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DEFENSE OF CULTURE- AN ANALYSIS OF THE CULTURAL ASPECT OF LAW

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INTRODUCTION

Culture is understood to be epitome of similar characteristics and knowledge of a group of people covering social habits, traditions, skills etc., often practiced at differing levels. Correspondingly, culture as an idea and in its application as well, is a relative concept. The reasoning and application of it keeps changing in reference to varying communities, regions and beliefs. Often exiguous ranges of contrasting aspects can be found between the existing varied cultures, many a times resulting in what is called the 'Clash of cultures.' If the cultural beliefs or practices of one go against that of another and/or against the tenets of the law as well, the defense of culture may be argued. Cultural defense mitigates the responsibility arising from activities that are incongruent with the law by maintaining that they were committed under a good faith belief in their propriety, based upon the actors cultural heritage or tradition.¹ This defense of law, essentially allows for the deviant actions to be seen under the light of the actors own beliefs and thought process and makes it a valid consideration in the following legislative decision.

The objective of this paper is to seemingly ascertain a more descriptive understanding of the idea of 'cultural defense,' its acceptance in criminal law and relative applicability in various cases. It is an attempt to understand the importance of its presence in criminal law and the seemingly contrasting drawbacks that it causes with reference to the current relative.

HISTORY

The idea of cultural defense, was formulated from the basic understanding that people have individual cultural rights. The idea behind the formulation of such a defense was the comprehension of the varied practices that exist in society and the understanding of a certain level of liberty for people to practice them. Rights of culture conceptualize the idea of recognition of the individualized cultural practices of different people as a legitimate authority, seemingly providing the required backing for the differentiated beliefs and practices.

¹John C Lyman, 'Cultural Defense: Viable Doctrine or Wishful Thinking' (1986) 9 Crim Just J 87.

Nonetheless, the state or institutional authorities generally don't have an obligation to recognize cultural rights in an absolute sense. A sense of factoring is required to ascertain which cultural practices or the rights to what extent must be allowed so as to qualitatively ascertain its applicability in the eyes of the state. A similar understanding exists for Cultural defense as well with the addition of another factor which is the consideration that no other more important countervailing reason exists so as to negate the recognition of the practice.²

Correspondingly, the essential idea of cultural defense is not just to protect rights, but in a more specific sense, attempt to protect the individual cultures of the people. It is often seen as a tool to formulate the perspective of all parties, in a seemingly formative understanding of a clash of cultures. It is a response mechanism which allows for the perspective of the minority practice, tradition or culture to be brought forth as a recognized view and not just harp on the prominence of the perspectives of the dominant parties. It facilitates recognition of parties which lack power and systematic representation. This is the comprehensive understanding behind formulating an idea of a defense of culture.

Moreover, the origin of this defense is justified in the same manner as that of Culture itself. The idea of culture was the recognition of the varied interests of the people which when accepted by a good number formulates into fundamental practices or beliefs. Therefore, it can be ascertained that Culture as a comprehensive concept, originated only through the recognition of individualism. Similarly, the defense of culture in its self has similar roots or has been formed from a recognized extension of similar ideas. The defense of culture is essentially a 'protection of the idea of origin' used for the formation of culture itself. Accordingly, cultural defense originated as an attempt of the conclusive protection of the origin of culture itself and the congruent right of its practice.

EMERGING TREND

The existence of a defense of culture or the extents to which it can mitigate responsibility for a criminal action has varying levels of debate surrounding it. There exist a range of diverse opinions; some in favor of allowing Culture as a valid precative in the considerations of law whereas some are hard lined against the existence of such a concept in the judicial decision-making process. A large number of scholars and researchers have opined on the particular avenue of debate. The extensive deliberations have allowed the formation of concrete outlooks for both viewpoints.

A few in favor of the principle are as such:

a) *Multiculturalism*

²Cultural Defense - An Overview | Sciencedirect Topics' (*Sciencedirect.com*, 2020)
<<https://www.sciencedirect.com/topics/computer-science/cultural-defense>> accessed 28 March 2020.

