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When Culture Means Gender: Issues of Cultural Defence in the English Courts

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Abstract: The use of cultural defence has been much discussed in the American context and has figured as one of the areas of concern in feminist assessments of multiculturalism. This paper examined two categories of cases from the English courts, those where cultural context has been seen as significant in interpreting the actions of female defendants, and those where 'culture' is invoked to explain severe acts of violence against women. It argues that cultural arguments become available to female defendants mainly when they conform to stereotypical images of the subservient non-Western wife. They have not, on the whole, been successfully employed by male defendants to mitigate crimes against women, though there are troubling exceptions. The larger problem is that mainstream culture itself promotes a gendered understanding of agency and responsibility, as when it perceives men as understandably incensed by the sexual behaviour of their women, or women as less responsible for their actions because of the influence of men. The conclusion is that the uses and abuses of cultural defence highlight issues that have wider provenance, for it is when cultural arguments resonate with mainstream conventions that they have proved most effective.

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The notion of ‘cultural defence’ surfaced in American law journals in the mid-1980s, in the wake of a number of cases where defendants invoked the traditions of their culture to explain or mitigate their actions.¹ It has subsequently figured as one of the areas of concern in the feminist literature on multiculturalism, where the reliance on ‘cultural tradition’ is widely regarded as legitimating crimes against women.² One much discussed case is that of Dong-lu Chen, a Chinese immigrant to New York who battered his wife to death with a hammer some weeks after discovering she was having an affair.³ At his trial in 1988, an expert witness testified that in traditional Chinese culture, a woman’s adultery would be conceived as an enormous stain on the man; that he would find it difficult to remarry if he divorced his wife for adultery; and that violence against wayward spouses was commonplace in China.⁴ The judge accepted that Chen was ‘driven to violence by

¹ Key articles include Julia P Sams ‘The Availability of the “Cultural Defense” as an Excuse for Criminal Behavior’ (1986) *Georgia Journal of International and Comparative Law*, 16, 335-354; Paul J. Magnarella ‘Justice in a Culturally Pluralistic Society: the Culture Defense on Trial’ (1991) *The Journal of Ethnic Studies* 19, 65-84; Alison Dundes Renteln ‘A Justification of the Cultural Defense as a Partial Excuse’ (1993) *California Review of Law and Women’s Studies* 2, 437-526; Diana C Chiu ‘The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism’ (1994) *Pacific Basin Law Journal*, 8, 80-90; Leti Volpp ‘(M)isidentifying Culture: Asian Women and the “Cultural Defense”’ (1994) *Harvard Women’s Law Journal*, 17, 57-101; Doriane Lambelet Coleman ‘Individualizing Justice Through Multiculturalism: the Liberal’s Dilemma’ (1996) *Columbia Law Review* 95, 1093-1166; Nancy S Kim ‘The Cultural Defence and the Problems of Cultural Preemption: A Framework for Analysis’ (1997) *New Mexico Law Review*, 27, 101-139; Jeroen Van Broeck ‘Cultural Defence and Culturally Motivated Crimes’ (2001) *European Journal of Crime, Criminal Law and Criminal Justice* 9/1, 1-31

² The issues associated with cultural defence feature in Susan Moller Okin’s highly influential essay ‘Is Multiculturalism Bad For Women?’ in Susan Moller Okin and Respondents **Is Multiculturalism Bad for Women?** (Princeton University Press, 1999), alongside a range of other illustrations designed to highlight tensions between feminism and multiculturalism.

³ *People v. Chen* (Supreme Court, NY County, December 2, 1988)

⁴ For good discussions of this case see Volpp, 1994, and Sarah Song ‘Majority Norms and Minority Practices: Reexamining the ‘Cultural Defense’ in American Criminal law’, paper presented to the

traditional Chinese values about adultery and loss of manhood'⁵, convicted him of second degree manslaughter, and sentenced him to five years' probation. In another much cited case, Kong Pheng Moua, originally from Laos, was charged with rape and kidnapping after abducting a young Hmong woman from her workplace at Fresno City College and forcing her to have sex with him.⁶ At his trial in California in 1985, it was argued that he was acting in accordance with a traditional Hmong practice of marriage by capture, in which the man would establish his strength and virility by seizing the woman, and she would ritually protest his sexual advances in order to establish her virtue. Kong Moua was found guilty only of a lesser charge of false imprisonment, and was sentenced to 120 days in prison and a fine of \$1,000. \$900 of this was to be paid to his victim in what experts regarded as the traditional form of 'reparation'.

In the American literature, the use of cultural defence has given rise to a polarised debate, with some suggesting it be formally established as a new kind of criminal defence (akin therefore to currently recognised defences like diminished responsibility or self-defence), and others that it be excluded from the courtroom. This latter position has often drawn on explicitly feminist arguments. In the aftermath of the Chen judgement, for example, the National Organization of Women argued that cultural defence should be inadmissible, because it so self-evidently reinforces patriarchal power.⁷ In one influential critique, Doriane Lambelet Coleman argues that the use of cultural evidence weights the interests of defendants above those of victims, and is particularly damaging to women.

American Political Science Association Annual Meeting, 2002. In Volpp's assessment, the witness was testifying more to 'his own *American* fantasy' of Chinese life: divorce rates have in fact been rising sharply in China, where less than 12% of the population now think of divorce as disgraceful; and the expert witness admitted that he couldn't actually recall a single instance of a man killing his adulterous wife.

⁵ Cited in Kim, 1997,120

⁶ *People of the State of California v. Kong Pheng Moua* (Fresno County Superior Court, February 7, 1985)

⁷ Volpp, 1994,77

While she acknowledges the right of defendants to cite cultural factors as mitigating circumstances at the point of sentencing (itself a large concession), she argues that only culture-neutral evidence should be permitted in establishing the question of guilt. Thus ‘a defendant who killed his wife upon discovering that she had strayed from the marital bed could interpose the traditional defense of provocation’, but he ‘would not get the benefit of arguing that in his particular culture, the shame and devastation is elevated’.⁸ The courts need to demonstrate multicultural sensitivity, but should not allow for ‘cultural defence’.

The debate on cultural defence feeds into a wider discussion of tensions between multiculturalism and gender equality, polemically signalled in Susan Moller Okin’s question: ‘Is Multiculturalism Bad For Women?’⁹ Issues relating to the use of cultural evidence form only one small part of this wider discussion, but raising as they do some particularly pointed questions about the relationship between recognising cultural difference and securing the rights and protections of women, they deserve fuller attention in the British context. In this paper, I focus on ways in which culture is currently invoked in the criminal courts, exploring what problems, if any, these pose for women. I begin with an overview of the general issues (some more overtly gendered than others) thrown up by the use of cultural defence. I then provide a brief background to multicultural practice and legislation in Britain before moving on to address specific cases. Though it is part of my argument that the loose equation between culture and ethnic minority status

⁸ Coleman, 1996, 1159

⁹ Key contributions include Susan Moller Okin ‘Feminism and Multiculturalism: Some Tensions’ (1998) *Ethics* 108; Monique Deveaux ‘Conflicting Equalities? Cultural Group Rights and Sex Equality’ (2000) *Political Studies* 48/3; Ayelet Shachar *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press, 2001); Jeff Spinner-Halev ‘Feminism, Multiculturalism, Oppression, and the State’ (2001) *Ethics* 112; Susan Moller Okin ‘“Mistresses of Their Own Destiny”: Group Rights, Gender, and Realistic Rights of Exit’ (2002) *Ethics* 112.

is problematic, ‘cultural’ considerations are primarily raised in cases that involve defendants from ethnic minority groups. Because the overwhelming majority of ethnic minority citizens live in England, all the cases I discuss come from the English courts.¹⁰

Why is cultural defence a problem?

What is ‘cultural defence’ and why is it perceived as a problem? One definition, by Paul Magnarella, is that a ‘cultural defense maintains that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture’s norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture’.¹¹ (Note that on this definition, the Chen case would be a misuse of cultural defence, for wife murder is not condoned in contemporary China.) Jeroen Van Broeck argues that such definitions should be supplemented by a definition of cultural offence: ‘an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation’.¹² The point of the addition is that Van Broeck believes there has to be a link between the offence itself and the defendant’s cultural background before the courts should consider allowing a cultural defence. Just the general fact of being socialized into a different

¹⁰ In recent years, some of the key judgments involving the annulment of forced marriages have come from the Scottish courts (*Mahmood v Mahmood* (1993) S.L.T 589; *Mahmud v Mahmud* (1994) S.L.T 599). However, these do not really fall within the remit of a discussion of ‘cultural defence’. The central issue in the declaration of nullity of a marriage has been what counts as force and consent, and while this has drawn the courts into the interpretation of cultural markers, there is no suggestion that cultural context might mitigate what would otherwise be regarded as coercion.

