

Cultural Defence: An Odyssey for English Courts

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Abstract

When individuals commit culturally motivated acts that clash with the law, they may ask the courts to consider imperatives that influenced their criminal behaviour; namely, invoke a 'cultural defence' so as to lessen their responsibility. The increasing amount of literature dealing with the issue and the defence's recognition in other jurisdictions raises the question of its incorporation in the English courts. This piece seeks to contribute to that by illustrating the difficulties of such a development. It seeks to raise the issues of reviewing the authenticity of claims and the defence's potential misuse, and most importantly, the difficulty in understanding the 'foreign'. While the proponents of the defence have addressed some of these issues, others remained unexamined, lacking theoretical assessment, which is essential for incorporating the fluidity and changing nature of cultures. Such examination aims to function as a warning of the enormity of the reforms suggested by the defence's proponents.

Introduction

With the constant influx of immigrants and the subsequent phenomena of Diaspora and globalization, diverse cultures come to exist under single legal systems. This raises the question of whether defendants' cultures should be considered in criminal trials as mitigating factors. Common law has long been reluctant to do so.¹ However, Renteln alongside an increasing number of academic advocates for the admission of such a defence, are pushing courts to adopt interdisciplinary approaches where the *mens rea* of the defendant has been interfered with by his cultural dictates. This piece argues that the recognition of such a defence will bring with it several difficulties for the English courts in establishing the authenticity of claims, preventing the defence's misuse and understanding the foreign. These indicate the enormity of the reform suggested.

Rationale for Cultural Defence

Renteln supports the establishment of an official cultural defence in criminal trials as long as other human rights are not undermined.² This is based on the assertion that one's perception and thus acts are fundamentally affected by culture. Cultural factors may be categorised with analogous social attributes like age, gender and mental state, that are taken into account by the courts, and are additionally supported by international law instruments and fundamental legal principles like the fairness and equal protection of the law.³ Accordingly, proponents of cultural defence dispute the fairness of expecting a

¹*R v Barronet and Allan* [1852] 169 Eng. Rep. 633

²Alison Dundes Renteln, 'The Use and Abuse of Cultural Defense' (2005) 20 *Canadian Journal of Law and Society* 47, 48

³*ibid*

newcomer to adjust to and know the law of the state he resides in.⁴ The principle of fairness is also reflected in the risk of excessive punishment.⁵

“What is the Culture?”

Authenticity

If such evidence is admitted before the courts, Renteln notes that judges have to verify the authenticity of the claims put before them.⁶ Reliable information will thus be needed, most probably provided by the use of expert evidence. It seems unlikely that experts such as anthropologists and sociologists will be part of the culture themselves. Thus a transformation of cultural facts into forms in the court structure will be essential. Such practice remains highly unexplored in UK criminal courts while it also raises philosophical and practical issues of understanding, as it will be later analysed.⁷ In addition using members of cultural groups as experts themselves bears the risk of misinterpretation of cultures, due to societal pressures of defending friends or relatives.⁸ Torry further warns us that such experts risk stepping a ‘minefield’ in an adversarial trial, where members of the community or students of the culture can easily contest them.⁹ This relates to the indeterminacy of cultures, resultant from the different views within communities themselves, which in turn makes the

⁴Carolyn Choi, ‘Application of Cultural Defense in Criminal Proceedings’ (1990) 8 Pacific Basin Law Journal 80, 86

⁵*Renteln* [n2], 52-53; *Siripongs v Calderon* (1998) 9th Circ. 133F.3d 732

⁶*Renteln* [n2], 49

⁷Gordon R Woodman, ‘The Culture Defence in English Common Law: The Potential for Development’ in Marie-Claire Foblets and Alison Dundes Renteln (eds), *Multicultural Jurisprudence: Comparative Perspectives on Cultural Defense* (Hard Publishing, 2009), 32

⁸*Renteln* [n2], 66

⁹William I Torry, ‘Culture and Individual Responsibility: Touchstones of the Culture Defense’ (2000) 59 Human Organization 58, 65

“cultural evidence” in the courtroom diverse and opposing.¹⁰ The fluidity of cultures and the subsequent impossibility of a permanent definition are also troublesome.¹¹ Unlike anthropology, current law seems to be based on an outmoded worldview of culture that makes no accommodation for cultural dissenters.¹² The *Al-Saidy Case*, where two teenage sisters were forced to marry Iraqi immigrants (aging 28 and 34 and charged with first-degree sexual assault to a child)¹³ is illustrative. While the incident was deemed definitive of Iraqi culture, observers asserted that though such cases were common years ago in Iraq, they are currently rare.¹⁴

