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In Defence of Culture? Racialised Sexual Violence and Agency in Legal and Judicial Narratives

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Abstract

There is a rich body of work in critical race and feminist theories that have criticised as Euro/Anglo-centric, and hence exclusionary, the liberal foundations of Western democratic legal systems. The basis of such critiques is that legal personhood is premised on an atomistic individual agent that purports to be neutral but in actuality reflects and maintains the hegemonic gendered and raced status quo privileging the white, middle to upper-class man to the exclusion of women and all racial and cultural Others. Some approaches, such as cultural defences in criminal law, have sought to address this via a recognition and incorporation of the *difference* of Other groups and their different moral norms, proclivities and circumstances. To illustrate, this discussion will draw on a cultural defence that was advanced in a series of group sexual violence cases that involved four Pakistani, Muslim brothers. While concluding that culture permeates the actions of all individuals, this article seeks to show how cultural recognition approaches in law often overlook the individual agency of those differentiated through their racial, ethnic and religious visibility. Instead of asserting the primacy of individual free will and a rational agent as the main driver of criminal behaviour cultural defences, in particular, appear to attribute criminal action to the morally aberrant traditions and practices of non-Western cultures. At the same time, such approaches to cultural recognition fail to acknowledge that culture, and not just the culture of Others, is necessarily the backdrop for *all* (group) sexual violence. With these points in mind, the paper ends with some suggestions for accommodating alternative narratives that seek to avoid the reductive scripts that currently appear to characterise legal and judicial musings on culture.

Keywords

Culture; gender; racialisation; sexual assault; agency.

Introduction

The current discussion reflects on the ways in which the notoriously slippery concept of culture, as exemplified through cultural defence, has been mobilised in some racialised sexual violence cases in Australia. Empirically, this article focuses on the highly publicised Sydney trials of four Pakistani immigrant Muslim brothers, the 'K brothers', who perpetrated a series of aggravated

group sexual assaults on several young women throughout 2002. Concentrating on the issues of culture raised throughout the brothers' trials, and a cultural defence raised in a sentencing appeal for the ringleader, this discussion contends that an Anglo or Euro-centric legal system's understanding of Other cultures represents a departure from its liberal philosophical underpinnings that are founded on individualism, free will, and rationality – the tenets of liberalism that have long been critiqued by feminists and critical race theorists as highly gendered and racialised despite being posited as neutral (see Delgado and Stefancic 2000; Naffine 1987; 1990; Razack 1999; Threadgold 1991). By drawing on the insights of critical theory, this paper argues that liberalism's central tenet of the individual free agent seems to be superseded by law's invocations of Other cultures, becoming markedly lost within cultural defence arguments in criminal law (Volpp 2001). Instead of asserting the primacy of individual free will and a rational volitional subject as the main driver of criminal behaviour, cultural defence takes a view of criminal actions as largely determined by the morally aberrant traditions and practices of non-Western cultures.

More broadly, following Razack (1994; 1999), this paper maintains that 'culture talk' in law and politics traverses some treacherous ground. While recognitions of difference and the relevance of culture might be advanced in adversarial legal frameworks with progressive intent, such 'recognitions', if they may be so accurately called, are plagued with political and ethical ambivalence. Though they seek to acknowledge diverse moral frameworks which may influence or constrain the actions of individuals – frameworks presumed to be fundamentally *different* to the dominant normative context within which the law operates – cultural defences often fail to move beyond the reductive and objectifying projects of colonialism and conservative politics which presuppose the moral superiority of hegemonic Western cultures (Narayan 1998, 2000). Indeed, when the culture of Others is deployed as part of an explanation or as mitigation for abhorrent criminal acts, 'culture talk' functions to racialise (or 'culturalise') such acts while criminalising certain cultural groups (Humphrey 2007: 14).

Through application to the crimes of ethnic and religious Others, cultural defences are premised on representations of Others as bound to the dictates of backward and intransigent cultural practices. As seen in the case study on which this paper focuses, sexual violence cases also promulgate a concept of cultural conditioning as specifically gendered, only giving voice to patriarchal understandings as delivering the truly authentic notions of cultural tradition whilst eliding voices that offer alternative cultural narratives that oppose and challenge the patriarchal status quo (Narayan 2000; Phillips 2003, 2007; Razack 1994, 1999). A similar phenomenon can be observed in post-colonial legal discourses that seek to mitigate the sexual violence of Aboriginal men in Australia (Cripps and Taylor 2009; Howe 2009) and elsewhere (see Razack 1994 for a Canadian example).¹ By apportioning responsibility to culture and the cultural group that gives life to certain traditions and practices, cultural defences deny agency, responsibility and the individual subjectivity that might be afforded to accused persons who are identified as culturally different.

