FRANKEL, S. Cultural recognition in the New Zealand criminal law.

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Cultural Recognition in the New Zealand Criminal Law - "That Equals be Treated Equally and Unequals Unequally"

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Introduction

In 1985 Stephen Hoyt Erick was prosecuted for assault under section 194(1) of the Crimes Act.[1] The charge was that he had assaulted his six year old son Christian, who had been strapped many times, as punishment, for his behaviour towards his sister. Evidence showed there was a large degree of force used although there was no permanent injury.

The elements of the offence under section 194[2] were established so Erick raised a defence under section 59[3] of the Crimes Act. That section justifies force, by way of correction, if the force is reasonable in the circumstances. The section establishes "the reasonableness of the force used is a question of fact".[4]

The major fact under consideration was Erick's nationality as a Niue Islander. Evidence was given as to the part corporal punishment plays in the upbringing of Niuean children. Heron J. upheld the submission that such cultural characteristics will be relevant to the issue of reasonable force.[5]

> I do not think it is possible to look at this question in a vacuum and simply look at the extent, for example, of the injuries to the child concerned. It seems to me that it is proper in all circumstances to have regard inter alia to the cultural characteristics of the parent and the family as a measure of what is reasonable in the circumstances.

He overruled the judge at first instance's decision to exclude the examination of cultural characteristics. As a High Court decision the weight of this ruling is not as

great as it would have been, had it been a dictum from the Court of Appeal. Its value is perhaps lessened by the fact the recognition of such characteristics was not necessary to the ultimate decision. However its importance should not be undervalued as the judge saw it important to rectify what had been misleading by the District Court judge.

However the case was dismissed because of the evidence of Erick himself. He had felt remorseful for what he had done, indicating he considered the force used in excess of reasonable by his own standards. There was also evidence that his wife did not perceive the force used as reasonable, for she required an explanation from Erick.

If there had been no evidence that Erick subjectively considered the force used was unreasonable we cannot affirmatively know what the outcome would have been. However the implication seems to be that as the considerations of Niuean culture are relevant in the determination of reasonable force there would have been an acquittal. Heron J. dismisses the trial judge's reasoning "that on New Zealand standards that is excessive force ... the community better relook at its methods of discipline while it remains in New Zealand".[6] The trial judge had added to this by saying "on any objective test the treatment went too far ... other matters of customary discipline in my view have no relation to culpability. They may be considered by the court in mitigation only."[7] Heron J. does the exact opposite of this. He considers cultural characteristics as a vital if not governing circumstance. The only reason

given, that the Niuean acceptance of considerable force in child raising did not rule the case, was the subjective considerations of Erick. The subjective recognition of excess of reasonable force took priority over any doubt that objective reasonableness may have placed on Erick's culpability.

Essentially Heron J. answers the question of whether a Niuean behaved reasonably having regard to the fact he was governed by a culturally recognised "norm" of Niue Islanders. The circumstances in which the judge places reasonable are those recognised by Niueans in New Zealand. He gives full recognition of the relevance of "customary discipline" to the measure of culpability. This recognition becomes a problem when it is combined with its New Zealand location.

It must be remembered that the possible result of the case cannot be conclusively determined. However it can be noted that the judge's decision gives considerable weight to the cultural characteristics fashioning the mode of Erick's behaviour.

Prima facie the unreported case of Erick v Police[8] has little significance, but when its treatment of cultural characteristics is examined its relevance to the criminal law is of importance. Was Heron J. correct in placing such attention on cultural characteristics?

This paper will examine the current acknowledgement and implications of such cultural recognition within the New Zealand criminal law.

The Classicist Theory of Criminology

In simplistic terms a criminal offence involves a criminal act (actus reus). Unless absolute liability is intended this guilty act must be accompanied by a guilty mind (mens rea). It then becomes a question of what is a guilty mind and how is it determined.