¹¹ Magnarella, 1991, 67

culture is not in his view enough: there has to be something about the cultural background that changes the meaning or moral status of the offence.

A classic illustration from the English courts, which fits well with both the above definitions, is *R v Adesanya*, where a Nigerian mother was prosecuted for the ceremonial scarring of the cheeks of her nine and fourteen year old sons.¹³ In this case, the fact that the scarification would have been accepted as a normal part of Yoruba custom, and that the Nigerian community in Britain was probably not aware that the practice was contrary to English law, was felt to change the status of the offence - though it undoubtedly helped that the children were said to be willing parties to the ceremony, that the scars were unlikely to leave permanent marks, and that the mother was deemed of excellent character. Mrs Adesanya was nonetheless convicted: in English criminal law, a minority custom cannot be a defence to a prosecution, unless this is explicitly allowed for in legislation. She was, however, given an absolute discharge.

The use of cultural defence raises four major issues. The most general is that it threatens to undermine legal universalism. This is not so much because it allows individual circumstances to be taken into account in sentencing (of itself, this is hardly contentious), but because in its larger application, it threatens to elevate cultural membership above other considerations. Ignorance of the law, for example, is not normally accepted as a legitimate defence. Why then should an ignorance that derives from cultural difference, or a defendant's relatively recent migration, be acknowledged as a salient factor? And what of other groups whose perception of an offence may differ from that of the wider society, but in their case for political rather than cultural reasons?

¹² Van Broeck, 2001, 5

¹³ Unreported, but noted in [1975] 24 ICLQ 136

An unsophisticated Proudhonist who claims that property is theft is unlikely to cut much ice when he uses this to explain why, in his world, it is entirely legitimate to appropriate his landlord's property. Why then should a Rastafarian be able to argue that smoking *ganja* conforms to the prescriptions of his religion, and is not an offence within his culture? As it happens, the English courts have never accepted this last argument,¹⁴ but the general point remains. Is it appropriate to single out either cultural membership or religious beliefs as entitling people to differential treatment under the law, or does this veer too far in the direction of different laws for different communities?

Cultural defence can also lend itself to opportunistic defences. Claims about what is normal within a particular cultural group are notoriously tricky. Something may be claimed as a cultural practice when it has long been contested or abandoned by other members of the group; and individuals who have largely adopted the practices and conventions of the surrounding culture may suddenly 'rediscover' an allegiance to a different culture because it now serves their interests to do so. In the civil courts, for example, there may be strong financial incentives to identify oneself with a different legal tradition when this offers more favourable inheritance or divorce settlements.¹⁵ Similar issues inevitably arise in criminal cases, where judges may have to struggle with the question of whether defendants really are, as they claim, shaped by the prescriptions of a

¹⁴ In his sympathetic assessment of the case for ending the legal prohibition on the use of cannabis by Rastafarians, even Sebastian Poulter inclined to the view that the prohibition should be ended for everyone, rather than just for those who can establish some legitimate cultural or religious claim. Note also that the argument in this case turns on religion rather than a more generalised notion of culture. Poulter *Ethnicity, Law and Human Rights: The English Experience* (Oxford University Press, 1998) Chapter 9.

¹⁵ There may be opportunistic reasons for claiming adherence to English law as well as to traditional or customary law. In the divorce case of *Ali v Ali* (1965), for example, the judge recorded his 'very strong impression' that the husband had chosen to apply for a divorce under English law because he would have had to return a deferred dowry debt of 50,000 rupees if he had pronounced divorce by *talaq* in India. See also *Matthew Olajide Bamglose v Jon Banhole Daniel and Others* (Appeal from the West African Court of

minority culture, or are just using this to secure some legal advantage. One American contribution suggests that new immigrants should only be permitted to employ a cultural defence up to the first five years of their residence in the USA, or up to ten years in the case of elderly migrants - who are presumed to be less open to change.¹⁶ Van Broeck, in contrast, argues that 'time is not an absolute factor for acculturation'¹⁷, for groups experiencing discrimination and/or isolation may well find their traditional identities or conceptions of honour becoming more rather than less important. As these differing positions suggest, it is not easy to determine which cultural influences might be acting on an individual. In the absence of any transparent test, the use of cultural defence could leave itself open to considerable manipulation.

The third and more specifically feminist argument is that cultures operate to sustain male power: Susan Moller Okin tersely comments that 'most cultures have as one of their principal aims the control of women by men'¹⁸. If this is so, then allowing cultural tradition as a legitimate element in a criminal defence could be said to encourage and sustain patriarchal practices. The kinds of cases that have come up in the British courts include ones where men have been charged with sex with an under-age girl, and have represented this as more 'normal' within the context of their countries of origin¹⁹; or have been charged with the murder of a family member, and have referred to their cultural background to explain the disgrace brought upon the family by the sexual

Appeal, 1954), where the appellant unsuccessfully appealed to English law on marriage and succession, in an attempt to disinherit the children of his uncle's polygamous marriages.

¹⁶ Veronica Ma 'Culture Defense: Limited Admissibility for New Immigrants' (1995) *San Diego Justice Journal*, 3, 462

¹⁷ Van Broeck, 2001, 13

¹⁸ Okin 'Feminism and Multiculturalism: Some Tensions', 667

¹⁹ (*R v Bailey, 1964, R v Byefield, 1967*); or

behaviour of their victim²⁰. The guidelines provided by the Judicial Studies Board (which has, among other things, the responsibility for training judges in matters of cultural diversity) are at one level crystal clear. They offer ‘no support whatever for the proposition that “my culture” can be offered as an excuse for any kind of aberrant behaviour’; and the *Equal Treatment Bench Book* stresses that ‘it would be quite wrong to suggest that culture might have caused an Indian or Pakistani husband to strangle his wife, following his discovery that she was having an affair with another man’.²¹ The guidelines continue, however, that ‘it would be quite right to remind a jury that given the immense significance of honour and shame in South Asia, a husband might well find such an experience far more humiliating than a man of some other ethnic origin.’ The qualification potentially muddies the clarity of the initial message, and could be interpreted in ways that diminish the severity of wife-murder.

As the two cases cited at the beginning of this article indicate, culture has been successfully invoked in the American courts as a defence against charges of rape or the murder of an adulterous wife - though the fact that these two figure so prominently in the literature may suggest that they are the exception rather than the rule. The cultural conventions referred to in such cases are often deeply patriarchal. As Okin puts it, ‘the idea that girls and women are first and foremost sexual servants of men – that their virginity before marriage and fidelity within it are their pre-eminent virtues – emerges in many of the statements made in defense of cultural practices’²². Cultural defence does not, however, simply equate with male interests: we cannot say that culture is only

²⁰ For example, *R v Shabir Hussain*, Newcastle Crown Court, 28 July 1998 (transcript: J.L.Harpham Ltd); *R v Shazad, Shakeela and Iftikhar Naz*, Nottingham High Court, 24-25 May 1999 (transcript: Cater Walsh and Co.); *R v Faqir Mohammed*, Manchester Crown Court, 18 Feb 2002 (transcript: Cater Walsh and Co.)