Meanwhile, cultural defence, by differentiating itself from other criminal defences, remains resoundingly silent on the everyday cultural practices of individuals who are identified as part of the dominant cultural framework. By so doing, the cultural defence fails to acknowledge that most criminal defences or character assessments, aside from those citing reduced capacity due to age or mental illness, are in effect cultural. Examples may be found in legal scripts where accused persons are attributed positive character traits such as achievements in education and professional life (such as an example of educational achievement under adverse circumstances as cited in relation to the youngest of the K brothers) or are generally and generically represented as law-abiding citizens who are devoted to their families. Such normative representations are implicitly racialised through their silent attribution to the dominant Anglo or Euro-centric majority culture that is reflected by law.

The numerous criminal trials for the offences of four Pakistani immigrant Muslim brothers, the 'K brothers', illustrate some of these issues. The K brothers perpetrated a series of aggravated group sexual assaults on several young women throughout 2002 and were reported by mainstream media to exclusively attack young white Australian women. The theme of racialised sexual assault echoed popular and political discourse around the cases, trials and sentencing, between 2000 and 2006, for a series of other group sexual assaults involving two separate groups of young Lebanese Muslim perpetrators who were also seen to target young white Australian women. Popularly labeled as the 'Sydney gang rapes', the trilogy of group sexual assault cases included AEM and Others, Bilal Skaf and his cohorts, and ended with the K brothers' attacks. These other cases comprised part of the general social and political backdrop in which the K brothers' trials took place. These incidences of group sexual violence were ubiquitously racialised in public discourse – with Middle Eastern Muslim men attacking white Australian women – and it was widely held that the actions of the offenders were driven by their cultural backgrounds that were conflated, in popular political discourse, with their ethnic and religious affiliations (Poynting et al. 2004). As such, the crimes were represented in some quarters as 'race hate' crimes, with public and political calls for more severe punishment (Johns et al. 2001).

Despite the political racket, legal discourses around the cultural backgrounds of the perpetrators in all three cases were typically subdued on the issue of race, ethnicity and culture (terms interchangeably used), with the exception of the K brothers' trials where the most striking and problematic references to culture emerged in the form of a cultural defence in a sentencing appeal that sought to explain the ringleader's violent misogyny through reference to his cultural background. In fact, cultural defences used to mitigate gendered violence are unremarkable and have featured in American (Okin 1999; Renteln 2004; Volpp 2001), English (Phillips 2003) and Australian courts (Maher et al. 2005), particularly with reference to provocation cases where men have killed their estranged or unfaithful partners. Yet all have been fraught with the same issues of cultural essentialism and, in some cases, the morally undesirable outcome of asserting the primacy of 'cultural rights' (reductively understood) over women's rights (Phillips 2002, 2003, 2007).

The paper proceeds with an overview of the K brothers' cases with a detailed consideration of those passages in sentencing judgments and commentary within the courtroom and other legal documents, which engage with the concept of culture. Concluding that culture permeates the actions of all individuals – along with the structural circumstances in which cultural practices and individual choices are realised – this discussion ultimately seeks to show how cultural recognition approaches in law often overlook the individual agency and subjectivity of those differentiated through their racial, ethnic and religious visibility, while simultaneously failing to acknowledge that culture is the backdrop for all (group) sexual violence. The paper ends with some suggestions for accommodating alternative narratives that aim to avoid the reductive and essentialist scripts that currently appear to characterise legal and judicial musings on culture. These suggestions do not preclude recognition of the fact that sexual violence and generalised misogyny is indeed a *distinctly* cultural problem among men acting in groups within different social and institutional contexts and that gendered violence is not strictly the preserve of ethnically, religiously and racially marked Others.

