The Use and Abuse of the Cultural Defense

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Introduction

When individuals commit culturally motivated acts that clash with the law, they may ask courts to consider the cultural imperatives that inspired the actions in question. When they advance arguments of this sort, they usually wish to introduce expert testimony into court to underscore the validity of their claims. Unfortunately, judges are often disinclined to allow the presentation of such evidence and exclude it as "irrelevant." Their refusal to permit cultural evidence is unfortunate because it can result in a miscarriage of justice. My view is that the cultural defense should be established as official public policy as long as safeguards are put in place to prevent its misuse.

In this essay I begin with a brief rationale for the adoption of this policy, analyze cases in which culture was improperly excluded from the proceedings, and then turn to a consideration of potential misuses of the defense in the context of a few examples. It is crucial to think carefully about possible difficulties that may arise with the implementation of the cultural defense, as it is only in legal systems that guard against the abuse of the cultural defense that this strategy has a chance of becoming a viable policy option.[1]

The Rationale for the Cultural Defense

Cultural differences deserve to be considered in litigation because enculturation shapes individuals' perceptions and influences their actions.

[1] The debate over the cultural defense is taking place in countries across the globe such as Australia, Belgium, Canada, England, the Netherlands, South Africa, and the United States. See, *e.g.* Jeroen Van Broeck, "Cultural Defence and Culturally Motivated Crimes (Cultural Offences)" (2001) 9 Eur. J. Crime, Crim. L. & Crim. J. 1; Simon Bronitt & Kumaralingam Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) 21:2 Alt. L.J. 58; Sebastian Poulter, *Ethnicity, Law, and Human Rights: The English Experience* (Oxford: Oxford University Press, 1998); Anne Phillips, "When Culture Means Gender: Issues of Cultural Defence in English Courts" (2003) 66 Mod. L. Rev. 510; Charmaine M. Wong, "Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada" (1999) 42: 2-3 Crim. L.Q. 367; Deborah Woo, "Cultural 'Anomalies' and Cultural Defenses: towards an integrated theory of homicide and suicide" (2004) 32 Int'l J. Soc. L. 279; Pieter A. Carstens, "The Cultural Defense in Criminal Law: South African Perspectives" (2004) 2 De Jure 312. See also the essays on Folk Law in Conflict in Alison Dundes Renteln & Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of* Lex Non Scripta (Madison: University of Wisconsin Press, 1995).

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The acquisition of cultural categories is largely an unconscious process, so individuals are usually unaware of having internalized them. The premise of the cultural defense argument is that culture exerts a strong influence on individuals, predisposing them to act in ways consistent with their upbringing. The theoretical basis for a cultural defense hinges on the idea that individuals will think and act in accordance with patterns of culture.

Legal systems must acknowledge the influence of cultural imperatives as part of individualized justice, and this cross-cultural jurisprudence does not represent a radical departure from existing policies in most criminal justice systems. Taking a person's cultural background into account is fundamentally no different from judges taking into consideration other social attributes such as gender, age, and mental state. Insofar as individualized justice is an accepted part of legal systems, the cultural difference is simply another factor to review in the context of meting out condign punishment.[2]

Well-established principles of law support the use of the cultural defense. These principles include the right to a fair trial, religious liberty, and equal protection of the law. If individuals who come from other societies are entitled to these rights, it is incumbent on legal actors to take cultural differences into account.[3]

Another normative principle supports the use of the cultural defense. Under international human rights law, virtually all states have an obligation to protect the right to culture. The right to culture is found in various international instruments, with the most important formulation in article 27 of the *International Covenant on Civil and Political Rights* (*ICCPR*):[4]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[5]

The Human Rights Committee has construed the right as involving an obligation on the part of states to take affirmative steps to protect the right to culture.[6] As I have argued elsewhere, this right should mean, at the very least, that individuals who migrate to other countries, have the opportunity to tell a court of law what motivated the actions that apparently clash with the

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2 The challenge is to persuade courts to consider cultural motives. For a comprehensive treatment of culture in the context of criminal defenses, see Alison Dundes Renteln, "A Justification of the Cultural Defense as Partial Excuse" (1993) 2 S. Cal. Rev. L. & Women's Stud. 437.

3 For a more complete argument, see Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004) [*Cultural Defense*]. See also Renteln, "Visual Religious Symbols and the Law" (2004) 47 American Behavioral Scientist 1573.

4 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

5 *Ibid*. at art. 27.

6 The Human Rights Committee issues policy statements clarifying the scope of rights in the form of general comments. For its interpretation of art. 27, see *General Comment No. 23: The rights of minorities (Art. 27)*, OHCHR, 50th sess., CCPR/C/21/Rev.1/Add.5 (1994).

law of the new country.[7] If construed in this way, the right to culture should authorize use of the cultural defense.

The main benefit of an official cultural defense is that it would ensure the consideration of cultural evidence in a court of law. Rather than leaving the decision about the appropriateness of admitting evidence to the whims of particular judges, a formal policy would guarantee that the courtroom door is open to data of this kind.[8] Of course, this does not mean that the information would necessarily affect the disposition of the case. What effect the cultural evidence should have is a separate question. Judges and juries would have to decide to what extent, if at all, cultural differences should mitigate punishment, make an ethnic group exempt from a policy, or increase the size of a damage award.

The Scope of the Cultural Defense

Although many regard the cultural defense as a strategy for reducing punishment in criminal cases, it is, in fact, used in a much wider range of court cases and also affects pretrial legal processes. In family court the question may be whether or not to terminate parental rights. In civil cases judges are asked to increase the size of a damage award because the particular action, e.g., an unauthorized autopsy affected a minority family more than one from the dominant culture because of the family's religious background. In the asylum context, immigration judges must analyze traditions to determine, for instance, if women have a well-founded fear that they will be forced to submit to an oppressive tradition if returned to their countries of origin, i.e., the cultural argument is sometimes the basis of a request for political asylum.

In *The Cultural Defense*,[9] I document the ubiquity of culture conflict cases and contend that this widespread phenomenon deserves greater attention. I advanced an argument in favor of a cultural defense, even though there are bound to be difficulties associated with the implementation of this policy. If courts are authorized to evaluate evidence concerning the cultural traditions of ethnic groups and indigenous peoples, there is no question that judges must verify the authenticity of claims put forward.

To minimize potential misuse of the defense, were it to be put into practice, I have proposed a cultural defense test that courts could use to help avoid abuse. Courts applying it would have to consider three basic queries:

1. Is the litigant a member of the ethnic group?

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7 Alison Dundes Renteln, "Cultural Rights" in Paul Baltes & Neil Smelser, eds., *International Encyclopedia of Social and Behavioral Sciences* (Oxford: Elsevier, 2002). Renteln, "In Defense of Culture in the Courtroom" in Rick Shweder, Martha Minow, & Hazel Rose-Markus, eds., *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage, 2002).