The classicist theory rests on two fundamental principles, those of equality and rationality.[9] The overriding factor is individuals are considered equally responsible for their actions. Whilst there may not be equal material status all people were deemed to have equality of reason. Everyone has the same ability to make rational decisions over their actions.[10] Given this equal reasoning power, mitigating circumstances are not logically accommodated. It is assumed people always have free choice over their actions and thus they are always responsible. They always possess the capability, and are therefore in circumstances conducive, to making rational decisions.[11]

From this standpoint of assumed equality and rationality of thought emerges principles of liability and in turn principles of punishment.

On the basis of this uniform equality of reasoning power a hard and strict rule emerges. All criminally perceived acts, of a certain kind, are categorised in the same way, without any consideration of the individual circumstances of the case involved. This extreme objective analysis creates an assumed necessary uniformity in the criminal law. All acts of a certain kind are preclassified

as culpable and thus they are all grouped together under a predetermined punishment.

In practice this concentration on a said criminal act, with disregard to the particular case, is impossible to maintain. Exceptions have therefore developed. However it may be said that the classicist principles of objectivity remain the core of the criminal law.

It is somewhat paradoxical that what is cased in objective terms is in essence the core of subjectivity. That is an analysis of human intention. It is therefore no wonder that a balancing of objectivity and subjectivity causes no end of confusion. There has evolved a need to limit the pure objectivity of the classicist line.

What seems to have been acknowledged, in developing the criminal law, is crime is not committed in isolation of social circumstances. Prima facie there may be a criminal act, but surrounding circumstances may be relevant to determine an appropriate punishment for that act. In order to produce the perceived socially desired result of correction, differing degrees or methods of sentence may be more conducively employed to restore a person's preordained "rational thinking and free choice".[12]

Alongside the development of appropriate sentencing for given circumstances are legal developments. Exceptions to the strict classicist line, safeguarded by the law itself, have arisen. Certain groups are perceived as justifiably less capable of making rational adult type decisions. Children may be excused liability simply because it is acknowledged that owing to their age they physically do not

have the same reasoning capabilities of a said rational adult.[13] Similarly the insane are not regarded as having the same chance at free choice.[14]

The criminal law also provides defences so that a person who commits prima facie criminal acts in some circumstances may be excused. Circumstances like self defence[15] or provocation[16] fall into this category.

Behind these concessions to the harsh classicist line are perceptions of what is and is not culpable behaviour. That is what kind of behaviour is criminal or more specifically under what circumstances prima facie criminal behaviour may be excused because of the very circumstances in which it occurred.

It may be accurately stated that every criminal case is assessed in its own circumstances. Nevertheless only certain socially acceptable circumstances may exclude liability from prima facie criminal acts. Underlying all this is that, given certain above stated exceptions, behaviour must live up to one socially accepted standard. This standard in classicist theory is the rational free choosing man who is therefore individually responsible. Today the "norm" is expressed as "the reasonable man" or "the ordinary person" qualified by "in the circumstances".[17]

The Concept of Objectivity in New Zealand

New Zealand is a nation representative of many cultures. If the philosophical basis of the criminal law is a consensus

based on equality and rationality, the people subject to that law should be represented by it. This does not necessarily justify the importation of totally differing customs. What this reasoning implies is that those subject to the processes of law (burdens of proof and requirements of standard) should be represented by those procedural requirements. This in turn imposes questions of legal pluralism. How far and at what stage of the law can pluralism justifiably develop?

This paper is not concerned with pluralistic developments, within the penal system, of the different requirements and rehabilitative needs of different cultures. Nor is it concerned with change to the substantive law by directly importing alien customs like multiple marriage or ritual killing. The concern of this paper is the greater recognition of cultural diversity with the procedure and application of the law itself.

In the New Zealand context, for the criminal law to work effectively, multiculturalism should be accommodated within that law. The criminal law of a country should reflect the perceptions of criminal behaviour of the people of that country. A criminal law which is out of line with perceptions of the people it governs is incapable of achieving any goal for those people. The criminal law would become limited in its utilitarian value. Classicist theory acknowledges one of the law's goals as the deterrent of criminal behaviour.[18] Strictly following an objective rationale, out of line with public perception of criminality would not begin to achieve this or any other aim.