The K brothers

In 2003, four brothers identifying as Pakistani Muslim immigrants were tried and convicted of three separate group sexual assaults perpetrated on four young women.² This group of offenders came to be known as the 'K brothers': their names were subject to a media suppression order because two of the brothers and all of the victims were juveniles at the time of the attacks. A fifth man, RS, an international student from Nepal was unrelated to the others

and committed suicide in custody before he could be sentenced (*Regina v MSK, Regina v MAK, Regina v MRK, Regina v MMK* [2004] NSWSC 319 at 11).

The attacks occurred in a unit in a Sydney suburb over a six-month period during 2002, involving considerable violence and threats with offensive weapons. During the trials for these rapes, the court heard that the four brothers and RS often befriended a number of young women in a variety of different situations and, after becoming acquainted, would invite the young women over for a 'party' which ended in group sexual violence. The victims were as young as 13 years of age and the eldest brother, clearly recognised as the ringleader, threatened to kill them and used weapons, physical violence and psychological taunts to intimidate them if they did not sexually submit. After being sexually assaulted, the girls were usually abandoned, late at night, in suburban streets and warned not to tell anyone about the events.

The trials became infamous for the decision of the oldest two K brothers, MSK and MAK, to sack their barristers for the first few trials, and steadfastly refuse legal representation while expressing a preference to represent themselves. Their reasoning was based on the brothers' allegations that the Australian government, police, and the courts were complicit in an anti-Muslim conspiracy against them. MSK specifically accused their barrister of saying that 'all Muslims are rapists' and that they were subsequently forced to sack him. The brothers' allegations were followed by a sensational sequence of events in court, owing to the outlandish and unchecked courtroom behaviour of the self-represented accused, led by MSK, which resulted in stays to the legal process, aborted trials, retrials and numerous appeals.

The oldest brothers' courtroom histrionics occurred in the two separate trials conducted for three separate attacks: one for the first two victims that came forward, LS and HG (whose names were subject to a media suppression order), before Justice Brian Sully; and another for the second two victims (who famously waived their right to anonymity, Tegan Wagner and Cassie Hamim), before Justice Hidden some three years later. The well-publicised delay tactics prior to and during the trials for the cases of Tegan Wagner and Cassie Hamim included MSK feigning mental illness, where he claimed to have auditory hallucinations in which the voice of Satan prompted him to do bad things such as sexually abuse young women; MSK announcing to the jury that they had already been previously convicted and sentenced of gang rape and forcing a mistrial; threatening and actually attempting to physically attack members of the Prosecution team; throwing a glass of water at the Judge's bench and broken glass at the victims' mothers; and throwing pears at the jury. It was MSK's behaviour in particular that ensured that the K brothers' trials took over three years to conclude from the first trials (in 2003) to the end of the second (in 2006).

Perhaps the allegations of racism and the brothers' dramatic displays in court provided foundations for the distinctly cultural overtones of public narratives that racialised the K brothers' courtroom misbehaviour, providing some credibility to ideas that they obeyed 'alien moral codes' (Dagistanli 2007: 187). Aside from the well-publicised failure of the brothers to respect the majesty of the court, the two oldest brothers' insistence on representing themselves had established them as independent courtroom agents, alongside their family members upon whom the brothers relied as witnesses and alibis. The independence of the K family from other legal actors empowered them to advance extremely problematic and highly gendered and racialised understandings of their cultural background. Yet, despite their cultural difference, the K family's pronouncements on their own cultural background exhibited striking similarities to some of the legal and anthropological understandings of culture (and gendered victimisation) that were invoked in this case. Notable examples are found in the public commentary of the K brothers' father, Dr K (then a local GP), supporting his sons' allegations of racism by providing false alibis and blaming the victims for being sexually assaulted. In one comment outside court Dr K said to the media: 'You are the enemy. You are the enemy of the Muslim. You white people help only the white people ... they are not rapists' (Devine 2005). In another, he remarked:

'What do they [the victims] expect to happen to them? Girls from Pakistan don't go out at night', before asserting that his sons 'did not know the laws of this country' (Sheehan 2006a).

Comments such as these echoed the sharp division that had been constructed along religious and racial lines, particularly with popular political discourse around the preceding racialised gang rape cases, between Western culture (invisible in its hegemony) and Muslim minority cultures. Indeed, the sentiment outside the rarefied space of the courtroom could be summed up in a remark made by Paul Sheehan, a conservative journalist who wrote prolifically on the K brothers' cases and the court process: 'the crimes took place against the backdrop of a violent cultural clash between young Muslim men and young Western women' (Sheehan 2006b).