²¹ *Equal Treatment Bench Book*, guidelines produced by the Judicial Studies Board for judges: 6.4.3

invoked to let men off the hook for their crimes against women. In the (also much discussed) Kimura case, a Japanese-American woman tried to drown herself, and succeeded in drowning her two children, after learning of her husband's adultery.²³ At her murder trial in California in 1985, it was claimed that this constituted a traditional Japanese practice of parent-child suicide (*oyaka-shinju*); that a wife shamed by her husband's adultery might choose suicide as the more honourable course of action; and would think it cruel to leave her children to live on without her in conditions of disgrace. In this case, the cultural evidence was not used to suggest that the practice was excusable, but rather to establish Fumiko Kimura's mental instability at the time of the offence. She was convicted of voluntary manslaughter, sentenced to one year's imprisonment, five years' probation, and instructed to undergo counselling. This brought the penalty closer to what would have happened in Japan, where attempted parent-child suicide is regarded as a crime, but is usually punished with a rather lenient sentence.²⁴

Weighing up the pressures on a deeply distressed woman against the risks of condoning the murder of a child is, of course, notoriously difficult, and there have been other US judgements where a self-evidently disturbed mother has been treated far more harshly. But however one assesses the Kimura case, it is clearly not an instance of the woman losing out from the use of cultural defence. The more nuanced point made Susan Moller Okin is that even where the woman could be said to benefit, the cultural message is still thoroughly gender-biased.²⁵ The Kimura judgement implicitly normalises and legitimates the deep shame felt by a woman faced by her husband's adultery, rather than

²² Moller Okin and Respondents **Is Multiculturalism Bad for Women?** 19

²³ need kimura ref

²⁴ Sams, 1996, 343

²⁵ Okin et al 1999,19

in any way challenging this presumption. Even if individual women may sometimes benefit from cultural considerations, women as a whole could be said to lose out.

The fourth concern over the use of cultural defence is that it lends itself to stereotypical representations of the non-Western ‘other’ – what Pascale Fournier describes as a ‘vulgar use of culture’²⁶ - and that in these representations, both men and women may be diminished. In one recent Canadian case (*R v Lucien, 1998*), two men in their early twenties, both originally from Haiti, were convicted of sexual assault on an eighteen year old (also black) girl. Though the penalty for gang-rape normally ranges between four and fourteen years, they were sentenced only to 18 months’ curfew and community service. Noting their lack of remorse (usually a factor that would bring a more severe penalty), the judge suggested that it arose ‘from a particular cultural context with regard to relations with women’, and described the defendants as ‘two young roosters craving for sexual pleasure’.²⁷ In this case, the invocation of culture not only meant that a crime against a woman was treated with unusual leniency. It also conveyed what many saw as a racist slur on Haitian men. Complaints were filed against the judge with the Quebec Judicial Council, which accepted, however, that she was referring to certain groups of youths – rather than specifically black or Haitian – when she spoke of cultural context, and did not in the event reprimand her.²⁸

At one level, this example reinforces arguments made by Okin and Coleman about culture being deployed to excuse men’s crimes against women, but because it also

²⁶ Pascale Fournier ‘The Ghettoisation of Differences in Canada: “Rape by Culture” and the Danger of a “Cultural Defence in Criminal Law Trails’ (2002) *The Manitoba Law Journal* 29/81, 88

²⁷ Fournier, 93

²⁸ The case is discussed at length on Fournier, as is a parallel case where a Muslim man was found guilty of sexual misbehaviour – including anal intercourse - with his wife’s daughter, but was treated with leniency, partly it seems, because he had respected the value Islam attaches to virginity, and had ‘spared his victim’ from vaginal intercourse. In this case, the sentence was raised on appeal.

draws attention to the dangers of racist or cultural essentialism, it generates a more complex position. The Okin/Coleman critique has been felt by some to promote this very essentialism: to accept, that is, that non-Western cultures are indeed more sexist, more patriarchal, more tolerant of violence against women; and make this the basis for rejecting cultural claims.²⁹ But what if these representations of the cultural ‘Other’ are themselves a part of the problem? Commenting on cases in the USA involving under-age sex or under-age marriage, Leti Volpp notes that culture is invoked in a highly selective way, such that virtually identical misdemeanours by white North Americans and non-white immigrants get attributed to ‘culture’ only when the defendants come from a racialised minority group. ‘Behavior that causes discomfort – that we consider “bad” – is conceptualized only as culturally canonical for cultures assumed to lag behind the United States’.³⁰ This can clearly lend itself to ‘vulgar’ representations of culture, which could then justify the ill-treatment of women. Almost equally damaging, however, is the way it represents individuals from these ‘lagging’ cultural groups. Individuals from the dominant cultural group might be led astray or make mistakes, but are usually deemed as

²⁹ Coleman, for example, has been said to replicate a colonialist feminism that attaches all the virtues of gender equality to the West and all the vices of patriarchy to the Rest; she seems to take it as given that non-European migrant cultures really are defined by patterns of sexual and parental violence; and it is because she buys into these stereotypical representations of non-European cultures that she is so opposed to the use of cultural defence. Leti Volpp ‘Talking “Culture”’, *Gender, Race, Nation and the Politics of Multiculturalism* (1996) *Columbia Law Review* 96/6

³⁰ . Leti Volpp ‘Blaming Culture for Bad Behavior’ (2000) 12 *Yale Journal of Law and the Humanities* 89, 96 In one of the cases she discusses, Texan police and child welfare officials launched a massive search for a pregnant runaway - believed at that point to be only ten years old - and her boyfriend; when the couple were located, the girl was placed in a foster home and her twenty two year old boyfriend in a maximum security facility, charged with aggravated sexual assault of a child. Charges were dropped when it emerged that the girl, Adela Quintana, was in fact fourteen (above the age of consent to sexual intercourse in Texan law), and a family court judge ruled that the couple had a valid common-law marriage. In this case, both parties were of Mexican origin, and the events were widely discussed in the press as an illustration of the collision of cultures. It was assumed in these discussions, and indeed argued in the courts, that marriage between an adolescent girl and older man was a reflection of ‘Mexican culture’. In a similar case in Maryland, where Tina Compton, a thirteen year old (white) girl married a twenty-nine year old (white) man, none of the media debate and public outcry made any reference to the marriage as a cultural

in some way responsible for their actions. No-one suggests that ‘their culture made them do it’; indeed their culture has become such a taken-for-granted background that it has been rendered virtually invisible. Individuals from minority groups, by contrast, are more commonly conceptualised as defined by and definitive of their culture, so that even the most aberrant can become ‘typical’ products of their cultural norms. In his judgement on the Chen case, Judge Pincus described Chen as ‘the product of his culture’³¹: the individual is read off the culture, and the culture off the individual in turn.

Though it arrives at it by a different route, it might be said that this analysis of cultural essentialism leads to much the same conclusion as the Okin/Coleman critique: that cultural defence is a highly dubious development, and ought to be stopped in its tracks. This is not, however, the conclusion reached by Leti Volpp, who cautions against ‘an all-or-nothing approach that either precludes all cultural evidence, or admits it without challenge’³². Cultural evidence must, she argues, be interrogated for stereotypes, preferably by enabling competing narratives to be heard. But simply disallowing cultural evidence would encourage the false belief that the law has no culture, thereby leaving ‘American identity, and specifically the identity of United States law, a neutral and unquestioned backdrop’.³³ When references to cultural difference are disallowed, this has the effect of confirming the (supposedly non-cultural) majority norm.

This is one of the key issues arising in the assessment of cultural evidence and cultural defence. It seems entirely plausible that existing legal practice will be imbued with the cultural norms of dominant groups. If so, then refusing to acknowledge cultural

phenomenon. It seems that it is only when the parties concerned are relatively recent migrants from non-European countries that child marriage becomes a reflection of cultural traditions.

³¹ Cited in Chiu ‘The Cultural Defense’, 1053

³² Volpp ‘Talking Culture’, 1612

diversity – refusing to problematise cultural assumptions - puts members of minority communities at an unfair disadvantage. This is the danger highlighted by the Judicial Studies Board, which warns of the way ‘erroneous assumptions can be drawn about the credibility of those from minority backgrounds before they even say anything at all’, and the risk of juries ‘deploying their own assumptions to evaluate the behaviour of those whose cultural conventions are different from their own’.³⁴ The implication is that the use of cultural evidence is not at odds with principles of legal universalism; it should be regarded, rather, as a way of ensuring that these very principles are upheld.

This perhaps enables us to resolve the first of the problems outlined above, but the other ones of course remain. Defendants could clearly employ culture in opportunistic ways, for when faced with the prospects of a criminal conviction, one might well exaggerate the centrality of certain cultural practices in order to establish a legal defence. And in relation specifically to women, an uncritical use of culture could have two particularly damaging effects. First, it could encourage the courts to excuse, or at least mitigate, crimes against women, because it might lead them to accept such crimes as ‘normal’ within a different cultural context or different cultural codes. Secondly, it could diminish women (and men) from minority cultural groups by mis-representing their cultures, and mis-representing the individuals as less than autonomous beings.

