

Cultural Defence in Criminal Law: Instances and Issues

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Abstract

Every society has its distinct culture and its orientation. Law cannot remain aloof from the culture. The culture is in fact embedded in the law of land. Culture makes law and law also makes culture. Culture and law are interdependent. The legal proceedings, particularly criminal proceedings, do not accept cultural practice and tradition as a defence. At times, cultural practices and traditions come in conflict with each other. Protection of cultural rights on the one hand and the prevention of harmful consequences arising out of conduct have to be nicely dovetailed. In this paper an attempt has been made to analyse those circumstances where cultural tradition may be recognized as a defence in criminal or other legal proceedings on the basis of degree of harm likely to be caused by the conduct and also the circumstances where such defence cannot be extended. Where the culture and tradition violate the conscience, it may be considered in mitigating the sentence.

Keywords: Cultural Defence – Justification for - degree of harm – minimal – Indeterminate – Irreparable

I. Introduction

Culture and crime are interlinked. Cultural studies movement seeks to analyse the experience of individuals in every sphere of knowledge including law. The culture concept is being taken over in other disciplines, said Weiner.² The relation between law and the culture of a nation are considered as constitutive of law and, on the other hand, law as constitutive of culture.³ Sometimes the observance of

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² The President of American Anthropological Association in 92nd Annual Meeting held in November 1993.

³ Manachem Mautner, *Three Approaches to Law and Culture*, (2011) Vol. 96 CORNELL L REV 839.

cultural practices and traditions of one community is not acceptable to law of the land. Such a situation is aggravated when one move from his country to another and in the country where one has moved recognizes such a practice or tradition as a distinct crime. While States argue that the practices or traditions are in violation of law, the accused defends by arguing that it were a recognized part of life to the community of which he is a member. In other words, the accused sets up the defence that the act done was not an offence as it were culturally approved in the society to which he belongs. The accused either seeks excuse from liability or justifies his conduct. It is also a debatable issue whether culturally approved conduct of the accused would be a complete defence or would be treated as a mitigating factor. The culture plays a vital role in criminal proceedings. It is strange that the defence of cultural defence does not find any standard criminal law text.⁴An attempt has been made in this paper to highlight the instances where the issue of cultural conflicts arose and the issue was sought to be resolved on the basis of the degree of harm caused by the alleged conduct.

II. Justifications for Cultural Defence

Man never does one thing. The conduct may be done intentionally and extensionally. Marrying a widow is not ethically bad but marrying a widow mother is. Oedipus knew that he was marrying the widowed Queen without knowing that he was also marrying with his own mother. Oedipus intentionally married a widow but extensionally married his own mother. In other words, the doer may foresee the consequence and some consequences may remain unforeseen.⁵ Cultural defence assumes such a situation where the person is following his cultural traditions without intending to violate the law.

Law is more than custom and less than social control. Customs consist of social norms and social norms are sanctioned. Behaviour in conformity with social norms is rewarded and deviation is dealt with punitively.⁶ The culture of different

⁴ Michel Jafferson, *Criminal Law*. (1997) Third Edition ; Smith & Hogan, *Criminal Law*, (1983) Fifth Edition; Glanville Williams, *A Textbook on Criminal Law*, (1983)Second Edition; Andrew Ashworth, *Principles of Criminal Law* (1995) Second Edition; Card, Cross and Jones, *Criminal Law*, (2008)18th Edition

⁵ EZIO DI NUCCI, ETHICS WITHOUT INTENTION, (2014)

⁶ See, LLOYD'S INTRODUCTION TO JURISPRUDENCE, pp. 910-16, 7th Edn. (2001)

societies may be in conflict with that of the other. This may thus attract arguments for accepting the cultural defence or rejecting it. Justifications for admitting cultural defence mainly revolve around the basic principles of law, particularly the criminal law, international human rights regime pertaining to fair trial and religious liberty.⁷ Since criminal liability is determined by guilty act (*actus reus*) and guilty mind (*mens rea*), the motive for commission of crime is usually irrelevant.⁸ The accused is thus prevented from bringing the evidence on record explaining the motivation for conduct. The court is, under the circumstances, deprived of considering cultural aspect and may not arrive at a just verdict. Moreover, in judging the reasonableness the understanding of cultural traditions is apt. This matters more when a person is tried for an offence in such a country which is ignorant of cultural traditions and practices the accused belonged to, while the same would not have occurred in case where the counsels and the court are acquainted with the customs and practices of the community to which the accused was a member. It may be inferred that the accused following traditions and practices of his community is denied equal protection of law as he is not allowed to produce evidence of cultural practices. The cultural defence is based on motivational factors deeply embedded in the cultural background and its denial offends the equality right.

