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Adjudicating Culture

Review Essay

Adjudicating Culture¹

MICHAEL M. KARAYANNI²

MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENCE is a collection of essays written by social science and legal scholars from various countries on the normative propriety, meanings, and implications of what is known as “the cultural defence.”³ Although the concept of the cultural defence may appear to be broad and elusive, a clear and limited dilemma figures prominently throughout this book: to what extent should a court in a criminal proceeding take into consideration a defendant’s cultural motivation for the purpose of determining criminal culpability, punishment, or both?⁴ With the exception of a few cases, the discussion centres on the treat-

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1. Review Essay of Marie Claire Foblets & Alison Dundes Renteln, *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence* (Oxford: Hart Publishing, 2009) 378 pages.
 2. Director, Harry and Michael Sacher Institute for Legislative Research and Comparative Law, and Edward S. Silver Chair in Civil Procedure, Faculty of Law, Hebrew University of Jerusalem. The research conducted for writing this review essay was supported by the Israel Science Foundation (grant 385/05).
 3. This collection is preceded by a book by editor Alison Dundes Renteln, who examines “the cultural defence” with particular emphasis on the United States. See Alison Dundes Renteln, *The Cultural Defence* (New York: Oxford University Press, 2004).
 4. As Gordon Woodman states, the subject matter of the whole collection is “the question of whether or not people whose conduct conforms to rules of conduct prescribed by their culture are to be considered guilty and thus subject to punishment for the mere reason that their behaviour clashes with the rules of the dominant (national/official) legal system.” Gordon R. Woodman, “The Cultural Defence in English Common Law: The Potential for Development” in Foblets & Renteln, *supra* note 1, 7 at 7. Brenda Carina Oude Breuil, another contributor, perceives the overarching issue as being: “to what extent, if at all, should cultural imperatives mitigate punishment?” Brenda Carina Oude Breuil, “Dealing with the Ethnic Other in Criminal Law Practice: a Case Study from the Netherlands” in Foblets & Renteln, *supra* note 1, 287 at 287-88. Interestingly, the editors allow for a much broader meaning of cultural defence in their introduction. They note,

ment of the cultural defence by Western legal systems in situations where the person invoking the defence is a non-Western immigrant or a member of an indigenous minority community.⁵ The book's contributors consider a variety of culturally motivated crimes, the most prominent being those motivated by so-called family honour (*i.e.*, when individuals inflict harm on, or even commit the murder of, female family members in response to perceived culturally indecent behaviour).⁶ There is also another group of cases concerning practices that contradict the acceptable legal norms of the dominant society (or host country), even though the practices are considered harmless, or requisite, according to the cultural norms of the minority community (or country of origin). Examples of such situations include the Sikh who refuses to remove his turban while riding a motorcycle, despite regulations that mandate the use of a helmet;⁷ the Muslim imam who faces a charge of criminal discrimination in the Nether-

"[i]ndeed, some of the contributors have different ideas about what constitutes a cultural defence. While some view it as primarily a criminal law matter, others consider the role of cultural factors in other fields of law, eg, child welfare, housing codes and asylum jurisprudence." Alison Dundes Renteln & Marie-Claire Foblets, "Introduction" in Foblets & Renteln, *supra* note 1, 1 at 2. As the editors also make clear, the primary interest in the collection was "to find different approaches to the study of culture conflict in legal proceedings" (at 1). Instead of proposing a fixed definition of the cultural defence, the editors "left it to the participants to analyse the role of cultural factors in legal processes, as they saw fit" (at 2). It would have been helpful to understand exactly how the subject of the book was presented to the authors. This does not, however, change the general scope of the collection, which pertains mainly to the use of culture in criminal proceedings.

5. One contributor refers to an intra-Western conflict: the prosecution of a Frenchman in nineteenth-century England for murder. He was accused of participating in a duel with another Frenchman who was killed. The accused sought acquittal for the reason that, according to French culture, the action did not amount to murder. The English court rejected the claim. See Woodman, *ibid.* at 16 (discussing *R. v. Barronet and Allain* (1852), 169 E.R. 633). Although the focus on Western legal systems is made clear from the beginning, discussing the place of the cultural defence in a non-Western context would have broadened the discussion.
6. See Barbara Truffin & César Arjona, "The Cultural Defence in Spain" in Foblets & Renteln, *supra* note 1, 85 at 98-101; Mirjam Siesling & Jeroen Ten Voorde, "The Paradox of Cultural Differences in Dutch Criminal Law" in Foblets & Renteln, *supra* note 1, 145 at 150, 160-68; and Sylvia Maier, "Honor Killings and the Cultural Defence in Germany" in Foblets & Renteln, *supra* note 1, 229. See also John L. Caughey, "The Anthropologist as Expert Witness: the Case of a Murder in Maine" in Foblets & Renteln, *supra* note 1, 321 at 321-22, 329-33.
7. Woodman, *supra* note 4 at 17.