Such cultural schisms constructed in popular narratives outside the courtroom, and by the K family themselves, were reinforced within the courtroom by an intersection of legal, anthropological, psychological and medical discourses that sought to make sense of the K brothers' attacks. The most obvious example was a cultural defence argument advanced on behalf of MSK by his counsel Stephen Odgers – when the two older brothers decided to obtain legal representation in the trials before Justice Peter Hidden – as a potentially mitigating factor in sentencing. In the defence, MSK notoriously came to be known, in Stephen Odgers' words, as a 'cultural time bomb' waiting to explode (Odgers 2005). Drawing on independent anthropological research conducted in MSK's birthplace, Odgers claimed that it was only a matter of time before MSK's cultural conditioning drove him to commit deplorable acts of sexual violence against women in Australia. The cultural defence was also invoked at an earlier date in an appeal before the New South Wales Court of Criminal Appeal (NSWCCA) against the severity of the sentences handed down by Justice Brian Sully in the earlier trial for the K brothers' attacks on LS and HG.

The defence was supported by an expert witness, Professor Michael Humphrey, who had researched the tribal culture of North West Frontier Pakistan (NWFP), an anomic space at the border of Afghanistan that is marked by poverty and conflict (Abbas 2014), where the K brothers were born and lived for most of their lives (Odgers 2005). Aspects of the culture that Humphrey described were that:

[It is] a tribal culture with strong patriarchal values and an honour code enforced by personal violence ... Men have control over women in all areas of their lives; men's authority over women is reinforced by the legal system [and] rape is a crime that is prosecuted rarely. (Odgers 2005: 6)

Elsewhere, Odgers quoted Humphrey's arguments that the factual circumstances in which the offender found himself would, in NWFP 'almost certainly be found in a brothel' and that the 'proposition that a girl in this situation could take control by asserting her rights – i.e. saying no – would be very difficult in a patriarchal tribal culture where women are treated as dependants and legal minors' (2005: 7).

In sum, the substance of the submissions were that the offender 'by reason of this cultural background, did not appreciate, or did not fully appreciate, the wrongness and criminality of his actions', and that this, to an extent, diminished the culpability of the accused (Odgers 2005: 6). These statements were enthusiastically supported by MSK himself:

[TW] said no but I go ahead with it because I believe that at the time I commit these offences, I believe that she was promiscuous ... She don't know us, I don't know her ... she was not wearing any headscarf and she started drinking with us and she was singing ... I believe at the time when I commit these offences that she had no right to say no. (Wallace 2005: 5)

These arguments around culture and cultural conditioning came to contribute to the persistent racialisation of sexual assault at the time, even though they were advanced with what was presumably the politically progressive intent of cross-cultural recognition in order to explain the attitudes behind the attacks, partially absolve MSK of individual moral responsibility and, ultimately, secure a more lenient sentence.

In his sentencing judgment of 2006, Justice Hidden gave serious consideration to the cultural factors raised by Professor Humphrey's anthropological evidence about NWFP. His Honour noted the Crown's objection to the Professor's evidence on the basis of generality: 'He [the Crown] accepted that the Professor was qualified to speak of the social mores of the relevant area of Pakistan but noted that he had never interviewed the offender and was unaware of his upbringing' (*Regina v MSK, Regina v MAK, Regina v MMK* [2006] NSWSC 237 at 36). Justice Hidden remarked:

The argument that a cultural background such as that disclosed by the evidence in the present case might bear upon sentence for sexual assault is unpalatable, but it is worthy of measured consideration (at 37).

To attempt an explanation of MSK's attitudes towards women, his refusal to take responsibility for his offences, and the fact that he thought prosecution of his offences was ludicrous (and therefore part of an anti-Muslim conspiracy), Justice Hidden deferred again to Humphrey's evidence:

Professor Humphrey sketched briefly how men's authority over women is reinforced by the legal system, including areas of the criminal law which make it 'more difficult for women to get protection against domestic violence, rape and false accusations against them' (at 33).

His Honour's attention to these factors may be seen, by some, as laudable for its receptiveness to cultural difference. But Justice Hidden's reflections also signal a potential cultural blindness to the fact that the very same issues around the prosecution of gendered violence still also plague Western criminal justice systems. In the end, Justice Hidden rejected the cultural defence on the basis that MSK had been in Australia long enough to be habituated to its dominant cultural norms (thereby constructing Australia as a non-patriarchal society where sexual and gendered violence does not tend to occur in similar circumstances); but he did not reject the defence on the basis of its generality or for its reliance on limited or overly simplified understandings of culture and cultural difference.