8 One of the earlier articles on this subject emphasized how crucial it is to ensure consideration of evidence. Bernard L. Diamond, "Social and Cultural Factors as a Diminished Capacity Defense in Criminal Law" (1978) 6 Bull. Am. Acad. Psychiatry & L. 195 at 203.

9 *Cultural Defense*, *supra* note 3.

2. Does the group have such a tradition?
3. Was the litigant influenced by the tradition when he or she acted?[10]

If courts are careful to insist upon answers to the questions posed here, this should help reduce the number of false claims and discourage illegitimate use of the defense.

To demonstrate how the test might be applied in the context of cases that invoke ostensibly legitimate cultural defenses, I will discuss a few examples. Following the consideration of these cases, I will turn to others in which the failure to investigate cultural claims risks undermining support for this policy.

Because there is widespread concern about the possible misuse of the cultural defense, I would like to draw attention to several examples of what I regard as unjustified attempts to raise cultural defenses. As we shall see, in some cases litigants fail to meet more than one of the requirements of the test.

This essay focuses primarily on the question of how litigants should go about establishing their claims. I wish to note, at the outset, however, that even if they can authenticate their claims, courts might still wish to reject the cultural defense. Where cultural traditions involve irreparable harm to individuals belonging to vulnerable groups, the defense should not influence the disposition of cases. To prevent improper use of the cultural defense, one must ask first whether the claim is factually accurate as an empirical matter, but then go on to determine whether accepting the claim that the right to culture should permit the custom, risks undermining other important human rights such as the rights of women and children.

Proper Use of the Cultural Defense

Although there is a widespread perception that use of the cultural defense is improper, in many cases cultural information is crucial for understanding the context of actions. For example, numerous cases involve adults who touch children in the genital area and are subsequently prosecuted for child sexual abuse. Because those observing the conduct automatically assume that the action is sexual in nature rather than merely a way of showing affection, families have been broken up and even destroyed.[11] In the *Krasniqi*[12] case, an Albanian Muslim father touched his four year-old daughter in a public gymnasium. The prosecutor assumed that the touching was for the purpose of sexual gratification, and he had to establish the motive here because child sexual abuse is a special intent crime.[13]

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10 *Ibid.* at 207.

11 See *e.g. State v. Kargar*, 679 A. 2d 81 (Me. 1996). See also Nancy A. Wanderer & Catherine R. Connors, "Culture and Crime: Kargar and the Existing Framework for a Cultural Defense" (1999) 47 Buff. L. Rev. 829.

12 For an account of this case, see Hugh Downs & Barbara Walters "We Want Our Children Back" *20/20* (18 August 1995) (Nexis) [*Krasniqi*].

13 Most crimes require only *mens rea* (intent) and *actus reus* (act). Specific intent crimes also require proof of the motive or reason for the action. To be guilty of child sexual abuse, a parent must intend to touch the child, must touch the child, and must do so for sexual

When Sam Krasniqi was prosecuted in a Texas criminal court, an expert witness on Albanian culture testified that the touching was a way of showing affection, and the father was subsequently acquitted.[14] It appears that the court was satisfied that all three parts of the cultural defense were met: the father was Albanian, Albanians had a custom of touching children that was not erotic, and the father was motivated by the custom when he touched his daughter. Unfortunately, however, even though the criminal court exonerated the father, this had no effect on the earlier decision of the family court that had terminated his parental rights.[15]

Culture should also be taken into consideration in cases involving the defense of provocation, which, if successful, reduces a murder change to manslaughter.[16] In these cases individuals claim that an insult or gesture provoked them to commit violent acts. There are two "prongs" to the test for provocation: the subjective part, i.e., whether the defendant was actually provoked, and the objective part, i.e., whether the objective reasonable person would have been provoked. Although defendants may be able to prove the first, they have considerable difficulty with the second. Consider the unpublished decision of *Trujillo-Garcia v. Rowland*,[17] in which two Mexican Americans were playing poker. After Jose Padilla lost $140 to Trujillo-Garcia, he went home but then returned four days later demanding his money back. When Trujillo-Garcia refused, the man said "*chinga tu madre*," an extremely offensive phrase in Spanish.[18] Trujillo-Garcia drew a gun from his waistband and shot him dead.

The defense tried unsuccessfully to introduce evidence to show that the average reasonable Mexican would have been provoked by the phrase. The state courts agreed with the prosecution that the evidence was irrelevant. In federal court Trujillo-Garcia argued that the court's failure to take into consideration the cultural context of his action violated his right to equal protection. Whereas the nature of an act constituting a provocation is usually understandable to a jury, in the instant case, without the contextual information concerning the provocation that affected him, namely the verbal insult in Spanish, the jury could not comprehend the offensiveness of the insult. The federal courts insisted on adhering to the "objective" reasonable person test, and assumed that even if the court had allowed him to invoke a

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gratification. Otherwise parents would be unable to bathe their children or change their diapers.

14 *Krasniqi*, *supra* note 12.

15 *Cultural Defense*, *supra* note 3 at 59. Touching children in the genital area should probably be discouraged not only because parents will encounter difficulty with the law, but also because children caught between two cultures may feel uncomfortable if they realize it is considered inappropriate conduct in the larger society. But incarcerating parents or breaking up families are illegitimate means of inculcating new values.

16 It is a partial excuse that reduces a charge of murder to one of manslaughter.

17 *Trujillo-Garcia v. Rowland*, U.S. 6199 (Dist. Ct., 1992) (Lexis); U.S. 30441 (App. Ct., 1993) (Lexis), 114 S Ct 2145; U.S. 4219 (Dist. Ct. 1994) (Lexis), 128 L. Ed 873, 62 USLW 3793.

18 For analysis of the term "chingar" see Octavio Paz, "The Sons of La Malinche" in Paz, *The Labyrinth of Solitude: Life and Thought in Mexico* (New York: Grove Press, 1961). See also *Cultural Defense*, *supra* note 3 at 34-35.

culturally relative standard and argue that the phrase would offend the average Mexican, this would not have constituted adequate provocation.

Had the court used the cultural defense test, it would have found that Trujillo-Garcia was indeed Mexican American, that this verbal insult was extraordinarily provocative according to the standards of his ethnic group, and that he was motivated by the insult when he killed the individual who uttered it. By excluding the cultural evidence, the court effectively made it impossible for him to raise the provocation defense.[19]

Provocation, even if successful, merely reduces murder to manslaughter; it does not result in an acquittal**.** Some may agree that Trujillo-Garcia should not have been entitled to raise a culturally relative provocation defense because they think individuals who are provoked should exercise self control. Indeed, one might well agree that the provocation defense, ordinarily used by jealous husbands who kill their wives and lovers, should be rejected in all cases; it should be banned altogether because those who are provoked should not lose self control. The philosophical difficulty with the status quo is that it accepts as adequate provocation only what is insulting to the so-called objective reasonable person who in actuality is someone from the mainstream culture. Hence, provocation, a criminal defense, theoretically available to all, in reality cannot be used by individuals from other cultures because they are provoked by insults different from those that would offend the "objective reasonable person". This constitutes a serious violation of equal protection.