Cultural Practice in England and Wales

The practices associated with multiculturalism in Britain fall broadly into the category of extensions and exemptions. Some seek to extend to other cultural groups ‘privileges’

³³ Volpp ‘(M)isidentifying Culture’, 57

³⁴ *Equal Treatment Bench Book*, section 6: Key Points

previously enjoyed only by members of the majority or dominant culture. Obvious examples are scheduling exams so as to avoid key festivals of a number of religions, so not just the main Christian festivals; or extending the principle of state support for denominational schools (confined, until recently, to Anglican, Catholic and Jewish schools) to include schools for Muslims, Hindus, and Seventh Day Adventists.

Extensions are sometimes contested on the grounds of practicability – that there are just too many groups to take into account. Sometimes, more simply, the objection is that they *do* challenge the privileged status of the dominant culture. In most ways, however, extensions look the least controversial face of multicultural policy. The object is to redress a previous bias –sometimes deliberate, sometimes just unthinking - and ensure more equitable treatment. Because, however, they give added legitimacy to religious and cultural groupings, they can also work to strengthen the power of religious and cultural leaders over their members. For feminists in particular, they therefore continue to give cause for concern.

The more obviously controversial initiatives seek exemptions for members of particular cultural groups from requirements that are legally binding on other citizens, the usual justification being that conformity requires a much greater sacrifice of cultural values for some groups than for others. Examples include the exemption of turban-wearing Sikhs from the requirement to wear safety helmets on building sites or when riding a motor bike; or of Jewish and Muslim slaughterhouses from legislation governing the slaughter of animals. Those most firmly wedded to universal principles of justice may object that conformity to the law always requires more sacrifice from some people than others. Thus, libertarians may also have very strong objections to the law on crash

helmets; or to cite a rather unhelpful analogy from Brian Barry, those strongly attracted to rape will be more severely disadvantaged by the legal prohibition on it than those who never felt the temptation.³⁵ What Barry terms the ‘rule-and-exemption approach’ is on the face of it more troubling to notions of citizen equality than the idea of extending to other groups privileges previously enjoyed only by one. It has, however, presented less of an issue for feminism, because the standard areas of exemption have so little to do with male power.

The relevant legislation in England and Wales mainly deals with matters of food and dress.³⁶ The *Slaughter of Poultry Act* (1967) and *Slaughterhouses Act* (1974) allow Jewish and Muslim abattoirs to continue to slaughter poultry and animals according to traditional religious methods, basically exempting them from the requirement to pre-stun animals prior to slaughter. The *Motor-Cycle Crash Helmets (Religious Exemption) Act* (1976) exempts turbaned Sikhs from the requirement to wear protective helmets when riding a motorbike; the *Employment Act* (1989) similarly exempts them from the requirement to wear safety helmets when working on construction sites. The 1988 *Criminal Justice Act* prohibits people from carrying knives and other dangerous weapons in public, but specifically exempts knives that are carried for religious reasons. Though there is a gender subtext running through many of these examples – it is Sikh men, for instance, who wear turbans, not Sikh women – it would be hard to describe these exemptions as promoting gender inequality or conceding too much to patriarchal power. They do, of course, give a public validity to claims about cultural identity that might in

³⁵ Brian Barry *Culture and Equality* (Cambridge: Polity Press, 2001) 34

³⁶ The most comprehensive early review is Sebastian Poulter *English Law and Ethnic Minority Customs* (Butterworths, 1986)

later circumstances be employed to more damaging effect; but the immediate implications for gender relations are relatively innocuous.

In some of the areas that have been of more direct feminist concern, legislation has prohibited rather than exempted. Up until 1985, the position on female genital mutilation remained unclear. There was no legislation formally covering this and no cases establishing judicial precedent, but a number of reports suggested that operations were being carried out in the country. The *Prohibition of Female Circumcision Act* (1985) banned such operations except where they can be shown to be necessary for a person's physical or mental health, and explicitly excluded the belief that genital mutilation is a necessary 'matter of custom or ritual' as an illegitimate basis for exemption. Reports continue of operations carried out in private clinics, but there has been no prosecution under this law.³⁷

Under-age marriages, if legally contracted under a different jurisdiction, were condoned for a period, and the culturally relativist judgement in *Alhaji Mohamed v Knott* might certainly raise some eyebrows today. In this case, a thirteen year old girl who had contracted a marriage with twenty six year old man in Nigeria was committed to local authority care in England after a doctor alerted the police to her probable age. The care order was subsequently revoked by the Court of Appeal, which felt that what would be repugnant 'to an English girl and our Western way of life' would be 'entirely natural' for a Nigerian girl. 'They develop sooner, and there is nothing abhorrent in their way of life

³⁷ At the time of writing, a private members bill is proceeding through Parliament – with the declared support of the Home Secretary – that would make it possible to prosecute parents who took their children abroad for operations. It is hard to see how this could be effective, short of intrusive examination of young girls by immigration officers on their return to the UK.

for a girl of thirteen to marry a man of twenty five'.³⁸ The judgement has been cited as a good example of cultural tolerance³⁹, though to my mind, it only appears so when set against the Eurocentrism of the Juvenile Court, which had deemed the continuation of the couple's association as 'repugnant to any decent-minded English man or woman'.

Whatever one's view on this, under-age marriage is now illegal in Britain. In the mid 1980s, cases involving a twelve year old Iranian bride and thirteen year old Omani bride (both living with their student husbands) provoked a tightening of immigration regulations, and entry clearance is no longer granted to spouses if either party is under sixteen on the date of arrival.⁴⁰ Since those already in the country cannot legally contract an under-age marriage, there are no longer any circumstances in which such marriages would be condoned. As with female genital mutilation, this does not mean there are no de facto marriages involving girls under sixteen years of age— but legally at least, this is no longer an open issue.

The position on polygamy is complex, and again has been affected by changes to immigration rules. English law prohibits individuals who are already lawfully married from contracting a second marriage within England and Wales, and declares void any polygamous marriage (even a 'potentially polygamous' marriage⁴¹) contracted outside the country if either party is at the time domiciled in England and Wales. Since the 1988 Immigration Act⁴² also prevents second and subsequent wives of polygamous men from

³⁸ *Alhaji Mohamed v Knott* [1969] 1 QB 1

³⁹ Alex Samuels 'Legal Recognition and Protection of Minority Customs in a Plural Society in England' (1981) *Anglo-American Law Review*. Samuels goes on to argue that 'logically the age of the child wife ought to be irrelevant, although it has been suggested, illogically, that some sort of arbitrary lower age limit should be drawn.'

⁴⁰ HC 3069 of 85-6. see Sebastian Poulter (1998) 53

⁴¹ A marriage is potentially polygamous if it was conducted under a jurisdiction that allows the man to take more than one wife; even if he intends to remain monogamous, the marriage is deemed void within the UK.

⁴² Combined with Immigration Rules HC555 of 1988

joining their husbands in the UK for settlement purposes, there is virtually no scope for recently contracted polygamous relationships. The limited recognition that is given to polygamous marriages (both to the valid ones and to the ones declared void) is mostly to women's advantage, and it would be a pretty harsh imposition of universal monogamy not to allow these concessions. The children of such marriages are recognised as legitimate, and spouses are not prosecuted for bigamy. Divorcees and widows of potentially polygamous marriages are entitled to some forms of matrimonial relief and protection⁴³; even when the marriage is declared void, the courts may still make orders for financial provision or the division of property; and the NHS pension scheme allows for a splitting of the widow's pension between two widows of a polygamous marriage.⁴⁴ Some feminists might regard this limited recognition as going too far in its acceptance of patriarchal marriage. Some pluralists argue that polygamous marriages should be accorded the same legal recognition as monogamous ones⁴⁵. But the current balance would seem to work largely to women's advantage.

One point that arises from this brief review is that most of the issues that might fall into Van Broeck's category of 'cultural offence' - an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture, but *is condoned, accepted as normal, or approved* by the cultural group of the offender - have

⁴³Under the Social Security and Family Allowances (Polygamous Marriage) Regulations 1975, SI 1975/561, a widow of a potentially polygamous marriage (ie one contracted under a jurisdiction that allows polygamy) which was de facto monogamous is entitled to the same widow's pension as a widow of a monogamous marriage; she will not, however, get the pension if there is a second wife living elsewhere (*Bibi v Chief Adjudication Officer* (Court of Appeal Civil Division) 1998.)