lands for stating in a televised interview that homosexuality is a disease;⁸ and even cases of adults who are prosecuted for spanking or having sexual relations with children—all in compliance with their own acceptable cultural norms.⁹ The interrelationship between culture and the criminal justice system is discussed at length with respect to the cultural practices of certain communities, including the Romani in Spain (*i.e.*, cases of vengeance, the effect of Romani marriages, trespass, et cetera),¹⁰ the Aborigines in Australia (*i.e.*, the imposition of payback on the wrongdoer and its effect on criminal proceedings),¹¹ the Chinese in the United States (*i.e.*, honour-motivated criminal acts related to “loss of face”),¹² as well as cases in South Africa, where the use of witchcraft has led to murders.¹³

Criminal law is designed to determine the culpability of the accused and to impose an appropriate punishment—as such, it embodies an array of doctrines that can potentially offer recognition to the cultural defence. One such doctrine contemplates the “guilty mind” (*mens rea*) of the accused at the time that he or she is committing the acts that form the crime (*actus reus*). Within this context, the cultural identity of the accused and the cultural environment in which he or she was raised may play an important role in influencing a person to take “culturally-driven actions” that he or she believed to be culturally mandated or sanctioned. *Multicultural Jurisprudence* provides a thorough review of whether such a state of mind can serve as an excuse from criminal liability, even if it cannot justify the acts themselves.¹⁴

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8. Siesling & Voorde, *supra* note 6 at 153.
 9. *Ibid.* at 148-49 (referring to the beating of boys by Moroccan staff members at a special institute in Amsterdam for Moroccan boys); Woodman, *supra* note 4 at 30-31 (referring to a forty-year-old Caribbean man who was prosecuted for having sexual relations with the twelve-year-old daughter of his partner and to a Nigerian woman who inflicted facial scars on her two sons).
 10. Truffin & Arjona, *supra* note 6. See also Joke Kusters, “Criminalising Romani Culture through Law” in Foblets & Renteln, *supra* note 1, 199.
 11. Simon Bronitt, “Visions of a Multicultural Criminal Law: an Australian Perspective” in Foblets & Renteln, *supra* note 1, 121 at 133.
 12. Cher Weixia Chen, “A Critique of ‘Loss of Face’ Arguments in Cultural Defence Cases: a Comparative Study” in Foblets & Renteln, *supra* note 1, 247.
 13. Pieter A. Carstens, “The Cultural Defence in Criminal Law: South African Perspectives” in Foblets & Renteln, *supra* note 1, 175 at 175-77.
 14. See Woodman, *supra* note 4 at 16. See also Kumaralingam Amirthalingam, “Culture, Crime and Culpability: Perspectives on the Defence of Provocation” in Foblets & Renteln, *supra* note 1, 35.

Courts have generally rejected the cultural defence.¹⁵ In some cases, the concern for integrating and assimilating minority members into the dominant society has been put forward as an interest militating against the acceptance of the cultural defence.¹⁶ The willingness of the courts in Germany to take a defendant's cultural background into consideration in honour killing cases, for example, was perceived to be a result of Germany's flawed approach to integration and multiculturalism.¹⁷ In other cases, concerns have been raised over the potential threatening and balkanizing nature of the cultural defence to the existing legal order, especially in culturally diverse countries.¹⁸

At this stage, it may be useful to review the Canadian experience with the cultural defence. In light of Canada's general commitment to multiculturalism, the Department of Justice published a consultation paper in 1994 that proposed, *inter alia*, the addition of a cultural defence to the General Part of Canada's *Criminal Code*.¹⁹ According to the proposal, a person "would be found not guilty for conduct that would otherwise be criminal when the person acted in accordance with his or her customs or beliefs."²⁰ This initiative was not successful due to opposition from different interest groups, as well as opposition from the House of Commons on the basis that recognition of the cultural defence would undermine basic individual rights,²¹ such as the

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15. See Alison Dundes Renteln, "The Use and Abuse of the Cultural Defence" in Foblets & Renteln, *supra* note 1, 61 at 61 (noting that "judges are often disinclined to allow the introduction of such evidence [pertaining to the accused's culture] and exclude it as 'irrelevant'"). See also Maneesha Deckha, "The Paradox of the Cultural Defence: Gender and Cultural Othering in Canada" in Foblets & Renteln, *supra* note 1, 261 at 261-62; Truffin & Arjona, *supra* note 6 at 90-91. A noticeable exception is that of South Africa, where there seems to be more room for the cultural defence. See Carstens, *supra* note 13 at 194.
 16. See Woodman, *supra* note 4 at 33.
 17. Maier, *supra* note 6 at 230.
 18. Amirthalingam, *supra* note 14 at 43.
 19. See Charmaine M. Wong, "Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada" (1999) 42 *Crim. L.Q.* 367.
 20. *Ibid.* at 367.
 21. *Ibid.* at 368. Notwithstanding this official stance, it has been argued that the courts in Canada have effectively considered a defendant's cultural background in order to reduce charges, mitigate sentences, and affect the determination of whether the defendant had the requisite *mens rea* for the crime for which he or she is being tried (at 372).