In some homicide cases the question is whether cultural evidence must be presented during the sentencing phase, rather than the guilt phase, in an attempt to mitigate the punishment.[20] Failure of the attorney to present mitigating evidence concerning a defendant's cultural background arguably constitutes a violation of the constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. This was the contention in *Siripongs v. Calderon*.[21] Jaturun "Jay" Siripongs, a Thai national, was convicted of two murders with special circumstances for participating in the robbery of a convenience store during which two were killed. Siripongs admitted being present during the

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[19] For a thoughtful treatment of the dilemma of a defendant from another culture seeking to use the provocation defense, see Stanley M. H. Yeo, "Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism" (1990-1991) 33 Crim. L.Q. 280; Stanley M. H. Yeo, "Provoking the 'Ordinary' Ethnic Person: A Juror's Predicament" (1987) 11 Crim L.J. 96.

[20] See *e.g.* Michael Winkelman, "Cultural Factors in Criminal Defense Proceedings" (1996) 55:2 Human Organization 154; Olabisi L. Clinton, "Cultural Differences and Sentencing Departures" (1993) 5 Federal Sentencing Reporter 348; Kristen L. Holmquist, "Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide with the Federal Sentencing Guidelines" (1997) 12 Berkeley Women's L.J. 45; Yxta Maya Murray, "The Battered Woman Syndrome and the Cultural Defense" (1995) 7 Federal Sentencing Reporter 197.

[21] *Siripongs v. Calderon*, 35 F. 3d 1308 (9th Cir. Ct. 1994), denial of cert. 512 US 1183 (1995); 133 F. 3d 732 (1998).

commission of the crimes but denied that he had pulled the trigger.[22] During the sentencing phase of the trial, he did not display any emotion and would not name the individual responsible for the actual killing; the jury sentenced him to death. His attorney failed to explain the cultural aspects of his behavior, and this was subsequently the basis of an appeal of his death sentence. Despite a precedent in the same jurisdiction supporting the argument that failure to introduce cultural evidence may constitute a violation of the Sixth Amendment right to effective assistance of counsel, the Court of Appeals for the Ninth Circuit rejected his appeal. There was an enormous outpouring of support for Siripongs from members of the victims' families and the warden of San Quentin himself. Nevertheless, after two governors denied clemency petitions, Siripongs was executed.

Had the cultural evidence been admitted, it would have shown that in Thai culture, individuals are socialized not to display any emotion, even when they are under extreme stress. His stoic demeanor did not mean he lacked remorse, something which American juries often require if they are to spare a defendant's life. Moreover, some discussion of the Thai notion of "*boon*" and "*baap*" might have helped the jury understand why Siripongs was unwilling to enlarge the circle of shame by identifying the individual responsible for the killing, even when his own life was at stake.[23] If the jury had had the benefit of the cultural information, they would have seen that Siripongs was from Thailand, that the Thai worldview includes differing notions of responsibility and requires a stoic demeanor when in traumatic circumstances, and that these precepts affected his conduct. It is not clear whether he would have avoided the death penalty, but at least the trial would have been more fair. In the absence of cultural evidence during the sentencing phase of a trial, there is a serious risk that a defendant will receive a disproportionately harsh sentence.

In civil litigation the cultural defense test can also be useful as one can see in the case of *Friedman v. State*.[24] A sixteen-year-old woman, Ruth Friedman, went up the mountain to have a picnic with a male friend. Because the ski lift company negligently posted the notice indicating the lift would stop early that day, the two did not see it, and found themselves stranded halfway down the hill in a ski lift chair late in the afternoon. When it became dark, Friedman became hysterical about violating religious law by remaining alone with a man after dark, and she threw herself off the ski lift. In the lawsuit against the ski lift company, she had to establish that she belonged to the Orthodox Jewish community, that a possible interpretation of Jewish law includes a belief that a young girl should not be left unchaperoned with a male because this would ruin her reputation, and that she

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[22] As he was present during the commission of the crime, he was technically eligible to receive the death penalty under the felony murder rule whether or not he pulled the trigger. Nevertheless, a jury might have seen fit to spare his life had they believed someone else had actually committed the murder.

[23] For more on this case, see *Cultural Defense*, *supra* note 3 at 43.

[24] *Friedman* v. *State*, 282 N.Y.S. 2d 858 (1967), 54 Misc. 2d 448.

was motivated by this belief when she jumped off the ski lift chair. In this case the court, relying on expert testimony proffered by a rabbi, ruled in her favor, awarding her damages of nearly $40,000.

The cases here show the importance of taking cultural information into account to prevent a serious miscarriage of justice. Judges unfamiliar with the folkways of various groups frequently exclude the evidence because they consider it irrelevant. If they were to use the cultural defense test, they could establish the accuracy of the cultural claims to their satisfaction. Because they may have an intuition that overzealous attorneys will raise absurd cultural defenses, judges may be inclined to reject the defense altogether. This is unfortunate because there are legitimate cases in which courts cannot comprehend what has transpired without the benefit of evidence about the cultural context in which the acts occurred.

Misuse of the Cultural Defense

Critics of the cultural defense sometimes try to render it a ridiculous strategy by pointing to cases whose use of culture is so objectionable that even advocates of the cultural defense would reject it. For example, some refer to a case[25] in which an African American male prosecuted for assault, wanted to introduce testimony to show a "cultural difference" associated with "black people."[26] The defendant, arguing *pro se*, wanted to explain that when he invited the victim to his apartment, he spoke loudly. He claimed this had relevance for determining whether he had a reasonable belief the victim was consenting to sexual intercourse:

> He argues that he could have convinced the jury that she thought nothing of his loud voice because it is a common characteristic of black people to talk loudly to each other, and thus he reasonably thought she attached no significance to it because she was accustomed to such loud speech.[27]

Not only does the defendant conflate culture with race, but he makes an even more egregious error, putting forward a bizarre generalization about African Americans. Had he not been representing himself in court, he might not have sought to make such a patently absurd argument.

Another spurious use of the cultural defense case featured an Iranian Jewish husband who combined a battered husband defense with the "cultural" argument that his wife henpecked him, made him sleep on the floor, and forced him to beg for money for cigarettes.[28] Media coverage described his "cultural defense" as follows:

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25 *People v. Rhines*, 131 Cal. App. 3d 498 (1982) [*Rhines*].

26 For another case involving racism, see also Pascale Fournier, "The Ghettoisation of Differences in Canada: 'Rape by Culture' and the Danger of a 'Cultural Defense' in Criminal Law Trials" (2002) 8 Man. L.J. 88.

27 *Rhines*, *supra* note 25 at 507.