⁴⁴ National Health Service (Superannuation) (Amendment) Regulation 1989, SI 1989/804

⁴⁵ Alex Samuels argues that 'If a person is bona fide polygamous then...he ought to be allowed to take a polygamous wife in England provided that he conform to the law of the polygamous group to which he belongs, or abroad, provided that he conforms to the local law. There is no longer any reason, if ever there was, for making English law the personal law of all persons domiciled in England. A personal law based

simply been taken out of the picture. Some such practices, like female genital mutilation, have been banned. Others have been regulated through a combination of legislation, immigration rules, and judicial precedent to the point where there is little scope for legal dispute. It might, of course, be argued that these initiatives are themselves inappropriate: that public policy has been overly assimilationist on issues like female genital mutilation and under-age marriage, and that a more thorough-going 'multiculturalism' is required. My own view is that claims forwarded on behalf of cultural integrity are particularly questionable when they relate to the treatment of minors, who have, by definition, little authority within their cultural group and suffer a double disempowerment by virtue of both sex and age. Leti Volpp's requirement for competing narratives of culture to be heard cannot be met when the key participant is only a few years old. And while one might reasonably query whether the sixteen year old who is assumed to know her own mind about the choice of marriage partner was so devoid of agency a few days earlier, when she was only fifteen, the risks of subordination to someone else's version of what is appropriate to one's culture must surely increase in inverse proportion to age. Where a minor is concerned, the claim that a practice is condoned, accepted as normal or approved by a cultural group is self-evidently open to abuse.

Where something akin to 'cultural defence' arises in the English courts, it has been largely in respect of offences that *would also be regarded* as such within the defendant's culture, but where cultural factors might be said to mitigate the seriousness of the offence, for example by increasing the nature of the provocation or diminishing the responsibility of the defendant. As will become apparent in my argument, the gender

upon personal religion or culture is far more acceptable in a multi-racial society'. Samuels (1981) 'Legal Recognition and Protection of Minority Customs in a Plural Society in England', 251

issues here replicate wider points made about the gendering of criminal responsibility.⁴⁶ Provocation, for example, is one of the three pleas available to defendants for reducing a murder charge to one of voluntary manslaughter; the other two being diminished responsibility and suicide pacts. But because it relies on what has been viewed as a masculine model of ‘a sudden and temporary loss of self-control’, it has been less available to women subjected to months of physical or sexual abuse, who may act against their aggressor some time after his last assault. Aileen McColgan notes that this bias has to some extent been corrected in recent Court of Appeal judgements, but ‘(h)owever much the defence is tweaked and refined, the provocation plea is premised upon an angry loss of self-control...It is not designed to serve those who act in panic or fear, such as frequently appears to be the case when battered women kill their abusers’⁴⁷ Meanwhile, the plea of self-defence - which if successful, will lead to total acquittal - is more readily available to a man who matches his attacker in physical strength, and employs only what the courts will recognise as ‘justifiable force’⁴⁸. The limited applicability of either provocation or self-defence to women defendants makes them more reliant on a plea of diminished responsibility. So where men can argue that their action was ‘reasonable’ in the circumstances (that the provocation was such as would lead a reasonable man to lose his self-control, or that the force employed was reasonably proportional to the attack), women must more often present themselves as less than rational agents. This suggests

⁴⁶ eg in A McColgan ‘In Defence of Battered Women Who Kill’ (1993) *Oxford Journal of Legal Studies* 13, 508; F Railt and S Zeedyk *The Implicit Relation of Psychology and Law* (Routledge, 2000); Alan Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworth, 2001);

⁴⁷ Aileen McColgan ‘General Defences’ in D Nicolson and L Bibbings (eds) *Feminist Perspectives on Criminal Law* (London and Sydney: Cavendish Publishing, 2000) 151

⁴⁸ McColgan suggests that ‘the most interesting issue about general defences is the non-availability of a defence related to fear or despair, save to the extent that this can be brought within the reasonableness requirement of justifiable force.’ ‘General Defences’, 155

important parallels between cases in which culture is explicitly invoked, and ones where it is not perceived as an issue. I shall return to this point later.

English Cases

Two early cases of cultural defence involved prosecutions for under-age sex: *R v Bailey*, which involved the prosecution of a twenty-five year old West Indian man for intercourse with two girls aged twelve and fourteen; and *R v Byfield*, where a thirty-two year old West Indian was prosecuted for sex with a girl aged fourteen.⁴⁹ The girls were described as either 'precocious' or 'mature', and while this is itself a worrying move, implying that the children were somehow responsible for the course of events, there was no suggestion of non-consensual sex in either of these cases. Culture was invoked at the appeal stage as a relevant consideration in explaining why the men might be unaware that their actions were either unusual or unlawful. Bailey's nine month prison sentence was reduced to a £50 fine, while Byfield was discharged after serving three and a half months of his eighteen month sentence.

Culture intervened here in relation to penalty rather than guilt; and one gets a strong sense from these early cases (as also from *R v Adesanyo*) that the judges felt they were dealing with a moment of transition from one set of cultural norms to another. In this context, it was felt important that the convictions should reaffirm the requirements of English law, but not appropriate that the individuals concerned should bear the full weight of the legal penalty. Bailey was said not to have known that his conduct was unlawful, and to be so shocked by his conviction that he was unlikely to repeat the offence. Byfield was warned that whatever the social customs in the West Indies, he must

in future comply with English law. The judgements in these cases sent a message to new immigrants as to how they should conduct themselves, but the individuals who served as the occasion for the message were not dealt with too harshly. At this point, in other words, the courts could regard themselves as dealing with a one-off moment of accommodation: individuals in transition would be treated with some leniency, but pretty soon, all citizens would have adjusted to ‘how we do things around here’.

In later cases, the relationship between cultural background and knowledge of the law has been less prominent, and there is more of a sense that cultural pluralism may be a permanent rather than temporary phenomenon. Two kinds of cases have emerged that are of particular relevance for my argument: first, those where cultural context has been seen as significant in interpreting the actions of female defendants; second, those where ‘culture’ is invoked to mitigate severe acts of violence against women. The first category has been problematic because of the differential treatment accorded to women, depending on how closely they conform to images of female subservience; the second, more starkly, because it risks excusing the murder of women. The number of cases is too small to permit firm generalisation, but it does appear that two of the problems identified above – the stereotyping of the non-Western ‘Other’, and the ‘cultural’ mitigation of male crimes against women– have arisen in English legal practice.

R v Bibi has been described as ‘(o)ne of the best illustrations of how ethnic customs and values may affect length of a prison sentence’.⁵⁰ This is a case where a woman benefited from cultural considerations, and had her sentence cut as a result. Bashir Begum Bibi, a 47 year old widow living with her brother-in-law Abdul Ali, had

⁴⁹ *R v Bailey* [1964] Crim LR 671; *R v Byfield* (check)

⁵⁰ Poulter ‘The significance of ethnic minority customs’, 126

been sentenced along with Ali for her role in importing cannabis from Kenya. The cannabis was delivered to the house they shared, and Mrs Bibi had unpacked the contents. She was initially sentenced to three years' imprisonment and her brother-in-law to three and a half. Reviewing this similarity in sentence, the Court of Appeal noted that the social inquiry report on Bibi had described her as totally dependent on her brother-in-law for support, and socially isolated by her poor English. It suggested, moreover, that she was so thoroughly socialised into subservience that it was hard to consider her as an autonomous actor. '(I)t is apparent that she is well socialised into the Muslim traditions and as such has a role subservient to any male figures around her...Because she has assumed the traditional role of her culture any involvement in these offences is likely to be the result of being told what to do and the learned need to comply...In the light of that history, it would not be safe to credit her with the same independence of mind and action as most women today enjoy.'⁵¹ The Court of Appeal reduced her sentence to six months.

The suggestion that Bashir Begum Bibi could not be credited with 'the same independence of mind and action as most women today enjoy' seems to go considerably beyond her level of complicity in the drugs offence towards a general denial of her status as an autonomous agent. While the decision itself strikes me as appropriate and compassionate, it still gives cause for concern that it drew on stereotyped notions of 'the Muslim traditions' and 'the traditional role of her culture'. It also gives cause for concern that this kind of defence differentiates so sharply between those who conform to prevailing images of female subservience and those who in some way deviate from this norm.

