate about the most suitable perpetrator and method to kill the deviant sister, daughter, or wife. In this sense, honour killings resemble premeditated murder, without necessarily sharing the provision of base motive initiating the act. Perpetrators usually invoke the duty to uphold the family honour that has allegedly been sullied by the woman's inappropriate conduct. In their view, her failure to comply with the mores and rules adopted by the family and the community has brought shame upon all

family members. They are held responsible for this failure and consequently suffer from their peers' contempt and derision. In order to cast off their shame and restore the family status, they kill the woman in a well-organized and willfully planned way that strengthens the family's ultimate control and power.

Although the concept of family honour with its in-built bias towards male supremacy seems utterly alien to contemporary Western culture and therefore encounters collective indignation, it played a prominent role in European legal traditions and social practices until very recently.<sup>38</sup> A long process, often strewn with controversy, was required in order to reach the point where a person was not perceived as part of a larger group but as an individual with genuine rights. Male dominance embedded in, and validated by, the concept of family honour often survived until as late as the 1970s.

Remembering this part of European legal and cultural history might help to engage in a process of cultural translation. It resists the temptation of ›othering‹ a pattern of thought and behaviour that has been broadly familiar to ›us‹ in the not-so-distant past. This is not synonymous with advocating leniency in treating today's honour killings. As far as individual rights are concerned, developments in current European law and jurisdiction should not be reversed. Acknowledging concepts of family honour that defy a woman's right to live her own life is at odds with how modern Western societies are normatively structured. Furthermore, family honour can be used as a pretense and excuse for more egoistical and ›ignoble‹ motives and should therefore be closely scrutinized and questioned in all cases. At the same time, however, European normativities should be exposed both in their past and present deficiencies and inconsistencies. Discrimination against women had long been inherent in European law codes and court sentences, and sometimes lingers on until the present. As much as the honour defense has worked to

36 KOHLRAUSCH/LANGE (1961) 480: Insult includes »any grave offense, f. ex. adultery«. See also GRÜNEWALD (2010) 243–256.

37 LINKA (2008) 139; BERENSON (1992) 28.

38 See, as a valid critique, ABU-LUGHOD (2011).

consolidate male dominance and power, the heat-of-passion defense has privileged male acts of violence over women's. The manner in which legal experts, theorists, and practitioners have used emotions in order to thoroughly gender crimes such as manslaughter and murder has not yet been fully analyzed. Honour and shame, empowerment and

humiliation, passion and affect, insanity and self-control have been implicit as well as explicit concepts of legal anthropologies that are in dire need of cultural critique and translation. ■

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