Misuse

This risks increasing potential ‘misuses’ of the defence, which is perhaps the most obvious difficulty arising for the courts. Indeed, cultural defence has come to be invoked in an opportunistic manner to circumvent the criminal justice system, either by claiming of belonging to a group¹⁵ or creating peculiar generalizations.¹⁶ Phillips, in identifying this as one of the four main issues of cultural defence, suggests that for courts to avoid such manipulation, a transparent test is needed.¹⁷ Renteln attempts to resolve that by providing us with three questions the courts should take into account. Accordingly, the court has to make sure that (i) the litigant is member of the ethnic group, (ii) the group

¹⁰Doriane Lambelet Coleman, ‘Individualizing Justice Through Multiculturalism: The Liberal’s Dilemma’ (1996) 96 Columbia Law Review 1093, 1162

¹¹Ibid, 1163

¹²Madhavi Sunder, ‘Cultural Dissent’ (2001) 54 Stanford Law Review 495, 516

¹³Leti Vlopp, ‘Blaming Culture for Bad Behaviour’ (2000) 12 Yale Journal of Law and Humanities 89

¹⁴Dallas Morning News, ‘Iraqi Father of Child Brides claims culture as a defence’ (4 December 1996), 39A

¹⁵*United States v Bauer* (1996) 9th Circ. 84 F.3d 1549

¹⁶*People v Rhines* (1982) Cal.Ct.App. 182 Cal. Rptr, 487

¹⁷Anne Phillips, ‘When culture means gender: issues of cultural defence in the English courts’ (2003) 66(4) Modern Law Review 510, 513-514

has such a tradition and (iii) the tradition influenced the defendant when he acted.¹⁸ Failure to meet any limb of this test would render the defence inadmissible. She subsequently stresses that had such a test been admitted even in the most egregious cases of 'cultural defence', courts would have been protected from manipulations. What is particularly troublesome is the second limb of the suggested test, as it is directly linked to the impossibility of defining culture, as explained above. The difficulty in establishing the authenticity of such claims could directly influence the determination whether a cultural group has such a tradition, making Renteln's test likely to fail in preventing the defence's misuse.

Understanding the Foreign

The greatest difficulty that the courts will encounter however seems to be the understanding of the "foreign", which could lead to the misinterpretation of foreign customary practices. Renteln is aware of the issue, as she refers to *R v Adesanya*,¹⁹ a case regarding the scarification of a child from his mother as a Yoruba tribal custom. Despite the rejection of a cultural defence, the fact that the judge referred to a 'Nigerian' custom, omitting the diverse tribes within the country, highlighted the potential incapability of judges in understanding the foreign.²⁰ The most logical solution to the problem is the admission of forensic evidence by anthropologists.²¹ This however, could result in an 'unprecedented flood of complicated cases'.²² To avoid that, Renteln suggests a bigger project, which would require the examination of cross-cultural jurisprudence in law

¹⁸*Renteln* [n2], 49-50

¹⁹(17 July 1974)

²⁰*Renteln* [n2], 63

²¹*Torry* [n9], 59

²²*ibid*, 60

schools, the inclusion of cultural analysis in bar examinations, and the undertaking of cultural and linguistic educational seminars for judges.²³

Prejudice and the Cultural 'Other'

Even if the above are implemented, understanding remains a fundamental difficulty for anyone if perceived through Gadamer's theory of hermeneutics. To understand the motive of a defendant, you need to understand his culture.²⁴ Any form of understanding requires interpretation, and '[i]nterpretation begins with fore-conceptions'.²⁵ What Gadamer claims is that understanding is strongly affected by one's acculturation and tradition. In that way, the convictions one brings to an issue, will allow the truth of the situation to assert itself.²⁶ Any argument that suggests when a cultural defence is admitted in a court, pre-existing beliefs of one's culture such as gendered violence and patriarchy will be able to be omitted seems tenuous. According to Gadamer, however, such 'prejudice' is legitimate; it only becomes harmful when it is 'frozen'.²⁷ In a legal context, cultural prejudices bear that risk to a large extent, since current law seems to be premised on an outmoded worldview of culture, which can freeze cultural groups in the status quo.²⁸ As a result, Vlopp illustrates how the American society resorts to the selective blaming of culture and presumptions that immigrants of colour are passive victims dominated by their cultural traditions that come to threaten the alleged 'cultural-less' West.²⁹ It seems highly likely this will be the case in UK courts as well, where frequent

²³Renteln [n2], 66

²⁴Alison Dundes Renteln, *The Culture Defense* (OUP, 2004), 188

²⁵Hans-Georg Gadamer, *Truth and Method*, 2nd edn transl. by Joel Weinsheimer and Donald G Marshall (London: Sheed and Ward), 267

²⁶Robert Sokolowski, 'Gadamer's Theory in Hermeneutics' in Lewis Edwin Hann (ed), *The Philosophy of Hans-Georg Gadamer* (Open Court Publishing Company, 1997), 227

²⁷ibid, 227

²⁸Madhavi Sunder, 'Cultural Dissent' (2001) 54 *Stanford Law Review* 495, 503

²⁹Vlopp [n13], 113

KENT STUDENT LAW REVIEW Volume 3 2017

reference to 'English values' is made.³⁰ Since cultures, typically of the perceived other, are portrayed as primitive and backwards, the power dynamics within foreign communities are left unexamined and as a result cultures are misinterpreted.

