

Multicultural Jurisprudence

Comparative Perspectives on the Cultural Defense

EDITED BY

Marie-Claire Foblets and Alison Dundes Renteln



ONATI INTERNATIONAL SERIES IN LAW AND SOCIETY

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Introduction

ALISON DUNDES RENTELN AND MARIE-CLAIRE FOBLETS

IN THIS BOOK we have gathered together analytic essays demonstrating the widespread use of the cultural defence in many countries around the world. This monograph contains illustrations from Australia, Belgium, Canada, England, Germany, the Netherlands, Singapore, Spain, South Africa and the United States. The data prove irrefutably that courts are increasingly expected to resolve conflicts that require substantial cultural expertise, despite their lack of familiarity with ethnography and other tools of cultural analysis. We regard this as a serious problem.

This project was designed to provide a comparative analysis of the cultural defence. By focusing on the trial strategy of referring to litigants' cultural background in the courtroom, we aimed to show the range of possible situations in which attorneys may invoke this defence. We had several goals in mind: to document the range of experiences individuals have in presenting cultural evidence in legal systems; to encourage scholars to undertake research projects investigating uses of the cultural defences in other jurisdictions; and to inspire practitioners to consider the possibility of raising cultural defences in appropriate cases. An overriding concern of ours was to question whether there is sufficient expertise to handle the numerous cases in which cultural issues arise.

It was not our intent to develop a new theoretical model for analysing cultural defences in legal systems around the world. Nor did we expect that the contributors to this work would have a common conception of the cultural defence. Realising that there are various interpretations of the defence, we were interested in trying to find different approaches to the study of culture conflict in legal proceedings. Moreover, it was our hope that the research inspired by the meeting would reveal a broad range of possible uses of cultural arguments in court. By raising awareness of the ubiquity and variation in the forms, we aim to encourage others to identify the historic and contemporary practice in additional legal systems. We trust that the illustrations contained in this book will pave the way for others who wish to engage in further consideration of the phenomenon. This book is only the beginning of this project.

The volume is based on papers given at the Onati International Institute of the Sociology of Law in June 2005. The colloquium 'Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense' was

convened in order to shift the discussion of the cultural defence from the United States only to other countries which have also witnessed the rise of cultural defences.¹ We perceived a need to include scholars from these places in the conversation. We attempted to bring together our colleagues from different academic disciplines, including some who had already published on the subject, as well as individuals who had not previously carried out research in this area. By involving new scholars in the investigation of the phenomenon, we would gain new insights. Although we invited scholars from many continents, the challenges of travel and ill-health prevented some of our colleagues from joining us. We recognise that the bulk of the essays concentrate on cultural defences in Western Europe and wish we had obtained essays from even more countries. In the future, more research is needed to examine how cultural defences figure into legal proceedings in other parts of the world.

The essays in this collection do not share a common conceptual framework. Indeed, 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. We left it to the participants to analyse the role of cultural factors in legal processes as they saw fit. It will be up to the reader to decide if some went too far in what they included as relevant cultural defence cases in their data collection. However, our goal was not to offer a definitive statement about what the cultural defence encompasses. Rather, we were interested in finding out more about the range of possible uses of cultural evidence and divergent scholarly approaches to this important issue. Insofar as our purpose was to document the phenomenon in countries where little or no data existed, this work is a success.

As the scholars who contributed to this volume take differing views of the benefits of the cultural defence, we wish to emphasise here that we are not advancing any argument in particular in this book. We recognise that the cultural defence is a mechanism which can protect certain aspects of cultures. Although some may acknowledge the factual existence of this strategy, they may argue strongly that the accommodation of cultural differences should occur in extra-legal contexts. While conceding that it may be preferable to safeguard traditions in other institutional settings, we contend that sometimes the only way to help individuals belonging to ethnic minority groups is in a court of law.

The first set of essays examines definitional questions, as well as theoretical issues that arise in debates that centre on questions concerning if and

¹ Reading the English language commentary, one might have the misimpression that the cultural defense is employed exclusively in the United States.

when use of the cultural defence is legitimate. Although these chapters do contain concrete cases, their primary objective is to offer conceptual clarification of the parameters of the strategy. Part II is comprised of country studies that discuss various contexts in which cultural defences are raised in particular national jurisdictions. The essays in Part III offer analyses of specific issues or particular groups. The final Part contains papers that address the role legal actors play in interpreting cultural issues by legal actors and the tacit assumptions by which they operate. The master bibliography at the end of the collection contains all the sources to which authors refer throughout the book, as well as a number of additional sources with a view to offer the reader an instrument for further research and investigations.

One of the insights in the book is that public officials ought to be cautious about the consideration of culture. There is reason to be concerned about the lack of expertise evident in the behaviour of lawyers, judges and other legal actors. The contributors raise important questions. By what standards should expertise be measured? Should scholars with academic credentials enjoy a privileged status in court as opposed to the representatives of the cultural communities whose traditions are at the centre of the litigation? How should a tradition be evaluated when there is internal disagreement about its continuation? Should experts receive compensation for testifying about cultural practices? Should testifying be compulsory as a form of civic duty? Why it is more difficult to introduce cultural evidence in some legal systems compared to others? Would the adoption of a formal cultural defence address some of these evidentiary challenges?

It is, of course, true that some aspects of culture do not deserve protection. This view is most obvious in the discussion of honour killings. While one ought to limit the influence of culture as a mitigating factor in murder cases, it is important to note that cultural defences are raised in many other kinds of cases besides homicide. Therefore, although cases involving culturally motivated killings receive widespread media attention, we think that as a general practice it is dangerous to base public policy on sensational cases. The reason why scholars tend to focus on murder is not only that these cases enjoy a certain notoriety in the press, but also because the treatment of the cultural defence in law reviews also concentrates on these gory cases.

It is therefore our hope that the analysis of murder cases does not distract the reader from the more general arguments for and against the cultural defence. For in cases in which defendants invoke the cultural defence that do not involve the loss of life, there are, in our view, legitimate uses of this strategy. As always, there is the perennial question of 'where to draw the line'. But this volume is not intended to provide definite solutions to the problems we have identified. We hope that these provocative essays will spark interest in the subject, so that others will conduct further research on the potential uses of the cultural defences, as well as formulate policies concerning the limitations to their usage.

We are deeply indebted to all of the scholars who shared their thought-provoking scholarship with us. It is an honour to include their essays in this volume. We would also like to acknowledge the contributions of workshop participants whose insightful comments enriched our discussions. We thank Alepi Lida-Panagiota, Antonio Peña Jumpa, Odile Van der Vaeren, Hermine Wiersinga, and Unni Wikan. We owe an enormous debt of gratitude to the individuals at the Onati Institute who worked very hard to help us coordinate the travel of scholars from many places. Our special thanks go to Malen Gordo Mendizabal without whose assistance we could not have organised the workshop. It was a privilege to have the opportunity to meet in such an idyllic setting, a place that gave us the freedom to contemplate a policy without distraction. We also wish to thank Betty Vanden Bavière who prepared the manuscript for publication. Her tremendous expertise, patience and sense of humour were much appreciated.

I

Theoretical Perspectives