This paper cannot begin to assess utility or deterrent theories of the criminal law. Their relevance is merely that whatever the perceived aim of the criminal law, the purpose could not be achieved if the law bears no relation to those it governs. There would be a greater chance of achieving a purpose if the people being judged by an objective test, like the reasonable person, were representative of that standard. Of course no one is "reasonable" all the time, but reasonableness against which conduct is measured should represent a consensual "norm" to which the party being judged belongs.

Concerning the issue of "culturalism" in the law, it must be recognised that New Zealand is a multi-cultural society. Thus what are the implications for New Zealand's criminal law structure by recognition that the reasonable New Zealander encompasses many cultures? The reasonable person in a New Zealand context means more than just the reasonable European New Zealander. Given that a large proportion of the population may be classified as Maori or Pacific Islander the criminal law should somehow incorporate these cultures. In fact the argument extends to mean that as a major part of the population the Maori or Pacific Islander should not be accommodated within another structure, but the structure should be based equally around New Zealand's representative cultures.

It is unnecessary in the context of this discussion to consider arguments concerning the comparative status of New Zealand's racial groups.[19] The question here should be to what extent can the variations in cultural characteristics

of New Zealand's multi-cultural population justify differential considerations of fact within the criminal law reasonable situation?

In order to assess the degree of cultural diversity acceptable in New Zealand law, certain questions regarding these pluralistic developments must be considered.

1. The present recognition of different cultures within the reasonable person test of the criminal law through cases.
2. In what kind of cases differing cultural perceptions present a fundamental problem for that said justification behind the method of application of the criminal law.
3. What is the purpose of an objective reasonable person test when hemmed in by considerations of culture?
4. Given such cultural diversity is it possible to attain the standard of the reasonable New Zealander?
5. What is meant by and what are the implications of imposing some overall "New Zealandness" in the criminal law?

A Progression Through Relevant Case Law

The first case of relevance, R v McGregor,[20] occurred in 1962. It concerned the defence of provocation under section 169 of the Crimes Act. In order for a defence under the section to succeed, the circumstances must have been sufficient "to deprive the person having the power of self

control of an ordinary person, but otherwise having the characteristics of the offender, of that self control".[21]

North J. concludes what must be meant by this section.[22]

> the legislature must be regarded as having in contemplation a person with the power of self control of an ordinary person, but nevertheless some personal characteristics of his own, which are proper to be taken into account so that his reaction to the provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self control in an ordinary person who nevertheless possessed the special characteristics of the offender.

In effect the case held that the defence of provocation was primarily an objective one, but the wording of the statute limited its objectivity. The special characteristics of the offender are to be considered if the provocative words were directed at that characteristic. The statutorily implied subjectivity was limited even further by the definition of what was a characteristic. This was held to be "something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality".[23]

It was argued that if the characteristic meant more than this, the reasonable person test would lose its significance and value.[24]

> ... in order to make the section capable of application, while preserving the ordinary

> man test there must be some limitation on the term "the characteristics".

North J. includes in a list of possible characteristics race, colour and creed. He then connects these characteristics to the provocation.[25]

> So too if the colour race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon.

The facts of McGregor[26] have no particular relation to culture, thus the discussion of culture is obiter. The main points at this stage to draw from the case is judicial acknowledgement of the possible relevance of differing cultures, although in a substantially limiting way.