Moreover, Justice Hidden's musings on MSK's cultural background yield some interesting insights into the way Euro/Anglo-centric legal discourses – usually committed to liberal ideas of individual responsibility and freewill as exercised by rational men – appears to bestow or retrieve individual agency from accused persons who are viewed as culturally 'Other'. Here, the ability to act as a rational free agent appears to be dependent on whether an individual acts within the dominant normative cultural framework, an invisible culture that ostensibly does not influence its members to act in morally abhorrent ways that target vulnerable members of society. To the extent that racially 'unmarked' individuals morally transgress, they are seen to either *choose* their transgressions from established moral norms, or their actions are interpreted as the result of individual pathologies. The inverse appears to be applied by some legal actors to the criminal actions of cultural Others. Try as they might, the criminal(ised) Other cannot seem to escape the deterministic clutches of their cultural pathology; in such interpretations the actions of cultural Others are driven not by reason and free will but by an attachment to antiquated traditions of gender oppression and violence.

Hence, Hidden's entertainment of the idea that MSK's culture was responsible for his violent misogyny was only outweighed by the idea that he must by now be sufficiently enculturated to be an individual moral agent of the dominant culture and act on his own free will. In other words, His Honour presumes that MSK should, after a few years in Australia, have the ability to depart from the deterministic clutches of his cultural background that dictates highly patriarchal and misogynistic norms through which women are dehumanised. This sort of judicial reasoning operates on the liberal philosophy that underpins law: Kant's rational moral agent 'who is free only insofar as he can act in accordance with a universal law that he, as a rational being, legislates to himself' (Benhabib 2002: 139). Outside the courtroom, in the domain of popular media and conservative political commentary (which invariably seeps into legal discourse), there appears to be an oscillation between the bestowal of individual and collective (cultural) responsibility. While deviant actions are attributed to culture, the possibility that this may serve as mitigation for criminal behaviour often results in calls for cultural Others to be treated like 'everyone else' and punished with the full weight of the law.

Justice Hidden's approach may be contrasted to other judicial actors in the K brothers' cases who refused to consider arguments around cultural conditioning. In an earlier sentencing appeal at the end of 2005 against Justice Sully's sentences, the expert testimony of Professor Humphrey had not yet been made available by defence counsel. At that stage, the defence submissions relied simply on the argument that MSK held 'very traditional views about women' because of his cultural conditioning in Pakistani society (*Regina v MAK, Regina v MSK, Regina v MMK* [2005] NSWCCA 369). Such submissions were firmly rejected by the Justices McClellan, Grove and Hall of the NSWCCA with Justice McClellan commenting on their vagueness. Justice Grove concurred with McClellan that the term 'traditional views about women' was too vague, and expressed strong views about the inappropriateness of the submissions:

Whatever counsel implied by his expression 'traditional views about women', neither is there to be extracted some element of mitigation. If it was intended to suggest that differences might be observed in behaviour in the respective 'cultures' of Pakistan and Australia, there was, and is, not the slightest basis for concluding other than that in both places, all women are entitled to respect and safety from sexual assault (*Regina v MAK, Regina v MSK, Regina v MMK* [2005] NSWCCA 369 at 61).

Grove added that 'the expression "cultural time bomb" was, to say the least, inappropriate and inapt. It would understandably be regarded as offensive by those who fell within the scope of its insult' (at 61). The views of these judges seem to remain faithful to the law's privileging of individual responsibility and a steadfast refusal to surmise, as Justice Hidden did, on the presumably deterministic pull of MSK's cultural background.

In an earlier trial before Justice Sully of the Supreme Court, cultural defences were not explicitly raised. But the trial certainly did not lack in its share of strong understandings about culture; if not Pakistani culture, then 'foreign' or Other cultures in general. Aside from the commentary and behaviours of the brothers and their families that were upheld by popular media narratives as representative of Pakistani cultural norms, psychological assessment reports tendered as evidence, also featured the culture of the offenders – in terms of their ethnicity and religion – as a central tenet of the stories told in court:

An accurate knowledge of MSK's socio-cultural background and family dynamics ... would allow for a better understanding of the offences. In this context, it would be useful to know about any prevalent cultural assumptions and practices relating to females that they may have absorbed during their formative years – and in particular, cultural assumptions relating to young females who are

perceived to be sexually available (*Regina v MSK, Regina v MAK, Regina v MMK, Regina v MRK* [2004] NSWSC 319, Dr Baron at 61).