Many scholars in favor of the applicability of cultural defense have put forth the argument of Multi culturalism.

The multicultural movement promotes respect for the varied cultures and advocates for political, social and legal change to allow ethnic and cultural minorities to be respected and to be allowed to develop and protect their culture.³

It essentially promotes contemporary discourse based on how to respond to cultural and religious discourse in an attempt to facilitate the existence of all the different types of cultures and practices.⁴

However, the idea of cultural defense was raised in court long before the proponent of Multiculturalism⁵ and many multicultural scholars do not even address the perspective of defense of culture, treating the two concepts as individual topics of debate.

The logic behind the ones advocating for multiculturalism to not incorporate the defense of culture in their arguments is the recognition that most cultural practices should not be validated as they often limit individual liberty within their own practices and are, to varying degrees gender biased.⁶ This reasoning is the fundamental idea behind not incorporating cultural defense as an aspect of argument for Multiculturalism.

b) *Individual Justice*

This principle is essentially based around the idea that different people blamed for similar instances and identified for crimes within the same ambit should be meted out punishments not under a similar stance but punishments formed on the basis of relative moral culpability. The principal essentially considers mitigating the circumstances of the wrongdoer.⁷

The sine qua non understanding of the idea is that it's an extension of the practice of presenting the facts of the case or the relative happenings under the light of the wrongdoers understanding of criminality, morality and deviation during the sentencing phase. The advocates of individual justice under the same comprehension aim to extended the guilt phase.

The argument essentially is that the motive behind committing an action must be given an important consideration which means that motive must be considered while adjudicating

³Tamar Tomer-Fishman, 'Cultural Defense, Cultural Offense, Or No Culture At All: An Empirical Examination Of Israeli Judicial Decisions In Cultural Conflict Criminal Cases And Of The Factors Affecting Them' (Scholarlycommons.law.northwestern.edu, 2010)

<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7354&context=jclc>> accessed 28 March 2020.

⁴'Multiculturalism (Stanford Encyclopedia Of Philosophy)' (Plato.stanford.edu, 2010)

<<https://plato.stanford.edu/entries/multiculturalism/>> accessed 28 March 2020.

⁵*Id.*

⁶ ALISON RENTELN, THE CULTURAL DEFENSE (2004)

⁷ RENTELN, supra note 6, at 187-89; DorianeLambelet Coleman, Individual Justice Through Multiculturalism: The Liberals' Dilemma, 96 COLUM. L. REV. 1093, 1122 (1996); Renteln, supra note 3, at 439-40; Note, supra note 3, at 1298-311

crime and the following punishment so as to allow a wrongdoer to be punished only as much as their actions deserve.⁸

The principle is argued on the substantive belief that an accused should be allowed to present his moral views on the criminal stand. The moral standings may differ from the legal fundamentals, where the pertained legal liability might differ from what the accused's understanding of moral liability will be, hence it will be in contradiction with the understanding of Mens-rea and supposed criminal culpability.

c) *Principle of equality*

An idea in favor of cultural defense is that it promotes the tenets of equality i.e., it allows the fundamental aspect or is a provision for the extension of this aspect that everyone is equal before the eyes of law. The idea of cultural defense and its use is the enforcement of this right and its allowance for everyone, no matter if they are from a minority culture or an ethnic group which lacks substantial representation.

The principle of cultural defense is that it allows the same amount of protection that is guaranteed to the dominant communities whose cultures are reflected in law, to those who often don't have such recognition of their practices.

It allows for the evaluation of differentiated actions according to the individual aspects of the cultural code.⁹ The reference is made in recognition of the communal aspects that members of society often have which fundamentally corresponds to their idea or comprehension of morality which then transitions into crime as well and allows the acknowledgement of these individual understandings to correspond in the functioning of law so as to maintain equality.

This argument in principle covers the lack of recognition of cultural differences in the practice of legal identity of the cultural conflict cases.