Another principle is of notification of conduct which is prohibited by law in the country where the accused is residing. In other words, it is fair notice regarding forbidden act. The practice which is common in one country may be criminal in another but principle of fairness requires notification. Further, as one of the component of fair trial the right of the accused to be defended by a counsel. It is expected that he counsel will produce and explain the cultural evidence for explaining the conduct of the accused and dispel any prejudice of the court against the traditions and customs of the accused. The right to effective assistance under Sixth Amendment is violated in United States where the defence counsel fails to present cultural evidence.⁹ There is, thus, a need to enable the courts by making

⁷ See, United Nations Universal Declaration on Human Rights, 1948 International Covenant on Civil & Political Rights, 1966, Constitution of India.

⁸ Motive is a value laden concept. It is relevant in the determination of quantum of sentence. Good motive mitigates sentence while bad may aggravates it.

⁹ *Kwai Fai Mak v. James Blodgett* 754 F. Supp.1490 (1991) District Court for the Western District.

provisions in the Code in balancing the culture and traditions of the accused with the nature of harm caused cause.

III. Justification against Cultural Defence

On the basis of same referred instruments and documents, arguments against cultural defence revolve around the assumption that culture is primitive, static and unscientific. This belief leads to formation of irrational society where prejudices and inequality prevails and scientific temper is jeopardized. The growth and development of society would be hampered. The cultural defence will perpetuate and strengthen ill treatment against children, women and weaker sections of the society. The recognition will lead to plurality of contradictory culture and tradition leading to anomie and compromised social order. Moreover, the principle of equal protection of law shall be marginalized.

Further, where the courts receive cultural defence during trial, it would be an encroachment on the domain of other organ of the State. In any robust legal system, the doctrine of separation of power is followed where the policy laying is the function of the legislature and adjudication by the courts.

IV. Nature of Harm Arising Due to Observance of Cultural Practices and Traditions

The cultural traditions and practice is harmful or not, has to be decided by its effect. In prohibiting any conduct, the risk or danger to the society arising out of conduct has been significant and the same logic may be extended where cultural practice or tradition is being declared criminal. The issue arising out of various instances leading to its potential effect on the society may be discussed under three broader heads:

A. No Actual Physical Harm

Conduct which is likely to cause either no harm or minimal harm may be exempted from criminal liability. The instances are of cultural food pattern and religious practices.

Food Habits

During 1980s a controversy arose in America pertaining to Peking duck, a Chinese delicacy¹⁰, having public health issue and the Public health law required that the sale of unwholesome food should not be sold to public and its violation was made penal. The health inspectors threatened to prosecute various Chinese restaurants for failing to comply with health and safety codes. The ducks were displayed without maintaining the temperature posing risk of bacterial growth and it was contrary to law. The food inspectors closed the restaurant despite no illness was reported from consuming Peking duck either in America or in China. As the controversy gained ground the Peking duck was sent to laboratory for testing. The laboratory did not find any contamination or risky to health. Thereafter an attempt was made to exempt pecking duck from health statute. Similar situation occurred in respect of Korean Rice Cake¹¹ (*Tteok/Tteokbokki*). In Korean culture *tteok* is a food that is shared with family and friends at any celebrating event, It symbolizes offering to the spirits that bring good fortune and blessings. The consumption of *tteok* which initially appeared to be a health hazard if not properly stored at a given temperature and thus the health inspectors threatened to prosecute men running bakeries for violating the provisions of food regulations. The cake was, ultimately, not banned by the government but it made a provision for putting date stamp and to be sold within 24 hours. These are classic cases where America accommodated cultural difference in food habit as Peking duck or the Korean Rice Cake did not cause any ill consequences.