'Misinterpreted' cultures could lead to victims of the crime also becoming victims of injustice. This is exemplified in the long attribution of 'honour killings' to the Muslim diaspora in Europe. For example, in Germany, where a large Turkish community exists, prior to the 2004 Bundesgerichtshof landmark decision that prevented the consideration of cultural factors to mitigate convictions, courts have occasionally downgraded murders to manslaughters.³¹ It has subsequently been asserted that the killings could not be attributed to the culture per se.³² The perpetrators derived from a 'marginalized ethnic underclass' with poor education and social disadvantage, which could not be omitted in finding the motives of any offence, while the practice was not widely accepted within the Turkish community. In the English context, after comparing *R v Shabir Hussain*³³ with other male violence incidents, Phillips concluded that treating such cases as 'cultural' is indeed a misrepresentation.³⁴ In the aforementioned case the defendant was convicted of murdering his sister in law by driving into her. On appeal he introduced a guilty plea to manslaughter by provocation on the grounds that the victim

³⁰Woodman [n7], 33

³¹Sylvia Maier, 'Honor Killings and the Cultural Defense in Germany' in Marie-Claire Foblets and Alison Renteln, *Multicultural Jurisprudence: Comparative Perspectives on Cultural Defense* (Hard Publishing, 2009), 241

³²Dietrich Oberwittler and Julia Kasselt, *Ehrenmorde in Deutschland, Eine Untersuchung auf der Basis von Prozessakten [Honour Killings in Germany. A Study Based on Prosecution Files]* (Cologne: Wolters, 2011)

³³[1997] EWCA Crim 2876

³⁴Phillips [n17], 527

defaulted an arranged marriage for her in Pakistan when she was sixteen, the victim's refusal to sign documents so as to enable her husband entry to the UK and for having an affair with a married man. His sentence was reduced, as the court acknowledged how such behavior could have been highly offensive to someone with the defendant's cultural and religious background. Phillips refuses to categorize such cases as cultural as they simply seem to be gender difference conventions with a twist of what is perceived as cultural codes.³⁵

Agreement and morality

Gadamer also associates understanding with a strong sense of agreement. Accordingly, human beings understand each other until they reach an agreement.³⁶ Let us take an extreme hypothetical scenario. In the Republic of Utopia, it is a long established customary practice for parents to commit cannibalism on their babies when they are born with blue eyes. It seems improbable to imagine an English judge even considering a cultural defence in such a case. The judge will not be able to understand the utopian culture, because he will fundamentally *disagree* with the practice. This largely relates to the practice's moral stance. Fisher explains this through Dworkin's thesis. Accordingly, *Hercules* should understand legal material as presented in its best light, meaning in a way that it is morally justified.³⁷ In cases of more grievous and controversial offences, such as killings or rape, judges will inescapably encounter 'internal moral' questions. Such questions will be assessed under the judge's own background and moral values.³⁸ As a result, cultural defence

³⁵ibid, 528

³⁶Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (Polity Press, 1987), 9

³⁷James C Fisher, 'The Role of Morality in Culture Defence Cases: Insights from a Dworkinian Analysis' (2013) 1 Birkbeck Law Review 281, 288

³⁸ibid, 293

seems to be successful only in cases where the 'internal morality' of the committed act, meaning the particular moral substance of the foreign cultural practice, reflects the morality of the legal system in which the defendant is tried. Interestingly enough, such difficulty could redeem the violation of human rights of children and women as victims, one of the main opposing claims to admitting the defence in the courts.

Don't Forget the Jury!