Though a lot of factors work towards defining such a provision as a part of legal jurisprudence. Many elements delineate its presence as well:

a) *The feminist perspective*

This perspective is also formed on an understanding of equality; however, the application is quite different from that covered in the arguments in favor of cultural defense. The understanding put forth here is that everyone is equal in the eyes of law regardless of their cultural identities or practices. The feminist perspective on this ground has criticized the defense of culture through the comprehension that the acknowledgment of cultural identities in the rule of law allows for punishment of crime doers who commit acts of deviance against women and children to be mitigated.

⁸Renteln, supra note 3, at 442-44.

⁹James J. Sing, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 YALE L.J. 1845, 1879-80 (1999); Michael Winkelman, Cultural Factors in Criminal Defense Proceedings, 55 HUM. ORG. 154, 155 (1996)

The basic argument is that if the fundamentals of law are allowed to be tarnished by the acknowledgement of cultural practices and differences it would lead to in a direct or indirect manner allowing the condonation of practices that are carried out against women and will act as a subservient for the violation of their rights, leading on to diluting the deterrent affect the law plays out in society.¹⁰

However, the feminist understanding of cultural defense has been criticized from the varied fortieths of the feminist movement itself. The feminist's woman who are of color criticize this stance through the argument that often this understanding ignores the cultural and racial oppression that is underwent by women in communities of culture. The argument is that such an understanding of feminism is a formulation of elitist feminists and ignores the rights of women who are oppressed based on their gender as well as culture.

b) Uniform application of Law

The law as formed through as a tool for the maintenance of public order and to enforce the fundamental rights of all citizens. Its application, in an understanding of equitability is understood to be the same for everyone within its ambit, its tenets hold true and applicable over everyone who is a legal citizen uniformly.

However, with the acknowledgement of a defense of culture the aspect of uniform application of law will be fundamentally challenged. Cultural defense calls for the viewing of crime not just from a subjective perspective but its entailment extends to the understanding that crime should be analyzed from the perspective of the accused and the rules of law should be applied with reference to the accused's understanding of motive, knowledge and intention.

The subjective interpretation of crime and criminal law might seem like a fair standard for criminal decision and that the applicability of cultural defense might appear to be balanced.

Having said that, its of extreme importance to show the limitations of such an understanding of criminal law which might not be so apparent:

- i) Justice in its true sense in society requires for the treatment of all members, equally in the eyes of law. The practice of allowing individual interpretations of law and the analysis of law in reference to differentiated analysis of law would lead to the basic tenet of justice being uniform getting sidelined. Separated understandings of law In its practice establishes inequitable and nonuniform applicability and entails the dilution of the cardinal cognizance of Justice.

¹⁰ See Alice J. Gallin, *The Cultural Defense: Understanding the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 743-44 (1994); Okin, *supra* note 7, at 18-20.

ii) The maintenance of public order in a society which is extremely diverse requires the imperative understanding of a single and unified rule of law. It is essential that a single rule of law is recognized and is made applicable so as to prevent anarchy and disorder.¹¹

c) *Preferential Treatment*

The major argument of scholars who are in favor of a recognition of cultural defense is that it would allow for a more equal application of law. However, the idea that is oft ignored is that the defense of culture treats the cultural interpretation of a man who has not yet been truly assimilated with the general tenets of society as above the basic and majoritarian understanding of law. It allows for the individual to argue with the most synchronized understanding of law in protection of its rights which in an objective sense if allowed would lead to the destruction of the majoritarian understanding and would set the precedence to allow certain individuals to be treated preferentially with respect to the majority.

The simplistic comprehension for a legal system to function properly and without any formulative breakages is that every citizen is required to know as well as obey the established law.¹² If a comprehensive defense such as that of culture is allowed to challenge the exhaustive understanding of law, it would lead to the systematic breakdown of the legal system with its basic tenets being challenged at every step, allowing for certain individuals to be treated differentially and in a conclusively biased manner than most others.

The acknowledgement of such a defense in the criminal legal system would be a most inequitable one leading to the legal systems formulations based on equality and fairness being challenged and to a certain extent sidelined.