general right to equality guaranteed under the *Canadian Charter of Rights and Freedoms*.²²

In contrast to this dominant approach, several of the contributors suggest that legislatures and courts should, in fact, be more accommodating to the cultural defence. Two primary justifications are put forth in favour of this approach. The first justification addresses the individual's subjective state of mind when acting according to his or her cultural understanding. This justification builds on the notion that growing up within a community leads to "enculturation [which] shapes individuals' perceptions and influences their actions."²³ As a result, the quest for individualized justice, as embodied by criminal law in particular, demands recognition for the cultural defence. According to Alison Dundas Renteln, "[t]aking 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."²⁴ This argument resonates with liberal multiculturalism, especially the notion of justifying group rights on the basis of serving individual autonomy. Liberal multiculturalism posits that individuals—because of who they are as individuals—require group-based accommodations.²⁵ More specifically, because individuals are embedded in their culture to the extent that it becomes a part of what defines them as a person, liberal multiculturalism seeks to protect culture in order to protect individuals themselves.

A second justification in support of the cultural defence is embedded in the hierarchy of power that exists within majority-minority relations. Dominant norms in society, against which the actions of individual members are evaluated, are formed and shaped by existing hegemonic interests, namely those of the majority.²⁶ Thus, when the cultural defence is not recognized by the legal system, minority cultures become more marginalized and excluded.²⁷ John L. Caughey notes in his essay that "[a] trial is a cultural ritual, crime a cultural construct, and the court a cultural apparatus that represents and enforces the

22. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 [Charter].

23. Renteln, *supra* note 15 at 62.

24. *Ibid.*

25. See Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989); Joseph Raz, "Multiculturalism: A Liberal Perspective" (1994) 41 *Dissent* 67.

26. See Amirthalingam, *supra* note 14 at 36; Bronitt, *supra* note 11 at 123.

27. *Ibid.*

dominant culture's values and perspectives."²⁸ The hegemonic structure in society at large is also endemic in court-formed perceptions. Quoting Edwin Cameron, Pieter A. Carstens writes that:

Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting 'inarticulate premises' in the process of judicial reasoning.²⁹

By failing to recognize the cultural defence, courts working under the influence of hegemonic ideals are acting to further entrench majority dominance.

This sentiment should not be taken to imply that, each and every time a defendant waves the cultural banner, he or she should be exonerated. In endorsing a reconsideration of the cultural defence, the contributors provide a set of qualifications with the clear intention to control the possible misuse of the cultural defence in criminal proceedings. First, as a matter of criminal law theory, the cultural defence should be seen as a circumstance of excuse rather than a justification.³⁰ Second, in order to minimize potential misuse, Renteln offers a set of basic queries for the court to consider: "(1) Is the litigant a member of the ethnic group? (2) Does the group have such a tradition? (3) Was the litigant influenced by the tradition when he or she acted?"³¹ Cher Weixia Chen suggests in her contribution that we should also look at the legal norms and practices that exist within the immigrant's country of origin in order to determine whether that legal system does or does not accommodate the particular cultural defence.³² Although US courts have, in some cases, entertained the "loss of face" defence raised by members of the Chinese community, she notes that Chinese law does not, in fact, regard "loss of face" as a mitigating factor.³³

The contributors raise some additional concerns regarding the implications of recognizing culture in criminal proceedings. One concern is that certain members of the minority, whose culture is being invoked in order to mitigate

28. Caughey, *supra* note 6 at 323.

29. Edwin Cameron, "Judicial Accountability in South Africa" (1990) 6 S.A.J.H.R. 251, cited in Carstens, *supra* note 13 at 195. See also Deckha, *supra* note 15 at 263.