Dog eating has been considered to cause psychological trauma. Thus where two Cambodians consumed dog flesh after cooking it, but in the process of killing the dog, the neighbours were psychologically traumatized and called police. It was found that dog eating was not prohibited and thus no criminal proceeding could be initiated. However, a law was enacted subsequently prohibiting the eating of pets. Though the dog eating did not cause any physical harm to the members of the society, but as the pet lovers perceived emotional and psychological trauma

¹⁰ Dish is said to have originated during 13th century near Sanghai in China.

¹¹ It originated sometimes between 480 – 222 BC during China - Korea war.

thus the eating of pets was prohibited and it did not accommodate the cultural difference.

Religious Practices: Instances of Tandav Dance, Sword (Kirpan) and Full Face Veil (Hijab)

There is a sect in India called Anand Marg and its followers are called Anand Margis. The Anand Margis wanted to hold *Tandava* dance¹² on Public Street. The police did not permit and a writ was filed by the follower of Anand Marg who claimed that *Tandava* dance is one of the essential rites of Anand Marg. But in *Acharya Jagdishwaranand Avadhut v Police Commissioner*¹³ it was held that *Tandava* Dance in public is not an essential rite of Anand Marg. Thereafter, Sri Anand Murti Sarkar, the founder of Anand Marg, who had written a book wherein he prescribed that *Tandava* dance in public was an essential rite for the Margis. On this basis the believer of Anand Marg again approached the Police Commissioner and obtained the permission that *Tandava* dance may be performed in Public Street without knife, live snakes, trident and human skull. This order was challenged. The matter was remanded to the High Court and the High Court held that *Tandava* dance was essential rite of Anand Marg and could be performed in public streets without any restriction. This order of the High Court was challenged and the matter was referred to the Constitution Bench of the Supreme Court.¹⁴ The Supreme Court observed that Anand Marg was one of the sects of Hindu religion and *Tandava* dance in public is not essential rites of Anand Marg. The restriction imposed by the Police Commissioner was found to be in consonance with the restriction laid down on freedom to religion under Article 25 of the Constitution of India. This judgment has its importance for the present paper only to substantiate where the risk to public order is imminent; the argument on the basis of cultural defence is not acceptable.

For Sikhs kirpan is a religious symbol. Sikh children after a particular religious ceremony wear kirpan besides other things. Sometimes in the name of campus policy prohibiting weapons on the school campus, the Sikh children were expelled

¹² According to Hindu scriptures *Tandava Dance* is associated with Lord Shiva who performed it on various occasions particularly when Sati (the first wife of Lord Shiva) gave up her life.

¹³ (1983) 4 SCC 522.

¹⁴ Commissioner of Police v. Acharya Jagdishwaranand Avadhut, Appeal No. 6230/1990 Date of Judgment 11.3.2004.

from schools. This controversy arose in *Gurdev Kaur Cheema v. Harold Thompson*¹⁵ where three Sikh children were expelled on the ground of no knives policy on school campus. The central tenet of their religion required them to wear all the times five symbols including kirpan – a ceremonial knife, the school refused the children to wear kirpans. However, the court did not permit to carry kirpan in school campus despite there being a reported incident of violence with kirpans.¹⁶ An attempt was made through legislation for exemption of kirpans from application of Arms law but it could not be materialized.¹⁷

While in United Kingdom, carrying kirpan by the members of Sikh community was made through legislation, in Canada it was through judiciary. In *Balbir Singh Multani v. Commission Scholaire Marguerite Bourgeyos*¹⁸ the son and the father were an orthodox Sikh and believed that his religion required wearing kirpans all the times. The son dropped the kirpan which he was wearing all the times in the yard of the school which he was attending. The school board found that wearing kirpan was against the code of conduct of the school which prohibited the carrying of weapons. However, the court permitted to have a symbolic kirpan as a part of religious liberty. The religious practice of carrying kirpan was accommodated either through legislation or the legislation. In other words, the cultural defence was accepted in United Kingdom and Canada.