28 Thom Mrozek "Accused Wife Killer to Claim Mental Abuse" *Los Angles Times* (7 May 1993) B1.

> Moosa Hanoukai, 55, admitted beating his 45 year-old wife Manijeh to death (...) but claimed that she had abused him throughout their 25-year marriage. Testifying in Farsi and sobbing frequently, Hanoukai said that after the couple came to the United States in 1982 and opened a woman's clothing store, his wife forced him to sleep on the floor, prohibited him from spending any money, and persistently derided him as "stupid" and "garbage" in front of relatives.[29]

The lawyer also claimed that leaving the marriage was not an option in his community: "[d]ue to cultural and religious grounds, they were unable to get a divorce."[30] Even members of the community expressed skepticism about the argument that denigrating her husband's virility violates "(…) the norms of Persian Jewish culture in which the male is dominant."[31] Despite the questionable nature of the argument, the jury found the husband guilty of manslaughter instead of murder.[32]

If cultural defenses were raised in cases of only this sort, it would be understandable if the proposal to formalize the cultural defense failed to win many supporters**.** To guard against the abuse of the defense, it is worthwhile distinguishing some specific types of false claims that may be advanced.

In cases in which there is a *prima facie* legitimate cultural argument, the first question is whether the individual raising the cultural claim is actually a member of the group with the tradition in question. It is, of course, possible that an individual could pretend to be member of a group in order to be allowed privileges accorded that group. For example, students unfamiliar with the *kirpan*, the religious dagger that baptized Sikhs are required to wear, sometimes imagine that non-Sikhs might disguise themselves as Sikhs in order to wear knives in public. While it is conceivable that non-Sikhs might falsely claim to follow the Sikh religion in order to wear knives in public, it seems highly unlikely. Moreover, baptized Sikhs must also wear other religious symbols, which further calls into question the likelihood that someone will go to the trouble of masquerading as a Sikh in order to wear a dagger in public.

This question of whether the defendant is actually member of the group has arisen. For instance, in *State v. Bauer*,[33] Rastafarians were not allowed to raise a religious defense when they were prosecuted for possession of marijuana and conspiracy to run a multi-million dollar marijuana farm.[34] While Rastafarians are known to use "ganja" in religious ceremonies, the

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29 Tom Tugend "'Cultural Defense' plea gets sentence lowered" *The Jerusalem Post* (29 March 1994) 3.

30 Thom Mrozek "Cultural Defense in Wife's Death" *Los Angeles Times* (4 March 1994) B3.

31 One said: "I think it's a stupid lawyer's trick" (*ibid.*).

32 Thom Mrozek "Prosecutor Says Accused Killer Lied" *Los Angeles Times* (18 March 1994) B4. Despite accepting manslaughter, some jurors told the press they were "not swayed by the cultural defense," see Anne Burke "Man who said wife abused him guilty in killing" *Daily News* (26 March 1994) 3.

33 *U.S. v. Bauer*, 84 F. 3d 1549 (9th Cir.Ct. 1996) [*Bauer*].

34 The judges thought they should be entitled raise the religious defense with respect to the possession claims, but were doubtful as to whether the Rastafarian faith required the multi-million dollar farm.

federal judges in this case wondered if there were any Rastafarians in Montana.[35] The Court explicitly stated that just because the defendants want to "(…) claim the name of a religion as a protective cloak (…)",[36] neither the prosecutors nor the court had to accept "(…) the defendants' mere say-so".[37] Assuming the defendants really were members of the religion, the judges ruled that they should be permitted to raise a religious defense as to simple possession but not as to the conspiracy to distribute, possession with intent to distribute, or money laundering charges.[38]

In some cases litigants fail to meet more than one part of the cultural defense test. For example, if a person is not a member of the group, then even if the group has the custom in question, he or she cannot claim to have been influenced by the cultural imperative. Hence the individual will not meet 1 and 3. Likewise, if the person is a bona fide member of the group, but the group does not have the tradition, again the person will be unable to show he or she acted under the cultural imperative. So, while in theory, failure to prove one part would be sufficient to make the use of the cultural defense inappropriate, it happens that individuals attempting to raise the defense improperly will fail on more than one ground. I turn now to what I consider to be examples of egregious misuse of the cultural defense.

Adelaide Abankwah and her Gender Asylum claim

In a case that received tremendous media coverage, Adelaide Abankwah, a woman from Ghana, sought political asylum in the U.S. to avoid the custom known as "female genital mutilation" (FGM). She told immigration authorities that she was the eldest daughter of the Queen of the Nkummsa people and that her mother had just died. Because she was next in line to assume the throne, and because she was not a virgin, she had to be circumcised to avoid detection of her lack of purity. So as not to be forcibly subjected to FGM, she fled to the U.S. where she sought political asylum. She attracted considerable political support. Prominent feminists like Gloria Steinem and Hillary Clinton, the leading organization Equality Now, actresses Julia Roberts and Vanessa Redgrave, and legislators rallied around her, seeing her as a victim of a cruel cultural tradition.[39] The magazine *Marie Claire* had t-shirts printed with the phrase "Free Adelaide". Her gender asylum claim seemed promising as it followed a successful decision for a

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35 The appellate court said that when retried the defendants would have "... the obligation of showing that they are in fact Rastafarians and that the use of marijuana is a part of the religious practice of Rastafarians" (*Bauer*, *supra* note 33 at 1559).

36 *Ibid.*

37 *Ibid.*

38 "As to the counts relating to conspiracy to distribute, possession with intent to distribute, and money laundering, the religious freedom of the defendants was not invaded. Nothing before us suggests that Rastafarianism would require this conduct." (*Ibid.* at 1559).

39 For a detailed account of the proceedings, see David A. Martin, "Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum" in David A. Martin & Peter H. Schuck, eds., *Immigration Stories* (Foundation Press) [forthcoming in 2005] [Martin].

woman from Togo, Fausiya Kasinga, who won asylum in the U.S. to escape from precisely this custom.[40]

At first, the Immigration and Naturalization Service (INS) denied Abankwah's asylum petition because she had not proved she had a reasonable fear she would be harmed if returned to Ghana.[41] During the course of the appeals, she was detained for two years at a detention center in Queens, New York. Eventually the United States Court of Appeals for the Second Circuit accepted her account, rejecting the judgment of the Board of Immigration Appeals (BIA). The appellate court remanded the matter, ordering the BIA to grant her petition for asylum.[42] Judge Sweet was persuaded that Abankwah was a member of the Nkumssa tribe in central Ghana and accepted her story:

> Nkumssa tradition requires that the girl or woman next in line for the Queen Mother position must remain a virgin until she is "enstooled." During the ceremony to enstool a new Queen Mother, the designated Queen Mother must cup her hands and hold water in them. According to tribal legend, if the woman has disobeyed tribal taboos—including the one against engaging in premarital sex—she will be unable to hold the water in her hands, and it will spill out onto the ground. Even if the woman successfully holds the water, however, after her enthronement, the village elders select a husband for her who will inevitably discover whether she is a virgin or not. In either case, if the woman is believed not to be a virgin, she will be forced to undergo FGM.[43]

The federal appellate court discounted doubts expressed by the immigration authorities in the case.[44] The INS had noted that FGM was not practiced in central Ghana, the area from which Abankwah came, although it was in Northern Ghana, and that Abankwah admitted that FGM "(…) is not regularly practised by the Nkumssa tribe."[45] The outcome was grounds for celebration among women's rights advocates.