But for their reference to a Pakistani background perpetrator, this assessment might be applied to sex offenders from any ethnic background. Despite his consideration of such expert testimonies, Justice Sully's sentencing remarks reject culture as an excuse. Yet Sully explicitly accepts that the cultural attitudes of offenders might explain why sexual violence occurs:

In our society to force a woman, any woman, to have sexual intercourse, is always and everywhere a base act and a major crime. It is not, ever or anywhere, a defence that the woman was flighty, flirtatious or simply foolish. That latter comment is especially to the point with boys and men from foreign ethnic cultures. The status of women in foreign countries is, in the end, a matter for the law and culture of those countries. The status of women in Australia is a matter for the law and culture of Australia (at 48 and 49).

The problem with Sully's assessment is not that he accepts that cultural attitudes generate the conditions for sexual violence to occur but his suggestion that such cultural attitudes seem to be more prevalent within 'foreign ethnic cultures' and not 'our society'. His remark suggests a certain backwardness in respecting women's rights associated with specific cultures that is apparently not at all applicable to Australia, presenting a homogenous view of both Australian society and the culture of 'foreign countries'. It may be true that the culture of NWFP is deeply patriarchal and that gendered violence is rife in those regions (Perveen 2009). It may also be true that the majority of Australian society is not overtly patriarchal and equality for women has come far enough to generate deep disapproval of sexual violence (even in those cases where victims have been traditionally blamed). Yet the fact that Sully can allude to the possibility that women may invite sexual assault by being 'flighty, flirtatious or simply foolish' – even if this does not constitute a defence – is an implicit reference to dominant cultural norms that engage in victim blaming.

American legal scholar Leti Volpp (2001) has suggested that a focus on the sexism of other cultures obscures the extent of sexism and gendered violence in the dominant culture. While, as Anne Phillips (2007) argues, it may not be tenable to suggest that all societies are equally patriarchal or that some societies do not have a more robust agenda of equality between the sexes, this does not mean that an agenda, however marginalised it might be in these Other societies, simply does not exist.

Overall, Sully's assumptions do not account for the heterogeneity of either Australian or Pakistani society; indeed none of the judicial commentary in the K brothers' trials explicitly acknowledge that there are some parts of Australian society (and other English-speaking Western societies) that are exceedingly sexist and amenable to trivialising the damage of sexual abuse, just as there are some quarters of NWFP that engage in daily political struggles against the oppression of women. Some recent examples of sexual violence in homosocial institutions such as the Australian Defence Force (Australian Human Rights Commission (AHRC) Report 2012) (and other Defence Forces, for example, Fowler et al.'s (2003) *Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy*), elite Australian sporting teams (Cover 2013; Flood 2008; Philadelphoff-Puren 2004), the Catholic Church (Commonwealth of Australia (2014) *Royal Commission into Institutional Responses to Child Sexual Abuse*) and college fraternities (Sanday 2007 in a US context) have been the subject of heightened public and political attention and debate in an Australian and in other Western contexts. In ways unprecedented, recent discourse has at times moved beyond the 'bad apple' paradigm (see AHRC Report 2012) to acknowledge that the intensely patriarchal cultures of such institutions propagate the systemic misogyny and sexual violence that has been endemic – with impunity – in those organisations for decades.

Yet there remains a significant difference between the stigma attached to the sexual transgressions of institutional groups on the one hand and ethnic cultural groups on the other. One notable difference is the perception that non-Western ethnic cultural groups are intransigent, trapped in a pre-modern moral universe and beyond positive change, while Western institutional cultures are smaller in scale, retain at least some level of authority (even after the exposure of repugnant practices) and are deemed capable of reform. Another distinction lies in the extent of the stigma attached to institutional cultures and non-Western ethnic cultures, with stigmatisation of the latter being more widespread, inescapable and personal for individuals that are identified by the visible racial, cultural and symbolic markers associated with certain ethnic, cultural and religious groups.