30. Amirthalingam, *supra* note 14 at 46-47.

31. Renteln, *supra* note 15 at 64.

32. Chen, *supra* note 12 at 256-57.

33. *Ibid.* at 257.

the criminal liability of the accused, may receive less legal protection if the cultural defence is accepted.³⁴ In the vast majority of cases, vulnerable members of a community (*i.e.*, women and children) are often the victims of culturally motivated offences.³⁵ In this clash between culture and individual rights, Renteln posits a general solution: “[t]he right to culture is an important human right, but it should be protected only so long as it does not undermine other human rights.”³⁶

A second, connected concern deals with the encouragement of cultural essentialism and the stereotyping of particular constituencies.³⁷ Discussing crimes committed by members of immigrant minorities in the framework of a cultural defence by repeatedly referring to culture as the primary cause for the criminal act runs the risk of tagging the whole culture as monolithic, static, and backward.³⁸ Ultimately, the dominant Western legal culture in which the defence is raised emerges as progressive, and the culture of the minority group is depicted as primitive, childish, and irresponsible.³⁹ Dealing with honour killings in Germany and building on previous scholarship on the topic, Sylvia Maier exemplifies how an act of killing can be characterized as a crime of passion when the parties belong to the dominant Western majority or as a crime of honour when the parties belong to the immigrant, non-Western minority.⁴⁰ There does not appear to be a simple solution for this dilemma. Maneesha Deckha writes that “[t]o dissociate culture from violence would do violence to the concept of

34. See Renteln, *supra* note 15 at 64 (noting that “[w]here cultural traditions involve irreparable harm to vulnerable groups, the defence should not influence the disposition of cases”).

35. Deckha, *supra* note 15 at 273; Amirthalingam, *supra* note 14 at 43-44.

36. See Renteln, *supra* note 15 at 82. For a similar argument made in the Canadian context, see Wong, *supra* note 19 at 391-92.

37. This has indeed been a major concern in the literature dealing with the cultural defence. For a Canadian-based discussion, see Pascale Fournier, “The Ghettoisation of Difference in Canada: ‘Rape by Culture’ and the Danger of a ‘Cultural Defence’ in Criminal Law Trials” (2002) 29 *Man. L.J.* 81.

38. See *e.g.* Breuil, *supra* note 4 at 292-95; Siesling & Voorde, *supra* note 6 at 154. For previous work on the subject, see Leti Volpp, “Blaming Culture for Bad Behavior” (2000) 12 *Yale J. L. & Human.* 89.

39. Deckha, *supra* note 15 at 266.

40. Maier, *supra* note 6 at 234. See also Lama Abu-Odeh, “Comparatively Speaking: The ‘Honor’ of the ‘East’ and the ‘Passion’ of the ‘West’” (1997) 1997 *Utah L. Rev.* 287.

violence itself,"⁴¹ but any justification of "discursive, bodily or structural violence" must be approached critically.⁴² Kumaralingam Amirthalingam meanwhile concludes that:

Cultural accommodation has to be a two-way street: minority cultures need to recognise that they have an obligation to respect and obey the general laws of the nation-state to which they belong ... [and] the majority have to accept that a global human culture is slowly evolving, which will be shaped by a diversity of norms.⁴³

A rather distinctive approach can be found in the Netherlands, where calls have been made in Parliament and by prosecutors to apply harsher punishments to culturally motivated crimes such as honour killings.⁴⁴

A third concern raised by some of the contributors questions how litigants should produce evidence before a court that is willing to consider the cultural defence,⁴⁵ and who should constitute an expert witness in such a case.⁴⁶ Mirjam Siesling and Jeroen Ten Voorde highlight in their essay the dilemma that is faced by Dutch courts when they are considering evidence regarding a particular culture. Dutch law embodies a special doctrine of judicial restraint that precludes judges from evaluating the content of cultural norms.⁴⁷ But what if the judge does not have a clear understanding of the relevant culture or, worse, what if the judge hears contradictory expert testimony? This puts the judge into a seemingly irresolvable dilemma: "if he does deal with culture ... he risks violating the doctrine of interpretive restraint. If he does not discuss culture, he reaches a half-hearted verdict that will leave everyone dissatisfied."⁴⁸

Overall, *Multicultural Jurisprudence* is a rich and valuable guide for analyzing the meaning and legal treatment of the cultural defence in courts around the world, particularly with respect to criminal proceedings. The scientific bibliog-

41. Deckha, *supra* note 15 at 284.

42. *Ibid.*

43. Amirthalingam, *supra* note 14 at 60.

44. Siesling & Voorde, *supra* note 6 at 160-61, 167.

45. See e.g. Renteln, *supra* note 15 at 81; Chen, *supra* note 12 at 254-55. For a similar discussion in the Canadian context, see Robert J. Currie, "The Contextualised Court: Litigating 'Culture' in Canada" (2005) 9 *Int'l J. Evidence & Proof* 73.

46. See Caughey, *supra* note 6 at 329-33 (stressing the particular relevance of "anthropological testimony").

47. Siesling & Voorde, *supra* note 6 at 152.

48. *Ibid.* at 153.

raphy is helpful in providing tips on how to search for scholarly work on the subject, and it contains the sources cited in the collection as well as other relevant material.