Shortly after the Court of Appeals handed down its decision granting her request for political asylum, information came to light that Abankwah's claim was false. Adelaide Abankwah "(...) allegedly fabricated details of her background to portray herself as a human rights victim."[46] An in-depth INS investigation and an article in the *Washington Post* confirmed that indeed

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40 Kasinga proved that she had a well-founded fear of persecution and her fears were on account of membership in a social group. In *re Fauziya Kasinga*, B.I.A. 15 1996 (Lexis). See also Fauziya Kassindja & Layli Miller Bashir, *Do They Hear You When You Cry?* (New York: Delta, 1998).

41 She also requested withholding of deportation which is subject to different standards.

42 Amy Waldman "Woman Fearful of Mutilation Wins Long Battle for Asylum" *New York Times* (18 August 1999) B3; Winnie Hu "Woman Fleeing Mutilation Savors Freedom" *New York Times* (20 August 1999) B4.

43 *Abankwah v. INS*, 183 F. 3d 18, 1999 U.S. App. 15545 (Lexis).

44 The immigration judge apparently rejected her claim because Ghana outlawed FGM in 1994 and because there were no reports of the practice in the region from which she came. *Abankwah v. INS*, 185 F. 3d 18, 20 (2d Cir. 1999).

45 *Ibid.*

46 John Marzulli "Her Mutilation Tale is a Fake say Feds" *Daily News* (10 September 2002) 10.

Abankwah was an imposter.[47] Her real name was Regina Norman Danson, and she was not a member of the royal family: she was a former hotel worker, and she had stolen the identity of Adelaide Abankwah.[48] Moreover, her mother was still alive, and it was unclear from media coverage whether she and her mother were members of the Nkumssa tribe.[49] The people in Ghana had no such custom of circumcising adult women about to become queen, nor did they circumcise women as a form of punishment. In short, Regina Danson had assumed a false identity[50] and fraudulently claimed to be at risk of being forced to undergo FGM if returned to Ghana. According to a media report, a leader denied her claim: "[t]he tribal chief, Nan Kwa Bonko, testified that Danson was not part of the tribe's royal family, and that mutilation was not practiced in his region of Ghana."[51] Government officials in Ghana were amazed that the claims had been accepted without question:

> The government of Ghana was furious about Abankwah's claims. Ghana's Commissioner of Human Rights and Administrative Justice, Emile Short, cautioned foreign governments to be circumspect in accepting claims by illegal immigrants in their bid to regularize their entry. "We had our grave misgivings about these allegations when they were made and we were surprised at how the political authorities and women's groups in the US rallied to her cause with such passion without conducting proper investigations in Ghana to verify the truth of the story."[52]

A grand jury subsequently indicted her on nine counts including perjury, passport fraud, and making false statements to an immigration judge.[53] The INS filed charges just before the statute of limitations would have expired. In January 2003, Danson was convicted of several offenses in federal court.[54] On August 13, 2003 she was sentenced to time served and two years of supervised release and received a fine (special assessment fee) of nine hundred dollars.[55]

It is remarkable that this hoax was not discovered during the course of the litigation. One possible explanation for this is that judges may not want

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47 Dean E. Murphy "I.N.S. Says African Woman Used Fraud in Bid for Asylum" *New York Times* (21 December 2000) B3; William Branigin & Douglas Farah "Asylum Seeker is Impostor, INS Says" *Washington Post* (20 December 2000) A1.

48 Anthony M. DeStefano "Fraud Charge in Genital Mutilation Asylum Case" *Newsday* (10 September 2002) A13. Her name Regina was the only regal dimension of her identity.

49 Michelle Malkin "Mutilating the Truth" *The Washington Times* (20 September 2002) A20 [Malkin].

50 Evidently the victim of identity theft, the real Adelaide Abankwah, did not report her stolen passport for fear she would be deported. By cooperating with the INS she hoped to legalize her status.

51 "Sexual Mutilation Horror, or Hoax" Channel 2 CBS Los Angeles (*Associated Press*) (23 January 2003).

52 Tunde Chris Odediran "The Adelaide Abankwah Immigration Furore" *TransSahara News* (on file with author).

53 *U.S. v. Danson*, indictment, F#2002R01952, (FindLaw); "Federal court convicts phony African "princess" of falsehoods" 9:1 *International Law Update* (January 2003) (Lexis).

54 William Glaberson "Perjury Conviction in Asylum Case" *New York Times* (16 January 2003) B4.

55 Personal communication with David Martin (4 October 2004) Clerk's office, District court of Brooklyn. See also Martin, *supra* note 39.

to question the veracity of claims for fear they will appear culturally insensitive or even racist. Yet court failure to investigate the cultural claims thoroughly can lead to fraud of this kind. Those involved in the case should have verified her claim to being Adelaide Abankwah and assessed her characterization of female genital cutting in Ghana.[56] It is noteworthy that other Ghanaians living in the United States must have heard about the highly publicized case, and could have exposed the false claims, and apparently chose not to do so.[57]

This case had negative repercussions for well-intentioned feminists and for women with valid asylum claims.[58] Not only did this single case permit ridicule of women's rights advocacy, but it also called into question the wisdom of allowing courts to evaluate arguments concerning cultural differences. Perhaps most worrisome is the possibility that legitimate petitions for asylum might be rejected because authorities will be fearful of being bamboozled by fraudulent claims. One scholar expresses concern that the media attention to the case generated "public distrust" and says: "(...) that the public scrutiny after the INS follow-up investigation has cast a shadow on courts' presumption that applicants' testimony will be credible."[59] Inadequate research threatens to undermine accurate cross-cultural jurisprudence with dire consequences for many individuals whose human rights are in peril.

In this case Abankwah's claim was flawed in multiple respects. First, the group did not have the custom alleged in her asylum petition, second it is unclear whether she is even a member of that group, and third, her decision to flee from Ghana was evidently not motivated by the custom. The most outrageous aspect of the case is that she was not even the individual she purported to be, as she had stolen the identity of another woman! Surely this case demonstrates the potential risks of allowing cultural arguments to figure into legal proceedings without taking necessary steps to verify the factual basis of the claims.[60]

The Reddy Case and Sex Smuggling

Another misrepresentation of "culture" in court involves the presentation of a social practice as though it were an accepted and normal cultural tradition, when it is instead the unfortunate consequence of economic necessity. A

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56 This custom takes various forms. For a careful consideration of different types, see Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (Philadelphia: University of Pennsylvania Press, 2001).

57 I am indebted to Gordon Woodman, Professor of Law at Birmingham University and an expert on Ghana, for this observation.