It should also be noted that what Renteln suggests does not provide a solution of ensuring understanding for the juries. Since in an adversarial system it bears an immense role, its proper functioning should not be omitted. In addition to the issues of understanding analysed above, the jury frequently faces questions of what would the 'man on the Clapham omnibus' do. It is highly unlikely for the jury to be made up by members of the defendant's cultural minority. So how can the jury as simple UK civilians apply an objective test when they are on a 'different bus' from the defendant? Sheybanni highlights the importance of such an issue by referring to *People v Kimura*,³⁹ where a Japanese mother committed a mother-child suicide, which, despite illegal, was quite common in Japan.⁴⁰ The court, instead of considering Japanese culture, opted to base its judgment on lack of sanity and emotional illness, and reduced her sentence from murder to manslaughter. If the jury were to consider her cultural background, she would most likely be convicted of first-degree murder,⁴¹ simply because what she did is unreasonable in the eyes of an American jury. Contrastingly, in the eyes of a Japanese jury this would be completely

³⁹(1985) Los Angeles Super. Ct. No. A-091133

⁴⁰Malek-Mithra Sheybani, 'Cultural Defense: One Person's Culture is Another's Crime' 9 Loyola of Los Angeles International and Comparative Law Review 751

⁴¹ibid, 762-763

understood, and in fact would be considered a honourable way of dying.⁴² In the light of such scenarios, Renteln suggests the creation of juries made up by members of the defendant's minority group, though she herself admitted that such a huge reform is unlikely to be accommodated by any legal system,⁴³ as it might be considered an illegitimate form of affirmative action. *People v Hernandez*⁴⁴ illustrates how that can be the case, as it was held that the exclusion of Spanish-speaking jurors did not constitute a violation of equal protection, since the nexus between language and ethnicity (Spanish and Latinos) was weak.

Impossibility of Translation

It should also be noted that any attempt to understand the foreign would inevitably include the translation of foreign texts, either legal or not. This will raise issues either where the judges are the translators themselves or the readers of translated work. Since the reason of examination of foreign material is specifically the understanding of a culture, an ethical approach to translation should be adopted; namely, the translator should try to move the reader towards the writer, leaving the latter intact.⁴⁵ Yet, the feasibility of such an approach can be challenged in two ways. Firstly, access to foreign law can never be impartial. Gadamer's theory on 'prejudice' extends to textual interpretation. Secondly, it can be challenged through Jacques Derrida's *Monolingualism* where he equated ethics with hospitality. Pure hospitality can never be achieved, as rules will be imposed on the 'foreigner' simply because

⁴²ibid, 767

⁴³*Renteln* [n24], 209

⁴⁴(1991) 226 Cal. App. 3d 1374

⁴⁵Friedrich Schleiermacher, 'On the Different Methods of Translating' in Rainer Schulte and John Biguenet (eds), *Theories of Translation*, transl. by Waltraud Bartsch (University of Chicago Press, 1992), 42

his ontology and actions are unknown.⁴⁶ Similarly, ethical translation is limited by the rules of the target language. Accessibility to the culture deriving from the text is thus limited. Nonetheless, understanding culture is essential to the 'defence'. Therefore the "impossible should be made possible",⁴⁷ by adopting an 'alienating' strategy of translation which would highlight the particularities of the original text, giving thus the impression that the text read is foreign. Yet it should be remembered that this would turn the act of "translation" to one of "transformation", as it will inevitably involve an interpretative act.

Conclusion

Evidently, admitting such a 'defence' in the UK courts raises several issues. Establishing the authenticity of claims is hindered by culture's indeterminacy resultant from diverse views within it and its fluid nature, which current law fails to perceive. This in turn prevents courts from detecting cases in which 'culture' is notoriously invoked in order to circumvent the criminal justice system. Although proponents of the defence present several reforms that mainly include the adoption of interdisciplinary approaches, this does not seem to be enough so as to thwart current laws' incapacity to understand culture. Understanding the 'foreign' is by itself a demanding exercise. In the case of cultural defence it becomes even harder due to the westernized conceptions of the 'other' and the misconceptions about the feasibility of global application of western morality and human rights. Translation also stands as a further barrier in properly understanding the 'foreign', as capturing the exact meaning of a text and its

⁴⁶Herman Rapaport, *Later Derrida: Reading Recent Work* (Routledge, 2003), 29

⁴⁷Simone Glanert, 'Translation matters' in Simone Glanert (ed), *Comparative Law- Engaging Translation* (Routledge, 2014), 7

KENT STUDENT LAW REVIEW Volume 3 2017

enhanced cultural factors seems like an impossible task for either the reader of translated work or the translator himself. What Renteln suggests is a good starting point. Yet, in order to prevent the defence's misuse, the difficulty of properly understanding the cultural practice behind an offence should not be underestimated. Despite complete understanding being theoretically unfeasible, this era of globalization leaves the courts with no choice but to consider such factors. Multiculturalism is now a reality; we are entering into a new world order. Accordingly, what will be needed, sooner or later, is a new law order, whereby the criminal legal system, in a revolutionary coordinated effort, that some might view as futile, will seek to capture the 'foreign'- each time focusing on obtaining a deeper understanding, yet ultimately knowing that its mission will fail.