The relevance of consideration of culture becomes an issue again in 1976 with the case of R v Tai.[27] Tai was accused of murder. He claimed to be provoked by the actions of "a girl he had been intimate with",[28] who put an end to their association. Tai stabbed the woman many times. There had been some meetings and phone calls before the incident. These events combined with, just before the stabbing, where the girl refused to speak to Tai as soon as he demanded to speak to her, were the said provocative events in question. The defence claimed provocation (under section 169)[29] from these events felt by the "characteristics" of Tai. The problem was that provocation, as a defence to murder, has always required the act causing death to be almost simultaneously linked with the loss of self control.[30] Thus the cause of the loss of self control could not be too

distant. Hence the problem with relying on a series of spread out events leading to a loss of self control, as Tai was trying to. Therefore it was contended there was "a tendency towards a slow build up of passion"[31] being a characteristic of Samoan people "who are by nature slow-burning".[32] The overall submission being, that in order to fulfil the requirements of provocation, it must be recognised that characteristically the anger of Samoans takes longer to reach its peak than in the case of Europeans. Considerations of culture become an issue in order to accommodate Tai's actions within the historical criteria of the defence of provocation.

The court held "we are prepared to assume contrary we think to R v McGregor, that it could be said that this was a characteristic of the offender".[33] It was thought however that the characteristic had no relevance to the issue in the case, which was "whether the events described could have caused a person, whether slow-burning or quick-burning, to lose his power of self-control to the extent that he would act in the way the appellant did".[34] McCarthy P concluded that the answer could only be no.

Similarly to Erick[35] the exact extent of the relevance of culture was circumvented by other evidence. In Erick[36] it was the subjective acknowledgement that the behaviour was unreasonable. In Tai[37] it was concluded that, regardless of the presence of the "slow-burning" characteristic , the events contended could not be provocative enough to warrant the loss of self control.

The case of R v Taaka[38] involved the murder of the

accused's cousin. The incident which had apparently motivated the killing was what the accused believed was an attempted rape of his wife, by his cousin. Taaka shot the deceased at point blank range, at a party, two weeks after the attempted rape. A new trial was ordered because the trial judge refused to leave the defence of provocation to the jury.[39]

> in light of ... the appellant's personal history and race the insult of Hongi's conduct would be particularly deeply felt by him because of his particular characteristic. So much so that self-control of a normal person might not have been enough to restrain him from reacting to the provocation initially given thirteen days previously, but revived on the night of the party.

Hence the development of the relevance of culture, as a characteristic, in terms of the subjective elements of the statutory defence of provocation.[40]

In varying ways all the above cases encounter the problem of the degree of relevance of the acceptability within "another culture" of certain behaviour. "Another culture" may be taken to mean a culture distinct from the traditional pakeha on which the New Zealand criminal law test is primarily based.

The kind of cases where culture becomes a problem are those where acceptability to another culture has become like a defence. In considering whether certain behaviour is reasonable in the circumstances, the argument is put forward that it is reasonable because to the specific culture concerned the kind of behaviour is part of that

culture. The problem is especially evident when one accepted standard is radically different between two cultures. For example, in Erick v Police[41] where the Niuean accepted standard of corporal punishment for children is much more violent than the traditional white New Zealand level. In Tai[42] and Taaka[43] the issue becomes the problem of treating an accepted practice, of Pacific Island countries, as reasonable in New Zealand.

An argument contended for Tai was it is traditional or customary for rejected Samoan men to assault, or even kill, the other party to a marriage or like relationship, when it has broken up. The court rejected this submission as confusing the existence of a "native practice" in another country with the existence of a characteristic in the offender himself. It was concluded the presence of one does not imply the presence of the other.[44]

> ... tribal acceptance of approval elsewhere of killings contrary to the law could not be accepted on any possible reading of s.169 as a ground for reducing a homicide, committed in New Zealand, from murder to manslaughter.
>
> In essence the submission confused the existence of a native practice in another country with the existence of a characteristic in the offender himself.

It should be acknowledged that a Samoan, living in New Zealand, who has grown up with such a custom (if it can be adequately established as existing)[45] may have it ingrained in their personality sufficiently to be termed a "characteristic". Given that a significant proportion of the population is Samoan, it may be too simple to dismiss

that cultural aspect on the grounds it comes from elsewhere. While the existence of such a customary practice does not immediately exonerate a defendant, it still has some bearing. What has to be established is the extent of that bearing.