⁵¹ *R v Bibi* [1980] 1 WLR 1193

When Kiranjit Ahluwalia, for example, was tried for the murder of her physically abusive husband, the judge's directions to the jury tended to minimise the cultural considerations. He noted that her marriage had been an arranged one, but this 'may have been the custom'; he observed that her mother-in law had advised Mrs Ahluwalia to separate from her husband if she did not like him, and commented that 'if it was really as bad as all that, it may have been the best thing to do'.⁵² There is little acknowledgment here of the difficulties many Asian women have spoken of in exiting from an arranged marriage into a community that holds women responsible for the family honour. In one particularly revealing comment, the judge advised the jury that 'the only characteristic of the defendant about which you know specifically that might be relevant are that she is an Asian woman, married, incidentally to an Asian man, the deceased living in this country. You may think she is an educated woman, she has a university degree. If you find these characteristics relevant to your considerations, of course you will bear that in mind.' The only meaning I can give to this is that the jury might think she was more trapped in her marriage and less responsible for her actions because she was an Asian woman, but might also see this as cancelled out by the fact that she had a university degree.

Ahluwalia's murder conviction was overturned at subsequent appeal, largely because these directions had ignored medical evidence available at the time - though not used in the original trial - that she was suffering from a major depressive disorder. At this point, the judge laid more stress on her vulnerability, describing her as physically 'slight', as having suffered many years of abuse from the onset of her marriage, and trying to hold

⁵² R v Kiranjit Ahluwalia, unreported case, Lewes Crown Court, December 1989 (transcript: Hibbit and Sanders)

her marriage together because of her 'sense of duty as a wife'.⁵³ In this second judgement, Kiranjit Ahluwalia was represented in terms that more closely echoed the descriptions of Bashir Begum Bibi, appearing now as a passive victim of events.⁵⁴ What is striking, nonetheless, is the message implied in that original direction: that were Kiranjit Ahluwalia the 'typical' victim of an abusive arranged marriage, the jury might be more inclined to see her as someone driven to desperate measures; but since she was an educated woman, they probably shouldn't give this much weight. This suggests that 'culture' becomes available to female defendants only when they conform to prevailing images of the subservient non-Western wife. Culture then works to sustain certain stereotypes of the non-Western 'Other'.

The prevalence of such stereotypes has been one of the issues in the campaign to free Zoora Shah, who is still serving a life sentence with a minimum tariff of twenty years for the murder of Mohammed Azam. At her initial trial in 1992, the prosecution had presented her as voluntarily involved in sexual relationships with at least two married men; as seeking to secure from the first of these, Azam, the title deeds of the house she lived in (bought in his name but paid for with her money); conspiring with a second lover to forge Azam's name to a transfer of ownership; paying a hit-man to kill Azam; and when this came to nothing, poisoning him with arsenic so as to stop the civil proceedings he had taken out against her. Zoora Shah gave no evidence in court, but denied the four charges against her.

⁵³ *R v Ahluwalia* [1992] 4 All ER 889

⁵⁴ Drawing on the appeal case rather than the initial trial, Matthew Rowlinson stresses the way Ahluwalia's intentionality was effaced. 'Re-Reading Criminal Law: Gendering the Mental Element' in Nicolson and Bibbings (eds) *Feminist Perspectives on Criminal Law*, 114-6

When her case went to the Court of Appeal in 1998, the judgement revolved around three issues.⁵⁵ First, how was the court to weigh new evidence from medical practitioners (including a consultant psychiatrist with experience of trans-cultural psychiatry), suggesting Shah was suffering from a severe mental disorder at the time of the murder, against medical evidence from 1992 suggesting she was anxious and depressed but not suffering from a severe depressive illness? Second, was it permissible to introduce a plea of diminished responsibility when this was not used at the initial trial, or did this go against the ‘one trial’ principle? Third, was the new evidence Zoora Shah now provided on the course of events to be regarded as ‘capable of belief’? Through many months of meetings with Pragna Patel of Southall Black Sisters, Zoora Shah had told of being abandoned by an abusive husband, befriended by Azam, a heroin dealer, who had beaten and raped her and encouraged his associates to visit her for sex, and finally putting a powder in his food when he began to show a sexual interest in her twelve year old daughter. A statement based on these interviews was put before the Court of Appeal. If the story was true, however, why hadn’t she told it before? Why had she confided in no-one through all those years of physical and sexual abuse?

In their assessment of this last question, the judges accepted ‘up to a point’ ‘the importance of honour in the society from which the defendant springs’, and the particular difficulties a woman like Zoora Shah might have faced in making public a history of sexual abuse. But only up to a point, ‘because the appellant, as it seems to us, is an unusual woman. Her way of life had been such that there might not have been much left of her honour to salvage, and she was certainly capable of striking out on her own when she thought it advisable to do so, even if it might be thought to bring shame on her or to

⁵⁵ R v Zoora Ghulam Shah, Court of Appeal, April 1998 (transcript: Smith Bernal)

expose her to risk of retaliation'. Honour, by implication, attaches to the sexually chaste or the dutiful wife, while those exhibiting any capacity for action cannot hope to be believed when they say they were constrained by shame or fear. The fact that one of her daughters described her as a 'strong-willed woman' seems also to have told against her. You cannot, it seems, be both strong willed and abused by others; you have to be either the helpless victim wronged by others, or someone capable of wrong-doing herself. In the case of Zoorah Shah, cultural context is raised but not seriously addressed, and one is left feeling that culture will only be recognised as relevant when women conform to a particular stereotype. A woman portrayed as entirely under the control of male family members may draw on beliefs about non-Western cultures to make a claim for diminished responsibility, but if she is sullied by past sexual encounters or over-qualified by virtue of a degree, she no longer fits the prevailing image. There is little room here for the complexity of most individuals' lives.

When we turn to the second category of cases – those where religious or cultural beliefs are cited as partial defences against charges of murder - the courts have proved largely resistant to arguments that invoke a cultural defence. The number of cases is very small (the four I have identified compare with a figure of around 110 women killed in the UK each year by current or ex-boyfriends, partners or spouses), but the common pattern is the murder by family members of a young woman said to have sinned against religious or cultural prescription by her actual or presumed sexual behaviour. In 1991, Abdul Haq and Mohammed Saleem were sentenced to life imprisonment at the Leeds Crown Court for the murder of their eighteen year old sister, Sharifan Bibi, and Hashmat Ali, her forty-four year old lover. Sharifan had contracted a marriage in Pakistan, but had returned to

England without her husband, and begun a relationship with an older man. Both disappeared in 1988. Though their bodies were never recovered, witnesses in Pakistan testified that Saleem had admitted to the killings – allegedly telling his wife that ‘if we can kill our sister, we can kill you also’. Haq was also recorded (secretly) as admitting to his part in the murders during a conversation between the two men in a police cell. Their subsequent appeal against the murder convictions revolved around the use of this tape recording, and supposed difficulties in the translation of witness statements recorded. Both appeals were dismissed.⁵⁶

In a later and more fully publicised case, the victim was nineteen year old Rukhsana Naz, who had been married at sixteen to her second cousin, had two children from this marriage, but lived separately from her husband who remained in Pakistan. When she later became pregnant by a boyfriend she had known since her schooldays, she was strangled by her brother Shazad, with the assistance, it was charged, of her mother and younger brother.⁵⁷ The defence of Shakeela and Iftikhar Naz centred on whether they did indeed participate in the killing (in the event, the younger brother was acquitted of involvement in the murder). However, a plea of provocation was submitted on behalf of Shazad Naz, who was said to have been provoked by the revelation of his sister’s pregnancy into a sudden and temporary loss of self-control. His ‘idealistic’ religious beliefs were invoked to explain the intensity of the shame he felt on learning of his sister’s condition, and the jury was asked to consider whether Rukhsana’s conduct was such as to cause ‘a reasonable and sober person’ of her brother’s ‘age, religion and sex’

⁵⁶ *R v Haq; R v Saleem*, 1996

⁵⁷ *R v Shazad, Shakeela and Iftikhar Naz*, Nottingham High Court, May 1999 (transcript: Cater Walsh and Co.)

to act as he did. They decided, unanimously, that it wasn't, and both Shazad and Shakeela Naz were convicted of murder.