In this review essay, I would like to offer a response to some of the issues that are dealt with in the collection. In doing so, I seek less to debate the analytical methodologies that are employed in the different essays (though I will discuss an issue regarding the terminology used by the different contributors). The monograph is, after all, a collection of essays authored by scholars of different disciplines, drawn from different legal systems, and, therefore, there will understandably be differences in the contributors' treatment of a subject that is intrinsically related to localized norms and ideals. To their credit, the editors of the book acknowledge from the start that the essays "do not share a common conceptual framework,"⁴⁹ and that this conflict should be anticipated, given that the authors lack "a common conception of the cultural defence"⁵⁰ to begin with. Instead, I will focus on some of the observations and suggestions, made by several of the contributors, that are relevant to my scholarly interests in multiculturalism—primarily in regards to my own community, the Palestinian-Arab minority in Israel—and in private international law (or, as it is also known, conflict of laws).⁵¹

I. TERMINOLOGY

My first comment addresses the terminology that is used by the contributors in two different contexts: 1) to denote the factual reality of the existence of different minorities who happen to abide by specific bodies of cultural norms that are different from those that exist in the minorities' host countries, and 2) to denote the normative reality or ideal in a legal system that, in seeking to accommodate its cultural minorities, establishes group-specific norms and policies, including group autonomy and the preservation of cultural institutions such as language. The book's title, *Multicultural Jurisprudence*, creates a powerful impression that it is the normative aspects of these terms that are used in the different essays. However, in reading the collection, one finds a rather confusing or disjointed narrative.

49. Renteln & Foblets, "Introduction," *supra* note 4 at 2.

50. *Ibid.* at 1.

51. See e.g. Lawrence Collins, ed., *Dicey, Morris and Collins on The Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 2006) vol. 1 at 36.

For instance, the term “multiculturalism,” or more specifically “liberal multiculturalism,” has come to denote circumstances in which a minority group should be accommodated in the name of its individual members’ well-being, as opposed to only in the name of the well-being of the group.⁵² The mere fact that certain circumstances are characterized as multicultural connotes the positive nature of the society in question, portraying it as tolerant and considerate of different groups. The terms “legal relativism” and “legal pluralism” have also attracted the attention of theorists.⁵³ Relativists, as Michael Freeman reminds us, call our attention to the meanings and ramifications of these concepts and remind us to “regard all values as the products of the customs, practices and beliefs.”⁵⁴ According to the relativist understanding of norms, “we ask not whether social practices like child marriage or female circumcision are justified by the moral considerations that we find convincing, but rather whether they are sanctioned by the relevant social understandings of the cultures within which they are practised.”⁵⁵ Freeman concludes by noting that there can be no objective standards in legal relativism for reconciling the values of different traditions because what is regarded as objective and reasonable are themselves the “product of particular cultures.”⁵⁶ Legal pluralism differs from legal relativism precisely on the latter issue. Pluralism assumes that there are primary values that are independent of culture and can be referred to in order to settle conflicts.⁵⁷

How do some of the contributors refer to these concepts of multiculturalism, relativism, and pluralism? In his essay, “Visions of a Multicultural Criminal Law,” Simon Bronitt states that “Australia is a multicultural society.”⁵⁸ To substantiate this claim, he cites the official Australian census, which statistically details

52. Michael Mousa Karayanni, “Multiculture Me No More! On Multicultural Qualifications and the Palestinian-Arab Minority of Israel” (2007) 54 *Diogenes* 39 at 43.

53. See e.g. John J. Tilley, “The Problem for Normative Cultural Relativism” (1998) 11 *Ratio Juris* 272; John Griffiths, “What is Legal Pluralism?” (1986) 24 *J. Legal Pluralism & Unofficial L.* 1.

54. Michael Freeman, “Images of Child Welfare in Child Abduction Appeals” in John Murphy, ed., *Ethnic Minorities, their Families and the Law* (Oxford: Hart Publishing, 2000) 3 at 12, 11-14.

55. *Ibid.* at 12.

56. *Ibid.*

57. *Ibid.* at 13.

58. Bronitt, *supra* note 11 at 121.

Australia's current, ethnically diverse society. Multiculturalism thus becomes synonymous with an ethnically diverse society.⁵⁹ Bronitt also refers to the 1989 official government report, *A National Agenda for a Multicultural Australia*, in which the normative substance of multiculturalism in Australia is presented as one that seeks to protect "core liberal values and the rights of *individuals* rather than communities."⁶⁰ This observation is striking for a few reasons. First, multiculturalism is now referred to as denoting a normative reality. Second, it totally disregards the fact that multiculturalism, in its liberal form, has explicitly come to call for group rights rather than just the guarantee of core liberal values.⁶¹ The individual is held to have a right to culture, and, in order to uphold that right, culture must be protected at the level of the community, which is the only level at which a group's living language and traditions can exist.⁶² Multiculturalism therefore means much more than simply an ethnically, religiously, or culturally diverse society. If these were the only criteria, then the Soviet Union and segregated America might be considered "multicultural." At best, diversity presents us with what can be described as the "circumstance of multiculturalism."⁶³ Multiculturalism refers to a set of values that seeks to legitimize and consciously accommodate diversity.