None of the cases tackle the problem raised by the recognition of cultural characteristics. Tai[46] was dismissed on the grounds the evidence raised was insufficient to afford a defence of provocation. The problem may have been not that the evidence itself was insufficient, but that it was given insufficient weight. The defence of provocation looks for characteristics of the offender which may remove self control of an ordinary man. McGregor[47] lays down these characteristics must be relatively permanent not transient. Without analysing the precise depths of Tai's characteristics it is enough to appreciate that in some cases customary behaviour will have played a suitably large role in a person's life and cannot be so easily separated from them. That is, that whilst the practice exists in another country it may also exist in the offender himself. McCarthy P assumed too readily that the distinction of existing elsewhere or being a characteristic was valid. The line is not as precise as he implied. Hence the proposition that insufficient weight was given to such a claim.

We may draw from an examination of these cases that there is a leaning towards recognition of culture. It should be noted that that leaning is somewhat awkwardly contained within the existing criminal law structure.

Considering Objectivity

Behind the objective test lies the notion there is a consensus about the uniformity and order imposed by the strict classicist line, or today by the use of a modified objective test. Hence presumed consent in the justification behind the application of objectivity. This general ideology of consensus cannot be a justification if the consensus does not actually exist. The idea behind the consent theory is that "individualism" is sacrificed in exchange for the benefits of uniformity. The justification of consensus falls down if, the end result means, various sections of societies consent is not reflected in the law. It would seem therefore the only way to reflect necessary consent, is to allow differential considerations of fact. The route to obtaining a reflection of a multi-cultural society's perceived criminality, and hence the society's consent, is to recognise the cultural variants.

The question remains however the extent to which these differential considerations may exist. To what degree can cultural pluralism be accommodated within the criminal law?

A Consideration of Pluralism

In simplistic terms legal pluralism means a situation where two or more systems of law interact. What seems to be involved is the recognition by "state law" of some other principle belonging to a different legal culture. This

pluralism takes many different forms depending on the kind of cultural interaction involved.[48] For the purposes of this paper pluralism forms part of the discussion as it is the term applied to the infusion of culturalism into the prevailing legal system. The form this infusion usually takes is in a dominant system with subservient counterparts.[49] The proposition is that this sort of imbalance is wholly inappropriate in the New Zealand context.

In consideration of an acceptable degree of pluralism to New Zealand, there are two extremes.

a) a hard line classicist type objectivity which excludes acknowledgement of variant cultural characteristics i.e. no concept of pluralism.

b) a collection of "norms" relating directly to the relevant culture, but in isolation of each other.

Obviously neither of these extremes are satisfactory. What has to be found is a balance where the "extreme pluralism" of b) is limited yet not regressing too far into the strict objectivity of a).

Most pluralistic legal systems are formed in the dominant/servient mode. This feature does not aid maximum utility of the law. Nor is it compatible with the greater theory of consensus behind the application of the law. What it achieves is an invidious discrimination. It would on the other hand seem legitimate to discriminate between cultures in order to cater for their inherent characteristics. The balancing factor of that legitimate discrimination is that such an acknowledged cultural freedom does not override

the rights of the rest of the society. The traditionally espoused reasons for limiting pluralistic developments encase this idea of "the rest of society's rights". Hence the best way to preserve society's rights as a whole was thought to be uniformity throughout the criminal law. The concern seems to be that without a dominant force those principles of uniformity and equality will disappear resulting in arbitrariness and administrative inefficiency.

How can there be pluralistic developments yet the law may be preserved from arbitrary application and inconsistency?

The Concern of Arbitrariness and Inefficiency

Arguably ease of administration is support for regulating pluralistic developments. However it cannot be substantially justified as a sole reason for limitation. It may add to arguments, concerning the fear of arbitrariness, coinciding with the greater development of pluralism.

The adoption of greater cultural recognition does not necessarily substantiate the "fear of arbitrariness". The assumption is that arbitrariness will be avoided, and uniform equality obtained, by the application of one consistent rule. There are however two relevant considerations of uniformity. Firstly there is the idea of uniformity through consistent objectivity. Secondly uniformity may be achieved through equal treatment, by the law. There is an argument that equal treatment may entail

equal cultural recognition.