58 "Her exposure as a fraud has brought a warm glow to America's conservatives and professional Hillary-haters," see Martin Kettle "Feminist Cause was Fraud" *The Guardian* (21 December 2000) 13; See also Malkin, *supra* note 49.

59 B.J. Chisholm, "Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims" (2001) 44 How. L.J. 427.

60 David Martin describes how a judge noticed that her name was spelled Adelaide on her passport and visa but that she spelled her name "Adeliade" on many forms filed with the court, (Martin, *supra* note 39 at p. 14).

widely publicized case that illustrates this type of dubious characterization occurred in the case of Lakireddy Bali Reddy[61] who was criminally prosecuted and sued, for bringing young girls to the U.S. from India for the illicit purposes of forced labor and sexual exploitation.[62]

Reddy was an extraordinarily wealthy businessman in Berkeley, California, who brought young girls to the United States to work in his family's vast commercial enterprises, estimated to be worth approximately 70 million dollars. The illegal activities came to light in 2001 when one of the young girls, seventeen year-old Chanti Prattipati, died tragically of carbon monoxide poisoning caused by a defective heater in a rental property Reddy owned. The accidental death was discovered because a Berkeley resident, Marcia Poole, observed four Indian men carrying a green rug out the side door of a dilapidated apartment building. She recalled: "[t]hen I saw this leg descend from it (...) I realized they were carrying a body, and then they just threw it in the van."[63] When the authorities arrived, firefighters told Poole would be arrested if she did not leave the scene of the crime:

> The cops kept telling Poole that the girl's father said nothing bad was happening. He later turned out to be a fraudulent father for fake visa purposes only. "I knew instinctively he wasn't the father," says Poole. "He wasn't crying. Only the sister was."[64]

Lakireddy Bali Reddy and his relatives were criminally prosecuted in federal court and after that were sued in a civil suit alleging slave labor practices.[65] Although none of the cases went to trial, as the criminal cases ended with plea negotiations and the civil cases settled out of court, cultural arguments were part of the legal proceedings. They were under discussion and appeared in the pre-sentencing memo in the criminal case.[66] Ultimately, Reddy was sentenced to more than eight years in prison, and ordered to pay $2 million in restitution to three victims of sexual abuse and the parents of the young woman who had died.[67] The civil suit resulted in a nearly nine million-dollar settlement.[68]

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61 For a discussion of this case see Ivy C. Lee & Mie Lewis, "Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts" (2003) 10 U. of California Davis J. Int'l L. & Policy 169.

62 *Ibid*.; Anna Wang, "Beyond Black and White: Crime and Foreignness in the News" (2001) 8 Asian L.J. 187, Wang compares the Reddy case with the O.J. Simpson case, noting that race was explicitly addressed in the former but downplayed in the latter [Wang].

63 Anita Chabria "His Own Private Berkeley" *Los Angeles Times Magazine* (25 November 2001) 22-23, 40 [Chabria]. Reddy had Sitha's body cremated in accordance with Hindu rites even though her parents were Christian.

64 Rob Morse "Whistle-blower ready for justice" *San Francisco Chronicle* (27 January 2002) A2.

65 *U.S. v. Reddy*, indictment (25 October 2000).

66 Personal communication with Scott Kronland (July 29 2004). The main issues were the extent to which sexual abuse of minors is acceptable in India and how caste relationships affected the parties. See Virginia Griffey "Reddy to be Sentenced Today: Lawyer's Defense Utilizes Cultural Context" *Daily Californian* (19 June 2001) 1, 3.

67 Rona Marech "Slavery abounds in U.S., rights group says" *San Francisco Chronicle* (24 September 2004) A3; Anon., *Hidden Slaves: Forced Labor in the United States* (Berkeley: Human Rights Center, 2004). Initially Reddy expected a five year sentence, but the judge increased it to 8 years. See Matthew Yi "Guilty Plea in Smuggling of girls: Landlord gets 5 years in prison" *San Francisco Chronicle* (8 March 2001) A21; Matthew Yi "Berkeley

The story that emerged was that Reddy used "(…) fraudulent visas, sham marriages, and fake identities to bring at least 33 men, women, and children into the United States."[69] Many of the young girls brought to the U.S. were *dalits* or "untouchables", a social group that historically undertook work deemed to be beneath Hindus, e.g., cleaning latrines.[70] Because the chance to move to the United States was regarded as a golden opportunity, some considered Reddy's actions to be kinder than might first appear: "[e]ven American investigators admit that many of the alleged victims view Reddy as a savior rather than a trafficker in human lives."[71] The parents who sold their daughters "(…) had a hard time feeding their daughters."[72] In general, the defense relied on a notion that people in India were desperate to move to the United States.[73]

The cultural defense in the Reddy case incorporated two different claims. One contention was that sex with girls considered "underage" in the U.S. "(…) is not necessarily immoral if the age of consent is younger in other countries."[74] The gist of the other argument was that in India, it is common for *dalits* or "untouchables" to be given menial employment for nominal pay. The idea seems to have been that because the girls were from such a low tier of the social hierarchy, the sex slavery arrangement would be acceptable in India. Furthermore, the Reddy family was said to wield tremendous economic control in the village from which the girls came such that their families, and the community as a whole, had no realistic way of objecting to the way in which they were treated.

While it may be true that girls are victimized in India and in other countries, this social practice is not widely regarded as desirable. It is more accurately seen as a reflection of harsh economic conditions. Moreover,

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landlord jailed for 8 years" *San Francisco Chronicle* (21 June 2001) A15. One son, Vijay Lakireddy received a two-year prison sentence for visa fraud and had to pay a $40,000 fine. His uncle, Jayapakash Lakireddy received 366 days for the same conviction, see Sean Holstege "Berkeley sex-slave civil suit settled. Victim's family claimed wrongful death, sister alleged emotional suffering" *Tribune* (8 April 2004) 1,6. Another son, Prasad Lakireddy, received only one year house arrest and a $20,000 fine, see Justin Berton "But He Was Just Taking Orders" *East Bay Express* (16 June 2004) 17. Some have questioned whether the Reddy family was sufficiently punished, see *e.g.* Kathleen Kim & Kusia Hreshchyshyn, "Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States" (2004) 16 Hastings Women's L.J. 23. The interesting article by Kim and Hreshchyshyn discusses human rights lawsuits filed against Reddy under the *Alien Tort Claims Act* and the possible use of the *Trafficking Victims Protection Reauthorization Act* of 2003 (TVPRA) which created a private right of action for individuals trafficked to the U.S.

68 Eric Kurhi "Civil Suits against Lakireddy are settled" *The Berkeley Voice* (9 April 2004) A1, A9.

69 Chabria, *supra* note 63 at 22.

70 Alan Dundes, *Two Tales of Crow and Sparrow: A Freudian Folkloristic Essay on Caste and Untouchability* (Lanham: Rowman & Littlefield, 1997).