A similarly problematic usage of terms can be found in the essay, "Cultural Defence and Societal Dynamics," written by Erik Claes and Jogchum Vrielink.⁶⁴ Although very much aware of the philosophical coherence of the term "cultural relativism,"⁶⁵ the contributors explain that modern societies have come to deal with the reality of "different ethnic groups ... living together under

59. *Ibid.* A similar perception was evident in Siesling & Voorde, *supra* note 6 at 145 (noting that "[a]s a consequence of ongoing immigration, Dutch society has become increasingly multicultural").

60. Bronitt, *supra* note 11 at 121 [emphasis in original].

61. See Kymlicka, *supra* note 25; Raz, *supra* note 25; and Joseph Raz, "Multiculturalism" (1998) 11 *Ratio Juris* 193.

62. Avishai Margalit & Moshe Halbertal, "Liberalism and the Right to Culture" (1994) 61 *Soc. Research* 491.

63. See Paul Joseph Kelly, "Introduction: Between Culture and Equality" in Paul Joseph Kelly, ed., *Multiculturalism Reconsidered: Culture and Equality and its Critics* (Malen: Polity Press in association with Blackwell Publishers, 2002) 1 at 3.

64. Erik Claes & Jogchum Vrielink, "Cultural Defence and Societal Dynamics" in Foblets & Renteln, *supra* note 1, 301.

65. *Ibid.* at 311, n. 31.

the same societal context” by developing “a collective attitude, cultural relativism, which in its essence comes down to a positive embracing of multicultural pluralism and a self-critical attitude to one’s own cultural predispositions (anti-ethnocentrism).”⁶⁶ Yet, as Freeman notes, the essence of relativism, when discussing culture in the context of legal norms, is the conception that no particular value possesses any authority outside the cultural context from where it was produced. How is it, then, that the values of multiculturalism and pluralism, themselves conceptually loaded formulas, can work within the concept of relativism? It would have been helpful if the editors had clarified and established the range of meaning of such basic terms as multiculturalism, relativism, and pluralism in the introduction of their book.

II. QUALIFYING THE CULTURAL DEFENCE

I mentioned earlier that Renteln and, to some extent, Chen offer factors intended to help courts determine whether a certain cultural defence should or should not qualify. In addition to causal factors, such as whether the litigant is a member of the ethnic group and whether or not he or she was influenced by the tradition, the contributors suggest that one should also refer to the status of the practice within the group. In fact, it becomes essential to ask whether “the group [has] such a tradition.”⁶⁷ Chen’s suggestion to inquire into the standing of the defence in the legal system of the defendant’s country of origin is also important. To further this effort, especially in light of the concern about essentialism, I would add another line of inquiry that assesses the extent to which a group approves of the practice and the level of consensus within that group regarding the culturally motivated act. If the majority within the cultural group condemns certain practices, a court should consider this circumstance when determining the validity of the particular cultural defence. If generally applicable norms have undergone a certain process in order to qualify as official state norms, it follows that cultural norms should likewise undergo a qualification process in order to represent a certain culture.

In this respect, I would like to refer to a study conducted within my own community: *Attitudes Towards the Status and Rights of Palestinian Women in*

66. *Ibid.* at 311.

67. Renteln, *supra* note 15 at 64.

Israel.⁶⁸ In this study, a staff of researchers set out to inquire about perceptions among the members of the Palestinian-Arab minority in Israel on a wide spectrum of issues concerning Palestinian-Arab women, including the rights to employment and political participation, and, in particular, so-called family honour crimes. Although the murder of women in the name of family honour—or honour killings, as commonly referred to in Israel—is a marginal phenomenon, there are still, on average, ten such cases every year (in a population of about one million).⁶⁹

In surveys conducted among the Palestinian-Arab minority in Israel, it was found that 25.1 per cent of men expressed “understanding” for honour killings, and an additional 12.8 per cent expressed “strong understanding.”⁷⁰ Perhaps more disturbing, however, was that 22.1 per cent of women shared similar sentiments.⁷¹ The data also showed that attitudes pertaining to honour killings varied relative to the respondents’ level of education, geographic location, and socioeconomic status.⁷² It may not be surprising, then, that Israeli courts have generally rejected the cultural defence for family honour killings in cases involving a Palestinian-Arab defendant.⁷³ Indeed, a legislative initiative that would require the courts to impose a harsher sentence for honour killings is currently pending at the Israeli Ministry of Justice.⁷⁴