In conclusion, a formulative understanding of the scholars against the recognition of cultural defense in criminal law is that in order to have a culturally pluralistic society we must reject a substantive cultural defense.¹³

CONCLUSION

¹¹ Deputy District Attorney Lauren L. Weis, the prosecutor in the California People v. Kimura case, reasoned that "[y]ou're treading on such shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy." Spencer Sherman, Legal Clash of Cultures, NAT'L L.J., Aug. 5, 1985, available in LEXISNEXIS, Genfed Library, NTLAWJ File (quoting Deputy District Attorney Lauren L. Weis).

¹² See Julia P. Sams, Comment, The Availability of a "Cultural Defense" as an Excuse for Criminal Behavior, 16 GEORGIA J. INT'L & COMP. L. 335 (1986).

¹³ See Malek-MithraSheybani, Comment, Cultural Defense: One Person's Culture Is Another's Crime, 9 Loy. L.A. INT'L & Coep. LJ. 751, 779 (1987);

The formulative idea that is of debate in the whole issue of cultural defense can be summarized as the question that, "How should the law treat a wrong committed by one who does not realize that he has committed a crime?"

The two perspectives, both against and in favor have arguments systematically formed along this question and base their ideas as a formulative answer.

In an attempt to summarize the arguments of those in favor of having a defense of culture in criminal law can be said to be established as through the foundational understanding that in order for the law to be equitable and fair, a subjective perspective of the acts of those who deviate from the law must be referred to for an understanding of their motives, to evaluate whether there was an intent to commit the said consequences and if they had the knowledge element so required and quantified in order to ascertain culpability for a crime.

On the other hand the arguments of scholars opposed to establishing a defense of culture in crime can be summarized under a few basic tenets being; Holding the accountable liable as according to the blackletter of law and nothing beyond and beneath it, having a uniform and substantial understanding of rules applicable to one and all and the comprehension of a more equitable application of the law without allowing for preferential treatment of anyone, with their being a fair application of law throughout.

In analyzing both the perspectives and the points put forth in the arguments it can be ascertained that all of the issues raised are substantial in nature and none can be ignored. However, it is also quite easily ascertainable that the points of argument are not always complete or are often losing out on covering some essential subject matter that could question or often even negate their reasoning.

It is important that we analyze the arguments in reference to the whole subject matter without leaving out any issue.

There's no doubt that its extremely important for an equitable practice of law to allow for the individual cultural perspectives of those who commit deviant actions, so as to understand the mental design of the said individual in question, while performing the act. Correspondingly, it is also important that we understand that individualism in law can lead to the breakdown of the most basic tenets of the legal system i.e., equal law for all. An of this perspective can hamper public order held upon the principles of law which in their capacity are functional and formulative and have a more objective applicability.

In perspective of these opinion and in order to derive amore comprehensive answer dealing with all sides of the argument when it comes down to whether a person should be allowed to mitigate his culpability in respect to having a defense of culture should in an objective viewpoint be left to an understanding and analysis of circumstantial evidence.

The order of establishing a formal defense of culture can lead to many issues both in the nature of procedure as well as the understanding of law.

Nonetheless, completely negating the cultural perspective to a crime will lead to a majoritarian rule of law with increasing disparity in representation of the culturally different and those in the minority lacking the required amount of representation.

A more even-handed opinion to consider and allow both the perspectives would be to comprehend the concept as it has been understood in continued practice up till now and so seen in many cases which look towards establishing a more open-ended idea i.e., to not give a formalized recognition to such a defense but still continue its applicability as set by precedence earlier in reference to the general circumstances of the cases and the interpretation derived from the analysis of the said facts or circumstances of the cases.

The most equitable comprehension of the said concept is the one which systematically and without reference to conventional practices covers the cultural perspective, however without allowing for statutory recognition and estopping the negative aspects acquiring prominence in its practice.

In a culmination of both the sides of the argument while upholding their systemized fundamental tenets, shows a just application only when a recognition of the defense of culture is allowed in reference to the said precedence without providing it with statutory teeth and legal mandate.



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