71 Chabria, *supra* note 63 at 23.

72 Personal communication with Stephen Corrigan, U.S. Attorney, (29 July 2004).

73 Diana Russell discusses how Chanti Prattipati and her sister were given by their "poverty-stricken" parents to Reddy and had worked cleaning his properties in India before moving to California. See Diana Russell, "Why Did Chanti Die?" (2000) 30 *Off Our Backs* 10.

74 This argument is attributed to defense attorneys in Henry K. Lee "Guilty Plea seen in sex smuggling case in Berkeley" *San Francisco Chronicle* (22 June 2002) A15.

although caste differences persist in India, despite attempts to abolish this system of social categories, the claim that those belonging to higher castes are allowed to victimize those in lower ones would hardly be accepted in India.

Some have suggested that Reddy's so-called cultural defense was extremely weak, and this explains why Reddy and his accomplices agreed to plead guilty and to settle the civil matter out of court. The defendants realized that their cultural arguments would not be well received. Public reaction to the potential use of the "cultural defense' in this case was entirely critical.[75] Almost a dozen citizens wrote to the judge in the criminal case, asking that Reddy receive the maximum possible sentence of 38 years.

If the defense arguments were so tenuous, one wonders why the prosecution did not insist on taking the cases to court. It is possible that the victims were already so traumatized by the molestation and other forms of abuse that they were unwilling to testify in court.[76] Another difficulty was the misconduct of the interpreter who ostensibly told the victims to embellish their stories.[77] Her motivation for advising them to exaggerate the threats they faced is unknown, but there was conjecture that it was to make the story credible to the "Western ear".[78]

In the end what does one make of the so-called cultural arguments advanced in this case? One scholar, Gerald Berreman, professor of anthropology at the University of California, Berkeley, questioned the "cultural" aspect of the defense, saying the issue is more properly viewed as one of economic circumstances and not Indian culture.[79] While one might wish to dismiss the cultural defense argument in the Reddy case as "economic" rather than "cultural," it does not make sense to deny that commerce is part of culture. The problem with the cultural defense raised in this context is that the existence of a social hierarchy does not mean victimization of untouchables is accepted in India. The fact that laws have been enacted to try to stop discrimination demonstrates a desire on the part of Indian society to change this practice. Most important is that even if *dalits* are subject to maltreatment in India, smuggling of girls for sex slavery is hardly part of Indian culture.

In the Reddy case the question is whether the cultural defense test could be met. As Reddy originally came from India, he is part of the community. The next question is whether in India selling young girls into slavery and enslaving untouchables are accepted cultural traditions. Although violations of the rights of the girl child and of the rights of *dalits* are phenomena known to occur, their existence reflects calamitous economic circumstances

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75 See *e.g.* Chip Johnson "Crimes Usual in India, Reddy says" *San Francisco Chronicle* (16 June 2001) A11 [Johnson].

76 Chabria, *supra* note 63 at 40.

77 Jeff Chorney "Investigation into interpreter in landlord sex case; Translator may have encouraged alleged victims to exaggerate testimony" *The Oakland Tribune* (7 November 2001) 1, 6.

78 Chabria, *supra* note 63 at 40.

79 Johnson, *supra* note 75.

of families. The particular practices at issue in the Reddy case, sex slavery and forced labor, are not valued cultural traditions, but reflect desperation on the part of families. If one accepts the argument that India lacks these specific traditions, then Reddy cannot allege that his actions were motivated by cultural imperatives.

Even if one were to accept the factual allegations about social practices in India, one could still reject the use of the cultural defense on normative grounds. If recognizing a cultural tradition would undermine the human rights of vulnerable groups, it should be rejected. There is no question that condoning sexual smuggling of girls violates the rights of women and children; and it should be condemned more harshly when it results in death. Under these circumstances, even though the right to culture is a human right which requires allowing defendants to explain the cultural context for their actions as they perceive them, other human rights clearly supersede the right to culture.

The Normative Argument

Although courts should permit litigants to raise whatever cultural defenses they wish, individuals invoking the defense should have the burden of proving the authenticity of the claims. If we assume, for the sake of argument, that an individual can demonstrate that the practice is part of his or her way of life, that does not settle the question of whether the defense is used properly or improperly. Even if sex smuggling were completely accepted in other countries, individuals who migrate to new lands should be able to escape from customs that involve irreparable harm to them. There is no question that being sold into sexual slavery causes irreparable harm to young girls. Similarly, there is no question that FGM is truly mutilation to women who do not wish to undergo the surgery. Consequently, it would be a misuse of the cultural defense, in my judgment, if judges exonerate defendants who raise the cultural defense in cases of this sort.

Other Considerations

A common criticism of the cultural defense is that it leads to "essentializing" culture. The core idea is that the legal system is ill equipped to interpret traditions and because of this, judges will misinterpret what constitutes "the culture". This is a real danger as can be observed in the English decision *R. v. Adesanya*.[80] In this case, a Yoruba woman made tribal markings on her sons' faces to ensure the maintenance of their cultural identity. The judge rejected her position saying the "Nigerian custom" was no defense to the charge of assault occasioning bodily harm. It is odd that he should refer to a "Nigerian" custom when Mrs. Adesanya was Yoruba, one of hundreds of peoples in Nigeria. The judge's reference to a "Nigerian" custom gives the impression that he is unable to distinguish among the vast number of traditions of the many peoples in Nigeria. Despite explicitly rejecting her

[80] For more background and citations, see *Cultural Defense*, *supra* note 3 at 49-51.

argument and ordering the jury to convict her, he imposed a suspended sentence which makes one wonder about whether the cultural defense had an effect after all.

As there was a pretense of ignoring a cultural imperative, the judge may not have felt compelled to consider ritual scarification more carefully. Scholars who wrote about the case afterwards noted that the manner in which Mrs. Adesanya made the marks differed from tradition in two respects: she did it at New Year which was not the custom, and she did it when her sons were much older than is the usual practice.[81] This raises the question of whether for a cultural defense to be valid, a defendant must follow a tradition precisely as it was performed in the past. As no culture is static and traditions often evolve, it would be unfair to insist that traditions be carried out precisely as occurred in the country of origin.

A difficulty for Adesanya was that ritual scarification was said to be "dying out" in Nigeria. So although it would be wrong to insist that the custom be performed in a "traditional manner", if the custom has ceased to exist in the country of origin, there is a serious question as to whether a legal system should accept a cultural defense based on a discarded tradition.

Another matter of concern is how to handle a cultural defense involving a tradition which, although not yet extinct, is under attack in the country of origin. Oftentimes commentators contend that culture is "contested". It is worth clarifying the nature of this remark. Even if there is disagreement within the community as to whether it is necessary to wear the *kirpan* to be an observant Sikh, or for girls to have genital surgery in order to marry, members of the group will not deny that there is such a cultural tradition.[82] The point of disagreement is whether or not the custom should continue to be part of the way of life. It may well be that a cultural imperative will be less compelling if there is less support for it, but it does not render the argument invalid just because there is internal dissension over its use.