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68. Women Against Violence, *Attitudes Towards the Status and Rights of Palestinian Women in Israel* (Nazareth: Women Against Violence, 2005). Dr. Hunaida Ghanem was the work’s chief researcher.
69. See Aida Touma-Sliman, “Culture, national minority and the state: working against the ‘crime of family honour’ within the Palestinian community in Israel” in Lynn Wlechman & Sara Hossain, eds., *‘Honour,’ Crime Paradigms and Violence Against Women* (London: Zed Books, 2005) 181 at 182.
70. See Women Against Violence, *supra* note 68 at 154.
71. *Ibid.* According to the same study, 13.0 per cent of the women surveyed expressed “understanding” for honour killings, while 9.1 per cent expressed “strong understanding.”
72. *Ibid.* at 155. In her contribution, Maier notes a similar connection among the Turkish community in Germany. Maier, *supra* note 6 at 237.
73. See e.g. *The State of Israel v. Hasson* (1998), Criminal File 217/95 (Dist. Ct. Haifa). Honour killings are, however, barely investigated, and the law enforcement authorities, who handle the cases before the family members are indicated in court, have been criticized for being too lenient and not vigorous enough. See Touma-Sliman, *supra* note 69 at 187-89. See also Manar Hasan, “The Politics of Honor: The Patriarchy, the State and the Murder of Women in the Name of Family Honor” in Dafna N. Izraeli *et al.*, eds., *Sex Gender Politics* (1999) 267 at 297-301 [Hebrew text; copy on file with author].
74. Copy on file with author.

In cases where a minority tradition exists that is considered non-normative by the majority and subsequently criminalized, I argue that it is not sufficient to merely ask whether such a tradition exists in the community. Before a cultural defence qualifies for consideration, it should be proven that a majority among the relevant community, perhaps even an overwhelming one, approves of the tradition.

I have one caveat—again, based on the Israeli experience—in response to Chen’s suggestion to check the legal status of the cultural defence in the country of origin. Although a specific cultural defence might appear in the law books, it could, in fact, be culturally archaic. For example, section 91 of the *Israeli Civil Wrongs Ordinance* (the main statute defining tort norms in Israel) recognizes a traditional conflict-resolution method under which a tribal dispute caused by the infliction of serious bodily harm, usually causing death, may be resolved through a special payment called *di’ah*.⁷⁵ Following this traditional method would prevent a court dealing with a civil tort action from ordering the payment of damages. The *di’ah* is somewhat akin to the Australian practice of “payback.” However, this form of settling disputes, despite being officially recognized, is now considered obsolete⁷⁶ and should not qualify as a basis for a cultural defence.

III. THE RECOGNITION OF THE CULTURAL DEFENCE IN RELATION TO INDIVIDUAL HUMAN RIGHTS

Almost all of the contributors who showed sympathy for the cultural defence were also strongly aware of its possible clash with the interests of certain vulnerable individuals such as women and children. Mitigating the criminal liability of offenders necessarily makes those members of society even more vulnerable. A similar concern with promoting the concept of the cultural defence is the essentialism inherent in defining minority cultures’ norms and traditions. Using the cultural practices of a certain minority to limit the criminal liability of one of its members risks characterizing the entire culture as backward. However attuned the contributors are to the perils of the cultural defence, the answers they provide to resolve such concerns are far from satisfactory. A general observation by Renteln that “[t]he right to culture is an important human right,” but one that “should be

75. *Civil Wrong Ordinance (New Version)*, 2. L.S.I. (N.V.) 5, s. 91.

76. I have managed to find only one Israeli case in which the defendant asked that the action be dismissed on the base of a *di’ah* payment, and, even then, the request was declined. See *Hamda v. Ibrahim* (1975), Civil Action 25/74, Petition 934/75 (Dist. Ct. Jerusalem).

protected only so long as it does not undermine other human rights” is ingenuous.⁷⁷ Given the centrality of this predicament, especially in situations where a cultural defence is considered in a criminal prosecution that involves a victim whose basic rights have been violated, it would be of great interest to develop a defence that does not infringe on the rights of others. The literature dealing with multiculturalism has focused intensively on similar predicaments. Many scholars, however, have come to realize that group accommodations, made in the name of protecting the right to culture of the group’s individual members, may directly or indirectly sanction the application of group norms that are of an anti-liberal nature, particularly toward women and children.⁷⁸ Multiculturalism has since made significant advances toward mitigating this problem, whether by differentiating between accommodations that protect the minority group from the majority (external protections) and those that allow the application of anti-liberal norms to their members (internal restrictions),⁷⁹ or by guaranteeing an exit route for individual members of the minority community to free themselves from community-practiced norms.⁸⁰ These and other suggestions can be helpful when dealing with the conflict between the cultural defence, on the one hand, and the interest in guaranteeing basic human rights, on the other.