Under Islamic traditions women put on veil (hijab). There are many countries where it is banned.¹⁹ It has been reported that people in hijab committed offence by hiding their identity and thus hijab has been banned. It has also been observed that many males after putting on hijab committed crimes. The investigating agencies may effectively identify the accused. It appears that putting on hijab, a cultural tradition observed particularly by muslim women, is an innocuous not

¹⁵ (1995) United States Court of Appeals Ninth Circuit decided on October 12, 1995.

¹⁶ It has been reported that pencils and scissors have caused injuries on many occasions in public schools but no prohibition was imposed.

¹⁷ California Senator Bill Lockyer agreed to sponsor the legislation but it was vetoed by the Governor.

¹⁸ 2006 Supreme Court of Canada 6 Date of Judgment 2.3.2006

¹⁹ Austria, Canada, France, Russia, Kosovo etc. Recently in India wearing hijab in schools was banned in State of Karnataka and the order was challenged before the Karnataka High Court which has upheld that wearing hijab is not an essential religious practice of the Islamic faith. See, W.P. no. 2347/2022; for contrary view see *Amnah Bint Basheer v. CBSE* (2016), Ker. WP No. 6813/2016 date of judgment 26.4.2016

harmful conduct in itself and it could have been accommodated under law as in case of kripaan and food pattern unless it proved to have detrimental social consequences.

B. Indeterminacy as to actual Harm

There may be certain circumstances where it may be difficult to ascertain whether the conduct is harmful or harmless. From one perspective the conduct may be regarded as harmful and from that of another, it may be harmless. Such instances may be analysed under following two heads:

Folk or Traditional Treatment

In a community of South Asia a traditional form of medicine and technique called coinage (*cao gio*) is prevalent. This method is used by the parents to treat their children when they suffer from flu, cold or other kind of physical ailments. In this method of treatment the parents put oil mixed with menthol on the body of child and massage the body of the child patient with a coin which has dentate edge. Such serrated edge leave temporary marks on the soft skin of the child.²⁰ Causing such marks on the body of child is interpreted as child abuse. Theoretically such an act is contrary to law as causing hurt itself is an offence and if it is in respect of a juvenile it may amount to child abuse as it involve intentional infliction of injury but usually it is realized that it is not a case of child abuse. The motive of the parents has a dominating role as they want to cure the child from illness and not to inflict any injury. A Bill was introduced in the State Assembly of California to put such practices beyond the purview of child abuse but was defeated under the pressure of medical practitioners and also due to apprehension that it will result into none reporting of child abuse case. The faith healers will erode the scientific attitude in the society was also one of the reasons for the defeat of the said Bill. However, non-recognition of coinage treatment or folk medicines may at time leave the honest parent in state of trouble for violating the law.

Chewing qat

Qat (botanical name *Catha edulis*) is a flowering plant found in eastern and southern part of Africa. This plant and its leaves contain alkaloid, a stimulant which causes greater sociability, excitement and mild euphoria. Usually its young

²⁰ See, John Scarborough, (Ed.) *Folklore and Folk Medicines* ed. American Institute of History of Pharmacy, 1987 pp.33 -61

buds and leaves are chewed as stimulant. Chewing *qat* is part of social life of an individual particularly in Kenya, Somalia and Yemen including some part of India. It has an effect like a drug called amphetamine. The harmful consequences of *qat* chewing are not known. While the United Nations has classified *qat* as a dangerous substance and it is treated as a felony by putting *qat* in the category equivalent to LSD, heroine and other narcotic drugs of category A. Some of the European governments are considering criminalizing the use of *qat*.²¹ The criminalization of chewing *qat* may lead to a situation where the court has to be apprised of cultural habits of its users and the Europeans and the Americans might be unaware of such practice of chewing *qat*. The defence of culture in cases where the harmful consequences have not been ascertained may lead to plead the cultural defence successfully.