Cultural considerations were introduced in this case, but not accepted as justifying the plea of provocation, and the judge commented in sentencing that 'this was a particularly horrific offence, involving as it did the murder of a young pregnant woman, who was already the mother of two children, at the hands of her own family'. Cultural issues also surfaced briefly in the appeal case of the mother, when her counsel referred to the section in the Equal Treatment Bench Book that warns against ethnocentric assumptions, and the danger that a jury might erroneously deploy 'their own assumptions to evaluate the behaviour of those who cultural conventions are different from their own'.⁵⁸ But the key issue in Shakeela Naz' appeal was whether the jury had been properly directed on evidence relating to her own involvement. Since her defence had been that she was attempting to restrain not assist her son, she could not also invoke questions of family honour in her defence. Her conviction was upheld on appeal.

In 2002, Faqir Mohammed killed Shaida, his twenty-four year old daughter, with a knife after discovering her (fully clothed) boyfriend in her bedroom.⁵⁹ Here, too, the defendant submitted a plea of provocation. Here, too, the 'provocation' revolved around religious beliefs. In considering the plea, jury members were instructed to take into account Mohammed's depression (he had been treated with anti-depressants after the death of his wife) and his 'strongly held religious and cultural beliefs'. The judge accepted, in other words, that Mohammed could legitimately cite his belief that a daughter should not have a boyfriend without his consent, and his strong conviction that

⁵⁸ *R v Shakeela Naz, 2000*

⁵⁹ *R v Faqir Mohammed, Manchester Crown Court, 18 Feb 2002 (transcript: Cater Walsh and Co.)*

sex outside marriage was a grave sin, as possible causes of his loss of self-control. But ‘(a) man may not rely on his own violent disposition, by way of excuse’, and jury members had to weigh the depression and religious beliefs against evidence from six of his children that he was a man with a history of violence towards his children and wife, who had a greater tendency to violence than was ‘reasonably normal’. In this case, the jury rapidly came to the conclusion that Mohammed was guilty of murder. He was sentenced to life imprisonment.

The partial exception to this pattern is the case of Shabir Hussain, who was convicted in 1995 of murdering his sister-in-law, Tasleem Begum, by driving into her while she waited on a pavement for her lover, and reversing the car over her body. At the initial trial, Hussain denied his involvement, so there was no question of him submitting a plea of provocation based on either culture or religion. He was convicted of the murder and sentenced to life imprisonment. He successfully appealed against this conviction on the grounds of false identification⁶⁰, and it was at his retrial in 1998 that he introduced a plea of guilty to manslaughter by reason of provocation. The provocation was hardly one that would have stood ground were it not for cultural factors: all that Tasleem Begum had done was to default on a marriage arranged for her in Pakistan when she was sixteen, refuse to sign the documents that would have enabled her husband to get a UK entry visa, and later embark on an affair with a married man. In his judgement, however, the judge acknowledged that her illicit affair ‘would be deeply offensive to someone with your background and your religious beliefs’, and sentenced Hussain ‘on the basis that something blew up in your head that caused you a complete and sudden loss of self-

⁶⁰ (*R v Shabir Hussain, 1998*)

control.’⁶¹ (This resonates with the Chen case, where the judge commented that ‘(t)he culture was never an excuse, but it is something that made him crack more easily’.⁶²)

Hussain’s original life sentence was cut to six and a half years.

The contrasting treatment of Shabir Hussain and Zoora Shah – both of whom lied at the original trial and both of whom introduced new defences the second time round – gave rise to extensive media commentary, and certainly gives ground for thinking that cultural defence is loaded against women. The key point in the Hussain case was not so much the sentencing: six and a half years is not far out of line with the normal tariff for manslaughter of seven to eight years; the judge explicitly stated that he saw the case as falling towards the top end of the sentencing bracket, and that it was ‘very difficult for anyone hearing the account of what happened to understand what you did and why you did it’; and the minor mitigation was partly because the defendant had eventually pleaded guilty. The key point is that the prosecution accepted the new plea of guilty to manslaughter by reason of provocation, possibly (though this is speculation) because of anxieties about securing conviction when the initial murder conviction had been overturned on appeal. Once the provocation plea was accepted, the sentence was more or less predictable.

With this troubling exception, the English courts have not been particularly receptive to provocation pleas based on intensely held religious beliefs about pre-marital and adulterous sex, or cultural understandings of honour and shame. Yet one is left wondering what might have been the outcome for Faqir Mohammed if he had had no previous history of violence towards his children; or for Shazad Naz if the horror of his

⁶¹ R v Shabir Hussain, Newcastle Crown Court, 28 July 1998 (transcript: J.L.Harpham Ltd)

⁶² Cited in Chiu ‘The Cultural Defense’, 1994

actions had not been so much intensified by the fact that his mother was also involved. The fact that a defendant can legitimately cite the shame brought on his family by a sister's or daughter's transgressive behaviour remains in itself disturbing, and since this evidence could potentially reduce a murder charge to the lesser one of manslaughter, it promises to affect not only the question of penalty but also the question of guilt.

Writing in the late 1980s, Sebastian Poulter commented that 'for 150 years, at least, the English courts have followed a consistent pattern in their handling of defendants from overseas and in dealing with foreign customs and traditions. In determining the question of guilt English judges have decided to apply a uniform standard to all-comers, regardless of their origins, their cultural mores or their ignorance of English law.'⁶³ The murder cases discussed above suggest that the courts are now open to accommodation on the question of guilt. While judges and juries have been largely resistant to this move, this remains a matter of concern. One might imagine a parallel case in which a member of a white racist organisation claimed he had been put under unbearable pressure by seeing his sister with a black lover, and in a moment of madness, took her life. In this hypothetical case, the defendant might also believe that his sister's behaviour was an insult to the family honour and degraded the family name, but it is hard to imagine any court today accepting this as provocation. One obvious reason for the difference is that there is legislation against racism, but no law (and rightly so) against thinking pre-marital sex a sin. But the contrast potentially returns us to one of the questions posed in the opening discussion: should intensely-held religious convictions be treated differently

⁶³ Sebastian Poulter , 'The significance of ethnic minority customs and traditions in English criminal law' (1989) *New Community* 6/1, 122

from intensely-held political convictions? should 'culture' be elevated above other concerns?

The other way to view these cases, however, is in the context of the much larger category of 'non-cultural' murder cases where men invoke the provocation of an unfaithful or nagging wife to secure the lesser conviction of manslaughter: cases that themselves involve shared cultural assumptions about 'normal' wifely behaviour, but do not present these in explicitly cultural terms.⁶⁴ The murder cases discussed above do not, on the whole, suggest a pattern of differential treatment for defendants from minority cultures, and they compare with a much larger category of cases where male violence had been rendered explicable without any reference to cultural tradition. Indeed, the main difference introduced by 'culture' is that these men killed what they viewed as sexually wayward sisters or daughters. The more typical pattern in other cases has been a man who kills his ex-lover or wife. Culture has been invoked, not so much to explain a heightened reaction to what is perceived as transgressive sexual behaviour, but to extend the class of legitimately incensed males beyond the immediate confines of lovers or spouses. The common thread, however, through both 'cultural' and 'non-cultural' cases is the presumption that a woman's sexual behaviour can be enough to provoke a man to lose his self-control.

In these, as in all the cases discussed in this paper, 'culture' operates within a terrain already defined by mainstream gender assumptions: the idea that sex with an under-age girl is more excusable when she is 'mature' or 'precocious'; that women are not really responsible for actions undertaken under the direction of male family members (it was a key principle of English law up to the early twentieth century that married

women could not be held responsible for crimes committed in their husband's presence); or that men explode into rage when they discover their women involved in illicit affairs. References to the defendant's cultural background can ratchet up the characteristic in question. Thus, Mrs Bibi was credited with little independence of mind and action, and was said to be very different from the average woman in this; Shabir Hussain killed in circumstances that might cause other men to shout and swear. But Bibi's subservience only made sense because it resonated with what has been perceived as a general female characteristic; while Hussain's violence towards his sister-in-law fell within a recognisable spectrum of male behaviour. By contrast, neither Zoorah Shah nor (in her first trial) Kiranjit Ahluwalia fitted prevailing images of the vulnerable woman: the first because she was 'strong-willed' and had lived too long in a criminal sub-culture; the second because she was over-qualified. In some ways, it seems a misrepresentation to treat any of these as 'cultural' cases. What we see, rather, are pretty standard conventions of gender difference, given an added twist or intensity through what are perceived as cultural codes.