The argument is not that simple. Equal treatment does not necessarily equate with exclusive cultural consideration. The main point of consideration, as regards this large jurisprudential area of what constitutes equal treatment in any legal system, is that the assumption of the need for uniformity as the basis for any standard of objectivity, may not be as firmly based as such a proposition initially implies. What is being suggested here is that equality may not be achieved by the consistent application of the same rule. That rule may be a "norm" of some of the people it is applied to, but not of others. If only some of society is measured against a standard which reflects their view of criminality[50] there is not overall equal treatment.[51] Equal treatment may therefore mean criminal assessment against a standard to which the party in question belongs.[51]

The arguments in support of "objectivity", from the traditional standpoint, centre around the assumption that having that kind of regulation ensures smooth functioning of the law. Any argument of that kind is outweighed by the lack of value in applying a norm where the subject does not recognise its value.[53]

Pluralistic developments do not necessarily lead to arbitrariness unless taken to the extreme of unrelated systems of law. Variants of interpretation should not be considered arbitrary, but appropriate to the circumstances. This sort of pluralism does not mean a lack of control, but a simple diversity of interpretation on justifiable grounds. The differing interpretations are not for arbitrary reasons,

but for sound reasons on the facts of each case. The sound reasoning relates back to the consideration that it is not sensible to assess an accused against a standard which has little relevance to them. The principles in determining what facts are relevant to each case involve an establishment of guidelines.[54] The considerations in determining such guidelines have been described as follows.[55]

> The crucial objective in defining the scope of the defence is to advance the goals of individualised justice and cultural pluralism while recognising the concerns reflected in the desire for common values.[56]

On the contrary the selection of one norm over others to apply to all cases seems like an arbitrary choice. The more a predetermined line of objectivity, regarding certain behaviour, becomes the focus of a certain type of offence, a blur is placed on the reality of the individual case. This blur is arguably more arbitrary because it relates not to the case involved, but to a hypothetical tenet. In turn the hypothetical nature of this tenet questions any useful value it may have.

This is not to suggest that currently the criminal law is interpreted from a total objective viewpoint. It is merely an emphasis on the evident lack of sense or value in interpreting one culture in terms of another. The lack of value in artificially applying a set of one culture's "norms" to a situation where they cannot be accorded with the facts.

The Scope of New Zealand's Interpretive Pluralism

As discussed earlier, the strict application of the totally objective classicist test was modified in the face of social reality. New Zealand's social reality is its multi-culturalism.[57] If any objectivity, like the current reasonable person, is to justifiably remain in the criminal law it is to be a reasonable person in terms of that multi-culturalism.

In the Tai[58] case McCarthy P attempts to define the scope of this pluralism in terms of the standard of the ordinary New Zealander.[59]

> By "ordinary person" is meant naturally, an ordinary New Zealander - not only one of exclusively British blood or background. We have in this country a population of markedly mixed racial origins with, especially a substantial Polynesian minority. What has to be contemplated by the trial judge (and later the jury), difficult though it be, is an ordinary person in terms of that mixed society, one who could be expected to react in the way people who commonly accept current New Zealand standards.

Not surprisingly however he leaves up in the air what these common standards are and how they are to be recognised or interpreted.

What he seems to be suggesting is an assimilation of two contrary ideas. Whilst the relevance of different race and culture are acknowledged the reasonable person test, as it stands, and such factors are not really compatible. Hence the problem of assimilation of the two ideas in the

cases. If the test were to be strictly interpreted this would involve assessing one culture in terms of another. In reality this is not possible if both cultures are to keep their distinct identities.

McCarthy P. in his above quote assumes that it is possible, given the cultural variations, to form a standard of the reasonable New Zealander. As he points out, this is a difficult task. I would respectfully suggest that there cannot be an overall "norm" which can be sensibly applied to New Zealand's multi-cultural society. In acknowledging diversity of cultural "norms" it is somewhat artificial to then assume there is a set of common standards.