A direct consequence of this understanding is that the less capable individual members of the minority community are of leaving their community, the less opportunity they have to become full members of the dominant society—and, as such, the more wary we should be in granting recognition to the cultural defence.⁸¹

77. Renteln, *supra* note 15 at 82.

78. See e.g. Avigail Eisenberg & Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (New York: Cambridge University Press, 2001); and Leslie Green, “Internal Minorities and their Rights” in Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 257 at 258.

79. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 35-44.

80. Chandran Kukathas, “Are There Any Cultural Rights?” (1992) 20 *Pol. Theory* 105.

81. Cf. Alison Dundes Renteln & Marie-Claire Foblets, “Conclusion” in Foblets & Renteln, *supra* note 1, 335 at 338.

IV. THE CULTURAL DEFENCE AND CONFLICT OF LAWS

Despite the novelty of the focus on the conflict between the cultural norms of a particular minority and the otherwise applicable norms of the legal system, discussion of the conflict between the laws of different states is not a new phenomenon. Conflict of laws, or private international law, is an entire legal discipline in and of itself that tries to provide principles and rules for resolving the conflict between the laws of different states.⁸² These principles and rules help courts to determine, for example, which particular state should have jurisdiction to adjudicate inter-state disputes and which competing law should govern an underlying relationship. Over time, each country has devised its own rules regarding the conditions under which it will recognize and enforce judgments rendered in other jurisdictions.⁸³ In the regulation of these spheres, various theories have emerged that have led to variations in conflict of laws rules across time and different legal orders. This discipline of law is, after all, controlled by the municipal rules of each state (similar to the laws that pertain to contracts and torts), unless it is regulated by a treaty or other international instrument.⁸⁴ How then does the cultural defence relate to the area of conflict of laws?⁸⁵

The notion of the cultural defence opens a new frontier in standard conflict of laws thinking that has yet to be fully explored. Whereas the cultural defence introduces a conflict between norms that originate from the unofficial legal order of the culture and from the official legal order of the state, conflict of laws is chiefly preoccupied with the conflict between the official norms of two or more jurisdictions.⁸⁶ These two areas, however, may sometimes be interrelated in much the same way that an older, colonial, religious, or tribal layer of law remains in

82. See Friedrich K. Juenger, "A Page of History" (1984) 35 *Mercer L. Rev.* 419; Hessel E. Yntema, "The Historic Bases of Private International Law" (1953) 2 *Am. J. Comp. L.* 297.

83. John G. Collier, *Conflict of Laws*, 3d ed. (New York: Cambridge University Press, 2001) at 3.

84. *Ibid.* at 5. See also J.J. Fawcett, J.M. Carruthers & Peter North, *Cheshire, North & Fawcett: Private International Law*, 14th ed. (Oxford: Oxford University Press, 2008) at 7.

85. In their concluding remarks, the editors allude to the cultural conflicts that arise in a variety of legal disciplines, including private international law. Renteln & Foblets, "Conclusion," *supra* note 81 at 335.

86. Fawcett, Carruthers & North, *supra* note 84 at 17.

practice within the body of the law of a modern state. A close parallel to the cultural defence conflict can be found in several Middle Eastern legal systems.⁸⁷ In Israel, for example, the local population is still governed by religious norms in certain spheres of family law, thereby raising potential conflicts between those religious norms and norms from the general legal order.⁸⁸ An interesting challenge that the cultural defence introduces into conflict of laws is the setting in which a conflict of criminal norms arises—and which the cultural defence doctrine seeks to resolve. This is an innovative setting in traditional conflict of laws thinking, in that the discipline does not typically deal with conflict of laws issues outside the realm of private law.⁸⁹ In fact, there is a general perception that, in the sphere of public law—criminal law included—states abide by their own municipal norms and generally leave no room to discuss possible conflict between local and foreign criminal laws.⁹⁰ But the cultural defence discussion, as revealed through this collection of essays, furnishes us with a choice of law question in a criminal context, albeit in an intra-state setting. One is thus challenged to determine whether or not an independent sphere of criminal law conflicts is emerging that now deserves attention within the conflict of laws field.

Multicultural Jurisprudence is, without doubt, an important addition to the existing literature on the cultural defence, and it opens new challenges at several important intersections among the different disciplines that deal with cultural conflicts. It is the editors' vision that this collection of essays will invite scholars across the globe and from other disciplines to take up the various challenges that culture presents in different judicial settings.

87. See Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007) at 364-65.

88. See Amnon Rubinstein, "Law and Religion in Israel" (1967) 2 *Isr. L.R.* 380; Edoardo Vitta, *The Conflict of Laws in Matters of Personal Status in Palestine* (Tel-Aviv: S. Bursi Ltd., 1947) at 145-50; and Frederic M. Goadby, *International and Inter-Religious Private Law in Palestine* (Jerusalem: Hamadpis Press, 1926) at 115-19.

89. Fawcett, Carruthers & North, *supra* note 84 at 17.

90. See Collins, *supra* note 51 at 104-05.