Child Marriage

Child marriage is prohibited by law in many jurisdictions including India.²² Despite prohibition about 5.2% of the marriages in India are of children. Moreover, there are many communities in India where child marriage is their culture²³ and girls below 18 years are given in marriage as many tribes like Jangil, Andmanese, Rabari Khairwar have either become extinct or at the verge of becoming extinct. In such tribes the marriage takes place early. In communities where child marriage is prevalent, the introduction of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) made the sexual assault against children below the age of 18 years an offence without taking into consideration of cultural practices and traditions of several communities. Moreover, there is no provision in Evidence Act, 1872 for receiving any evidence on behalf of the accused on the basis of cultural defence. Similarly, the Indian Penal Code provides that sexual intercourse or sexual acts by a man with his wife below the age of fifteen years amounts to rape.²⁴ Neither the substantive nor the procedural laws consider defence on cultural basis.

²¹ Netherlands, Norway, Germany and European member States. In U.K. it is illegal drug of class C.

²² Child Marriage restraint Act, 1929; Prohibition of Child Marriage Act, 2006.

²³ In Kolha Tribes in Mayurbhanj District of Odisha child marriage is celebrated. Rabari Tribes in Kutch area of Gujarat, it's common in Jats and Bishnoi community in Rajasthan.

²⁴ See, Exception 2 of Section 375 of the Indian Penal Code, 1860.

The traditional or folk treatment is a kind of right which is has been created and preserved from time immemorial and it is equivalent to intellectual property right. The observance of such traditions unless it has some pernicious effect on the society must be guarded. Certain tribal communities which are at the verge of extinction must also receive the cultural defence unless their conduct is found to be so offensive that shook that conscience.

C. Irreversible Harm

There are certain cultural practice and traditions which cause irreversible harm. The prevalence of cultural practice resulting to irreversible harm may, by way of illustration, may be analyzed under following headings:

Clitoridectomy

In certain part of the world Female Genital Mutilation (FGM) is a common custom, particularly, in Nigeria²⁵. Clitoridectomy involves surgical removal, reduction of partial removal of the clitoris. Rarely, it is used for treatment purpose. Sometimes it is used when cancer develops or for change of sex. Such a cultural practice violates the rights of women and female children.²⁶ It was debated whether such a surgery could be called as harmful but it was rejected on the preliminary ground that the child on whom surgery is performed is incapable of giving a valid consent. It was observed that the relatives covertly took the female child to a country where it was permitted and came back to America or other country where FGM was prohibited. The concept of cultural defence has been abolished by U.S. federal Female Genital Mutilation Prohibition Act, 1995 except for medical purpose.²⁷ The United Nations has declared FGM a human rights violation. However, it is not specifically prohibited in India but complaints under the Indian Penal Code can be made for voluntary causing grievous hurt.²⁸ Since FGM is such a conduct which causes permanent and irreversible harm and that

²⁵ 18 African Countries have criminalized FGM. In 2000 Kenya also criminalized but there was a huge protest of Massai people who opposed the ban on the ground that it was an assault on their cultural practice.

²⁶ Timothy F. Yerima & Daniel F. Atidoga, JOURNAL OF LAW, POLICY AND GLOBALIZATION (2014) Vol. 28 pp. 129-140.

²⁷ The Secretary, Health and Human Services was directed to compile data on number of females living in US who have been subjected to FGM whether in US or in country of their origin.

²⁸ See, Section 326 of the Indian Penal Code, 1860.

too without the consent of the person concerned, the extension of cultural defence would not be appropriate in such a situation. The defence on the ground of culture should not prevail where human rights are violated and the harm cannot be reversed.

Honour Crime

While honour killing and honour crime are usually used interchangeably, in fact, honour crime is a genus and honour killing is the species. India is caste ridden society where marriage outside the cast is viewed with contempt and hatred. The marriage within sapinda or prohibited degree is not acceptable. The caste system puts barrier on the choosing the life partner in the name of caste or religion while it is legitimate constitutional right for any man or woman. In fact, it is individual choice and assertion of choice cannot be segregated from liberty and dignity. Liberty embraces the ability to choose. Such right is not expected to succumb to class honour or thinking of a group. The sense of class honour has no legitimacy even though practiced by people in the name of custom, practice or tradition. Honour killing has been viewed seriously by the legal system in India. Any kind of ill treatment in the name of honour is an assault on the choice of the individual relating to love and marriage is illegal and cannot be allowed. Motivated by cultural pride many girls and boys are killed every year in India. In few cases where the village court pronounced the order of gang raping the woman for breach of custom and culture of the society, the Supreme Court condemned such conduct for violating the constitutional morality and criminal law of the country.²⁹ Similarly in South India, a young man has to fight with a bull in a function of bull fight commonly called *Jallikattu* which endangers the life of man fighting with bull, and such cultural traditions has been prohibited by the court.³⁰ The accused are dealt with sternly and the court has not taken into account the fact of cultural practice and traditions. The Supreme Court on many occasions passed orders of severe punishment against honour killing.³¹