Practically the true nature of a sensible test in New Zealand should not be an objective one importing subjective characteristics, but a subjective test remembering that there must be some objectivity. This inversion recognises the emphasis should not be on an imposed and possibly irrelevant norm, but upon the relevant considerations of the case before the court. This increased subjectivity is not as specific as greater individual recognition, but it should be concerned with an individual belonging to a culture which recognises a certain acceptability of behaviour.

In practice this would involve firstly considering each case at face value. To consider in light of the specific circumstances whether such an act could be in any way justifiable, because of the actor. This is not to allow for legislation of a diversity of concepts. It is not a change aiming at the content of the law, but at the procedure of the law. It is acknowledgement of the practical and

justifiable significance of cultural factors to the application and procedures of the criminal law.

However there must be an overall acceptance of a decision to New Zealanders. Whilst acknowledging the specific characteristics of the immediate case there must be a degree of compliance with the substantive demands of the criminal law in order to make a decision valuable in a practical way. Somehow the demands of equal treatment and uniformity must be achieved throughout New Zealand.

The question becomes how and what is that proposed objectivity? The aim cannot be to find an average which accurately reflects all New Zealand cultural perspectives. The relevant culture for each case should be the centre of the applied test, but this has to be modified. A Niuean or Samoan cannot be tested as if they were in Niue or Samoa. For example, whilst it is relevant that Erick in beating Christian may be behaving in a reasonable Niuean manner, Erick is not in Niue. Nor does the law governing him cater exclusively for Niueans. This is where the relevance of a multi-cultural society becomes plain. The culture under consideration must be looked at with regards to the society in which it exists. Hence there emerges an objective limit on the proposed subjectivity.

Given that we are to maintain a central degree of equality and uniformity (as substantive demands of the criminal law) it seems impossible to admit cultural characteristics as a complete and separate defence. This would seem to firstly undermine those substantive requirements and secondly that culturalism has a role in the law

greater than a simple defence additive:

Although, it has been argued that the balance between individualized justice and cultural pluralism would be struck by the admission of a cultural defence per se.[60] In a sense, such a defence would be easier to frame and administer. However its separateness as a defence undermines the principles of liberal justice, which the recognition of cultural diversity advocates:

The problem of determining the uniformity and equality (borne out by McCarthy P in Tai[61]) is that when cultural characteristics are considered in the context of a reasonable person in the circumstances an imbalance is struck. The judges discuss the relevant culture in terms of what is deemed a "reasonable person". What really is happening is as soon as you consider what is acceptable to a culture you are considering what is the reasonable person. That is to say, you are considering what is the socially accepted "norm" of that culture.

Conclusion

The position reached so far is that a certain line of New Zealand cases point to a problem concerning interpretive pluralism, as regards cultural diversity in the assessment of criminal culpability. The problem is that admitting the relevance of culture into the criminal law involves a clash of legal principle. On the one hand the demands of objectivity to make the criminal law workable and generally

applicable. On the other hand the implied subjectivity of allowing variant considerations of fact as regards cultural diversity.

In broad terms this is a problem pervading the whole criminal law in the seeming erosion of objective principles, when a case requiring greater subjectivity is presented.

We have seen the inadequacy of laying down a static set of principles in the classicist experience. What needs to be done is an investigation into New Zealand's cultural diversity. This in turn will lead to an inquiry of the criminal law's role in such a multi-cultural society. Hence a consideration of which principles of criminality should be paramount in New Zealand law.

This consideration of the function of law with regard to society is a re-emergence of the greater principle that the criminal law is acceptable and of some value to its adherents. An attempt has been made to encompass these requirements in the idea of a reasonable New Zealander, but which greater examination has revealed inadequate.