Commenting on parallel cases in the USA, Daina Chiu makes the important suggestion that American courts only recognise 'cultural' factors when these resonate with mainstream American norms. Dong-lu Chen, for example, got off lightly for killing an adulterous wife⁶⁴, but the anger of a wronged husband is hardly unique to Chinese culture, and American courts could readily recognise what he did as a standard 'heat of passion' act. When Kong Moua expressed his surprise that the woman who resisted his

⁶⁴ A McColgan 'General Defences' in Nicolson and Bibbings (eds) *Feminist Perspectives on Criminal Law*

⁶⁵ *People v. Chen* (Supreme Court, NY County, December 2, 1988)

sexual advances really meant it⁶⁶, his incomprehension resonated with widely shared beliefs about women saying 'no' when they really mean 'yes'. The public sympathy for Fumiko Kimura⁶⁷ depended less on her Japanese background, and more on a wide-spread American perception that to live with the knowledge that you have killed your children is the worst punishment any woman can face. As Chiu tellingly notes, when Quang Ngoc Bui killed his three children and tried but failed to kill himself in desperation about his wife's affair (on the face of it, a very similar set of events), his cross-cultural evidence cut no ice with the court. Unlike Kimura, he was convicted of murder, and his death sentence was later upheld on appeal. An otherwise 'good' mother who kills her children in pitiable circumstances can be viewed as an object of compassion; a man who kills his children is likely to be seen as pitiless and cruel.⁶⁸

The suggestion here is that cultural evidence only 'works' when it enables judges and juries to fit the defendant's actions into a pattern already familiar through mainstream culture: that in the end, it is the sameness not the difference that matters. Invocations of 'culture' are themselves pretty clearly gendered. They convey for women a particular stereotype of passivity, and for men a meaningful context for violent actions, and are then likely to figure for men in diminishing the severity of their actions, and for women in diminishing who they are. But this gendering of cultural expectations resonates with a wider gendering of criminal responsibility that can leave women defendants with no option but to establish their mental impairment, whilst allowing men the additional recourse to provocation or self-defence. The content of the defences also draws on established norms of gendered behaviour: in Moua's case, the belief that many women

⁶⁶ *People of the State of California v. Kong Pheng Moua* (Fresno County Superior Court, February 7, 1985)

⁶⁷

make a play of resisting men's sexual advances; in Chen's, that violence is a normal male reaction when faced with an unfaithful wife. As Sara Song puts it, the 'cultural defense arguments raised by minorities are given credibility not because they are foreign but because they are familiar to the majority culture'⁶⁹. It is when 'culture' echoes gender norms in the wider society, or gendered practices in the law as a whole, that it is most likely to be recognised as an excuse.

Conclusions

There are two main conclusions to this discussion. The first is that while none of the cases I have identified from the English courts is as disturbing to notions of natural justice as *People v Moua* or *People v Chen*, there are clearly some problems with the way cultural evidence is currently employed. In the Hussain case, the prosecution was arguably over-receptive to a defence drawing on codes of family honour, and while not 'excusing' the killing of a sexually active young woman – Hussain was sentenced to six and a half years - the judge accepted in mitigation that her behaviour had put the defendant under unusual pressure. In the treatment of female defendants, meanwhile, 'culture' seems to be allowed or disallowed depending on conformity to cultural stereotypes, leading not only to an inconsistency of treatment between different cases, but to a perpetuation of those stereotypes. Though they appear here in relatively attenuated form, both the problems identified in feminist discussions of cultural defence in America

⁶⁸. Chiu 'The Cultural Defense', 1113-1120

⁶⁹ Song, 2002, 32. In her analysis of the Moua and Chen cases, she notes that most states in the US still admit a 'mistake of fact' defence in rape cases, allowing men to argue that they 'reasonably' mistook their victim's resistance as consent; and that courts consistently accept provocation claims in murder cases, allowing men to present not only adultery but even filing a restraining order or just threatening to leave the relationship as a provocative act of betrayal.

– the mitigation of crimes against women and the misrepresentation of women (and men) from minority cultures as less than autonomous beings – have surfaced in the English courts.

This first conclusion might suggest that the courts should now abandon their attempts to recognise cultural diversity while avoiding cultural excuse, and adopt the more straightforward ‘culture-neutral’ route advocated by Doriane Lambelet Coleman. This is at odds, however, with my second conclusion, which is that the difficulties that arise in the use of cultural evidence are themselves part of a wider pattern. It is largely when mainstream culture itself promotes a gendered understanding of agency and responsibility – as when it perceives men as understandably incensed by the sexual waywardness of their women, or women as less responsible for their actions because of the influence of men – that references to cultural context have proved effective. If this is so, then it is not the use of cultural evidence *per se* that is peculiarly gendered. It is not that this has unusually dire consequences for women, and ought on that basis to be curtailed. Such a position would suggest that gender inequities enter only at the moment when a minority cultural context is invoked, that the default position already secures the equal treatment of women, and that this is only threatened when ‘culture’ is allowed to intrude. Pleasing as it might be to think so, this hardly fits with the large body of literature in feminist legal theory⁷⁰; and is certainly at odds with (government as well as academic) concern about the treatment of rape and male violence against women.

Cultural arguments work when they enable judges and juries to fit what might otherwise be deemed extreme or incomprehensible behaviour into familiar patterns. Chiu puts it thus: ‘The jury will process evidence about another seemingly foreign and

different culture only to the extent that the jury can relate to it and understand it. Thus, where the jury finds common ground with the defendant, its deliberation and verdict become an exercise in recognizing cultural sameness, not difference.⁷¹ She takes this as a criticism – that what looks like an accommodation of difference is in truth a re-imposition of sameness - but I am inclined to think this is the best one can hope for in the context of a court. The implication, however, is that when the outcome of the process is judgements that favour men over women or defendants over victims, the reasons will lie in the dominant rather than minority culture. It is not the introduction of cultural evidence *per se* that generates problems in the equitable treatment of women, for such evidence only has the desired effect when it resonates with mainstream conventions.

The argument here links with more general questions about whether gender can be theorised in isolation from culture, and the dangers (much debated in the feminist literature) of setting up these two as separate and distinct.⁷² One problem is that women in minority cultures are thereby rendered invisible, or rather are swallowed up in what are said to be their cultural traditions, which are then presented as more unified and uncontested than is ever the case. The problem on the other side is that gender equality comes to be attached to those who are deemed to have no ‘culture’, becomes attached, in other words, to the dominant culture, where the relationship between the sexes is presumed to be more emancipated and less patriarchal than is the case within minority cultural groups. The further problem that emerges from this paper is that when gender and culture are theorised as distinct, any gender inequities that arise out of cases invoking

⁷⁰ Eg, D Nicolson and L Bibbings (eds) *Feminist Perspectives on Criminal Law*

⁷¹ Chiu, 1114.

⁷² For further discussion of this, see Anne Phillips ‘Gender Versus Culture: Not Always a Deep Disagreement’ in A Eisenburg and J Spinner Halev (eds) (forthcoming, 2004) *Minorities Within Minorities*

cultural considerations will misread as effects of ‘cultural defence’. This in turn will lead to the view that there has been too much accommodation of minority cultures, and that this is why women are disadvantaged.

I have suggested, against this, that cultural arguments only work when they resonate with mainstream views. Some of these will be mainstream understandings of non-Western culture, as exemplified in the perception of Asian women as passive and subservient to men. Others will be mainstream conventions about masculine behaviour, as in the readiness to accept that men are provoked beyond reason by a women’s sexual betrayal. In either case, it seems that the problem lies as much with the gendered conventions of the dominant culture as with the introduction of a cultural defence. It cannot be resolved by the elimination of ‘culture’ (which in this context is always understood as ‘minority culture’) from the courts, for this would unfairly discriminate between defendants from majority and minority cultures, permitting only the first to give full details on their individual circumstances and background. It would, moreover, promote the misleading notion that patriarchal norms characterise only minority cultures, and thereby encourage a false complacency about majority gender norms. ‘Culture’ operates on a terrain already defined by mainstream gender assumptions, and the gender inequities that have been associated with the use of cultural defence need to be understood within this context. The uses and abuses of cultural defence highlight issues that have much wider provenance, and should direct us to a more thoroughgoing challenge to patriarchal norms wherever these appear.