²⁹ *In re Indian Women says Ganged raped on Orders of Village Court Published in British & Financial News dated 23.1.2014* AIR 2014 SC 2816.

³⁰ *Arumugham Servai v. State of Tamil Nadu* AIR 2011 SC 1859.

³¹ *Shakti Vahini v. Union of India* AIR 2018 SC1601; *Asha Ranjan v State of Bihar* AIR 2017 SC 1079; *Vikas Yadav v. State of Uttar Pradesh* AIR 2016 SC 4614; *State of U.P. v. Krishna Master* AIR 2010SC 3071; *Bhagwan Dass v. State NCT of Delhi* AIR 2006 SC 2522; see also 242nd Law Commission of India Report on Prevention of

Adulterous union of wife offends the sentiments of a patriarchal society. The reaction of the aggrieved spouse is conditioned by cultural value of the accused to which he belongs. The provocation is generally a limited defence under criminal law mitigating the degree of culpability instead of absolving the accused from liability altogether.³² In such situations the degree of harm may be irreparable but criminal law has accepted the space for cultural defence. In an Australian case *R v. Dincer* (1983)³³ a Turkish Muslim immigrant was charged for murder of his daughter which was reduced to manslaughter. The father was, in fact, triggered by knowing the fact that his daughter was having extramarital relation. The court concluded that because of cultural differences the tradition of honor killing in Turkish culture may be allowed to reduce the degree of culpability. In *People v. Kimura*, (1985)³⁴ a Japanese mother of two children attempted to commit suicide by drowning after knowing about the infidelity of her husband. The children died but mother survived. She was charged for double murder. Under Japanese committing self by leaving children abandoned was much serious than what the accused did in this case. However, out of plea bargain the surviving mother was sentenced one year imprisonment. In Germany, on the other hand, which had recognized culture defence is now not acceptable.³⁵

It is desirable that the functionaries of the administration of justice should be exposed to culture of various communities and country so that they may assess whether or not to exculpate the accused; or alternatively, in reducing the quantum of sentence. In education system also this aspect may be taken care of by the education administrator and regulators.

V. Conclusion

Law cannot be separated from culture. In fact, law and culture both influence each other. Cultural may be addressed by law and law may be instrumental in

Interference with the Freedom of Matrimonial Alliances in the name of Honour and Traditions.

³² *Boya Munigadu v. The Queen* ILR 3 Mad. 33; *Re Muruggan* ILR 1957 Mad. 805; *Jan Mohd. v. Eperor* AIR 1929 Lah. 861; *Emperor v. Balku* AIR 1938 All 532.

³³ See, Honour Killings and Cultural Defense (with Special focus on Germany)) *Milnikiky Prava v. Stredoeuropsskom Priestore* (2009) <http://ssrn.com/abstract=1422503>.

³⁴ *Ibid.*

³⁵ *Id.*

protecting healthy practices and traditions of the society followed since long. Every society has distinct cultural orientation. Culture is deep seated in every legal system which is also reflected in criminal law beside other laws. Cultural defence may be accepted in order to avoid injustice particularly to those who are immigrants having a different culture. Cultural diversity, it is submitted, may be given space in law. Since any conduct which is a part of social life of a community, if done, the intention is not to flout the provisions of law instead to carry on the cultural traditions. However, cultural defence has to be recognized on the basis of degree of harmful consequences arising out of a conduct. Cultural defence is acceptable only when the degree of harm caused is of less significance but its extension does not seem appropriate in cases where the harms are of considerable and irreparable nature. Further, any act done in pursuance of cultural tradition may be treated as a mitigating factor at the time of award of sentence.