What this overall "New Zealandness" focus involves is a task for the legislature and the judiciary. It is a consideration only defineable through practice, experience and the gathering of empirical information. However it is a problem which should no longer be circumstantially avoided by cases like Erick v Police.[62]

Footnotes

1. Erick v Police 1985 Unreported, Auckland Registry, M 1734/84
2. Crimes Act 1961
3. Idem
4. Crimes Act, s.59(2)
5. supra n.1, 3
6. supra n.1, 4
7. supra n.1, 4
8. supra n.1
9. I. Taylor, P. Walton, J. Young The New Criminology: For a Social Theory of Deviance (Routledge & Kegan Paul Ltd, London, 1973)
10. These assumptions about criminal responsibility are part of a wider doctrine of social contract. That theory basically assumes there is a consensus in society that certain activities are to be punished, because they are detrimental to that society. The society consensually believes it desirable to protect property and welfare and when that protection is violated, to punish. The assumptions of equality and rationality are more specific heads, from the greater doctrine of social contract. They are more readily identifiable in the criminal law.
11. supra n.9, ch.1
12. H. L. A. Hart Punishment & Responsibility (Oxford University Press, London, 1968)
13. supra n.2, s.21, s.22
14. supra n.2, s.23
15. supra n.2, s.48
16. supra n.2, s.169

17. These are judically recognised phrases encompassing the interpretation of reasonable throughout the Crimes Act. For specific statutory examples see s.59, s.169.

18. infra n.51, 1032 for a discussion of deterrence.

19. It should be noted there are various arguments concerning the validity of pluralism depending on the cultural groups relation to the prevailing legal system. Namely whether it is imposed upon them or if they emigrated to it. infra n.48

20. [1962] N.Z.L.R. 1069

21. supra n.2, s.169 2(a)

22. supra n.20, 1081

23. supra n.20, 1081

24. supra n.20, 1081

25. supra n.20, 1082

26. supra n.20

27. [1976] 1 N.Z.L.R. 102

28. Ibid., 103

29. supra n.2

30. For further discussion of provocation see B. Brown "The 'Ordinary Man' in Provocation: Anglo Saxon Attitudes and 'Unreasonable Non-Englishmen'" [1964] 13 Int & Comp LQ 203

31. supra n.27, 106

32. supra n.27, 106

33. supra n.27, 107

34. supra n.27, 107

35. supra n.1

36. supra n.1

37. supra n.27

38. [1982] 2 N.Z.L.R. 198

39. Ibid., 201

40. It is pertinent here that the courts seem much more able to recognise cultural characteristics in an entirely subjective defence, like colour of right (Crimes Act s.2 "... an honest belief that the act is justifiable"). For a case example see Police v Minhinnick [1978] N.Z.L.J. 199

41. supra n.1

42. supra n.27

43. supra n.38

44. supra n.27, 107

45. Sufficient evidence of the actual existence of such a custom would have to be given before the custom could be substantially relied on.

46. supra n.27

47. supra n.20

48. M. B. Hooker Legal Pluralism (Oxford University Press, London, 1975)

49. Idem

50. "their view of criminality" is said guardedly because it is not a specific as a direct reflection of a view, but a reflection of a consensus to which they belong.

51. See "The Cultural Defence in the Criminal Law" (1986) 99 Havard Law Review 1293
at p. 1299 the proposition is put, "Treating persons raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather a vindication of the principles of fairness and equality that underlie a system of individualised justice".

52. Ibid., p. 1301 lin 4

53. supra n.51, 1300 "Laws are more effective in commanding obedience when individuals internalize the underlying norms to the point where they believe the

law embodies morally correct values.

54. Such considerations would have to be determined by the legislature or judical development.

55. supra n.51, 1038

56. The "Cultural Defence" article suggests guidelines like
- the probability of recurrence and severity of the crime
- the identifiability, degree of self containment and size of the cultural group
- the defendants assimilation into the mainstream culture.

These considerations may be helpful to the New Zealand situation, but until more empirical evidence is gathered the scope of culturalism in the law cannot be so precisely defined.

57. supra n.51 for similar arguments re America's commitment to cultural pluralism.

58. supra n.27

59. supra n.27, 106

60. supra n.51

61. supra n.27

62. supra n.1

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