A serious objection to the cultural defense is the worry it will reinforce stereotypes about groups. It is important that the cultural question be handled with sensitivity, so that the case does not convey the erroneous impression that just because one individual followed a tradition, everyone within a particular cultural community behaves in a way that violates the law. The risk is that some will fail to recognize that there are patterns of culture from which individuals inevitably deviate. Ways of acting do not correspond to specific social identities. Hence those involved in cultural defense cases should make clear that the tradition is followed by some, but not all members of the group. If this is not emphasized, it is conceivable that the public perception may be that the group as a whole engages in criminal

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81 Peter Lloyd "The Case of Mrs. Adesanya" (1974) 4:2 RAIN: Royal Anthropological Institute News.

82 For discussion about the significance of the *kirpan* for Sikh communities in the U.S. and Canada, see Vinay Lal, "Sikh Kirpans in California Schools: The Social Construction of Symbols, Legal Pluralism, and the Politics of Diversity" (1996) 22 Amerasia J. 89. See also Sarah V. Wayland, "Religious Expression in public schools: kirpans in Canada, hijab in France" (1997) 20 Ethnic and Racial Studies 545.

behavior, when, in fact, one defendant has acted in accordance with one tradition.

Improper generalization becomes an issue when the cultural practice central to a case seems bizarre. For instance, when Cambodians living in the city of Long Beach, California, killed a dog to eat it, there was concern that this would generate anti-Asian sentiment.[83] Because there was genuine fear about this perception, a Cambodian organization denied that Cambodians ever ate dogs, even though this is historically inaccurate. To the extent that media coverage of a cultural defense case reinforces the notion that members of the ethnic group are "the other," there will be legitimate concern about stereotyping. This suggests that reporters should take care in describing the issues at stake in a case.[84]

Most cultural defense cases involve a specific custom which means it is improper to interpret the raising of a cultural defense as placing the entire culture under siege. It is only the specific tradition on trial that is at the center of the litigation that is at issue; this must be understood as only one aspect of the way of life. Failure to emphasize that the custom is but one part of the culture risks having outsiders miss positive dimensions of the culture.

Toward an Accurate Cross-Cultural Jurisprudence

Increasingly courts are confronted with issues of cross-cultural jurisprudence, so that their capacity for interpreting the facts in the context of existing legal frameworks is challenged. It is clear that those who participate in legal proceedings need to be better prepared to evaluate cultural arguments. To ascertain the validity of cultural claims, professional associations should establish lists of members who have specialized in the study of particular ethnic and religious communities. It would be relatively easy for groups such as the American Anthropological Association, the Society for Asian Studies, the Latin American Studies Association, and other professional organizations to compile lists of experts. Those willing to be contacted could have their credentials and addresses posted on the websites of these organizations. In many urban areas ethnic community centers, religious institutions, and universities have resources that could assist courts with the analysis of cultural traditions.

There may be concern that when expert witnesses are "hired guns," they may be pressured to find ways to reinterpret or distort ethnographic knowledge, in order to assist the client. To prevent this sort of abuse, it would be desirable to establish a code of ethics for expert witnesses. This would not only help ensure that the information presented to a court is accurate, but it would also protect the scholarly reputation of the expert witness. Safeguards must be put in place to protect the integrity of the legal system and of scholarship.

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83 *Cultural Defense*, *supra* note 3 at 104-105.

84 Wang's analysis of the Reddy case emphasizes the role of the media in disseminating racist stereotypes (*supra* note 62).

Another objection to the use of experts who are "outsiders" is that members of the group are the real experts on their ways of life. The tendency of courts to rely on experts rather than members of cultural communities may be considered insulting.[85] However, while it may be more politically appealing to request cultural information from members of the group whose traditions are in question, these individuals might feel pressured to misrepresent a tradition to save a relative or friend. In addition, members of the group may also be prohibited from divulging sacred knowledge, e.g., the precise boundaries of sacred sites. Another difficulty is that there may be divergent views about the custom at issue within the group, so that the court cannot assume that the interpretation presented reflects the views of everyone in the group. There is also the possibility that the court may be more inclined to listen to the expert who has the requisite academic credentials. In the final analysis, it may matter less who presents the cultural evidence in court than that the information is available.

Often there are large populations of particular cultural communities in circumscribed geographical areas. Lawyers and judges can anticipate some culture conflicts and should at least be conversant with the cultures of groups located in their jurisdictions**.** To this end, courses in cross-cultural jurisprudence should be taught at law schools. Tools for cultural analysis should also be a part of bar examinations. In addition, judges should have seminars in culture and study other languages to ensure that they are familiar with populous groups in their respective communities. Manuals outlining traditions of groups should be available. One model is the *Handbook on Ethnic Minority Issues*[86] published by the Judicial Studies Board in London.

Conclusion

It is imperative that the cultural defense be established as official policy. In order for this to be possible, policies must be formulated which ensure careful review of cultural claims. Not only is it crucial that the factual basis of claims be verified, but it is also important to guarantee that members of vulnerable groups are not subjected to irreparable harm. The right to culture is an fundamental human right, but it should be protected only so long as it does not undermine other human rights.

Résumé

Invoquer la défense culturelle est devenue une stratégie judiciaire populaire bien que controversée. Expliquant dans un premier temps que la portée de la défense culturelle est plus vaste que généralement comprise et qu'elle sert aussi bien à atténuer des sentences, à créer des exceptions à des politiques établies qu'à augmenter les montants de dommage et intérêts accordés, j'identifie ensuite les principes normatifs qui justifient ce type de défense. Même si elle peut être appuyée fondé sur des principes, si la défense culturelle a une chance d'être adoptée

[85] Of course there is no reason why courts could not hear testimony from both outsiders and insiders.

[86] Judicial Studies Board, *Handbook on Ethnic Minority Issues* (London: JSB, 1994).

formellement, des politiques doivent être établies pour prévenir des abus. Je propose des critères d'application de la défense culturelle qui sont illustrés par quelques cas. La présentation d'exemples où la défense culturelle est appropriée est suivie d'une démonstration des abus potentiels, à partir de cas particuliers dans lesquels les arguments culturels avancés ne remplissaient pas les critères du test proposé. L'article se termine sur des recommandations pour assister les tribunaux à trouver les experts qui peuvent authentifier les requêtes culturelles.

Abstract

Invoking a cultural defense has become a popular but controversial legal strategy. After explaining that the scope of the cultural defense is broader than is often understood and that it is used to mitigate punishment, create exemptions from policies, and increase the size of damage awards, I identify the normative principles that justify such a defense. Although it may be defended as a matter of principle, if this defense has any chance of being formally adopted, policies must be established to prevent its misuse. I propose a cultural defense test and show how it could be applied appropriately in a few cases. Following the analysis of its proper use, I demonstrate the potential for abuse by showing how in particular cases cultural arguments failed to meet the requirements of the cultural defense test I propose. Finally I recommend ways to assist courts in finding cultural experts who can authenticate the cultural claims.

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