'My Culture made me do it': Agency and responsibility in legal cultural scripts

The legal subject as an autonomous, rational agent – an extension of the citizen subject of liberalism – is one that has long been contested by feminists of various persuasions. The primary objection of feminist scholars to liberal/legal personhood is the claim that its characteristics are inherently masculine and that women and 'the feminine' are either 'Othered' – completely sidelined as legal or political agents, or expected to conform to the universalised masculine status quo prescribed by law (Naffine 1990; Threadgold 1991). Scholars focusing on diversity, structurally disadvantaged or marginalised populations and a politics of difference have raised similar objections to the premises of sameness that animate concepts of liberal citizenship (Razack 1999; Sandel 1982; Tully 1995; Young 1990) and legal personhood (Naffine 1990). In such work, the insights of feminism centred on the exclusion of women have been mobilised to criticise the exclusion of other group identities through universalised liberal claims to citizenship (and similarly, legal subjectivity) that purport to be neutral but are based on the white, male, privileged and autonomous subject that is said to remain detached from the parochial and irrational demands of cultural and group identities. As Savell points out (with reference to Mykitiuk 1994), 'the legal person is characterised as a self-sufficient, self-directing agent whose relations with others are antagonistic' (2002: 31).³ Moreover, critics of liberalism question the possibility of justice in a society based on a fiction of neutrality. For example, Sandel maintains that 'all political orders ... embody *some* values; the question is *whose* values prevail and who gains and loses as a result ... [T]he ideal of a society governed by neutral principles is liberalism's false promise. It affirms individualistic values while pretending to a neutrality which can never be achieved' (1982: 11, emphasis in original).

The scholarship critical of a liberal legal system's obfuscation of the gendered and raced status quo often offers answers through an acknowledgment of the difference and differential circumstances of diverse and subordinated groups. As Phillips points out in the context of a feminist analysis: 'In the framework of an unequal society, that refusal to recognise difference can have perverse effects ... [it] can become a covert way of elevating one group alone as the norm. Men then stand in for humanity, and humanity adopts a masculine form' (2002: 16). The same might be said in the context of race and class as the (male) legal subject finds its origins *within* and is articulated *from* a certain structural standpoint that is presumed universal. According to Naffine, the legal subject is 'the white, educated, affluent male... [who] evinces the style of masculinity of the middle classes' (1990: 100-101) while Hudson points to 'the dominant subjectivity ...[as] object in that it is he whose behavior law has in mind when it constructs its proscriptions and remedies; and it is this subject who constructs the law' (2006: 30).

There have been two key approaches in recognising difference to avoid uncritically accepting the privileged (white, male, affluent) status of the legal person. One is the progressively intentioned cross-cultural 'recognition' approach that generally prevails in communitarian scholarship and in cultural defences in law, where cultural group identities risk being seen as homogenous while their practices are potentially seen as immutable and fixed. Another

approach goes in the opposite direction, seeking to avoid this fixed and essentialist view of culture by denying the existence of a group identity at all. Stuart Hall takes this position in 'New Ethnicities' when he states that 'the fully unified, completed, secure and coherent identity is a fantasy' (1992: 277). Such views, taken to the extreme, deny the coherence of group and cultural identities and may even disavow the labeling of cultural groups. As a result, the politics of difference ends up converging, somewhat, with the individualistic stance associated with liberalism, and encouraging, as Phillips argues, 'an over-individualised understanding of political agency that attaches too little weight to structural difference' (2002: 24). Yet, as Phillips discusses:

... the 'ethnic minority', like the 'Aboriginal people' or 'the lesbian and gay community', is made up of women and men, old and young, rich and poor: people often engaged in conflict and disagreeing about the interpretation of their supposedly shared culture. (2002: 24)

Put differently, structural realities constrain the choices of individuals from ethnic minority groups in the same ways as they do for individuals from any other group, but that does not mean that the moral and political agency to resist and contest objectionable and outmoded cultural values or practices is simply absent.

Going back to the legal examples presented in the K brothers' cases, it is clear that failures to account for heterogeneity, difference and contestation *within* cultures and cultural identities (rather than only *between* cultures) highlight two important points. Firstly, it is easy to pathologise and generalise about faraway cultures of which we know very little. Katha Pollitt sums this up very nicely in her rebuttal of Susan Moller Okin's infamous question about whether multiculturalism is 'bad for women' (1999). Pollitt asks:

What is a culture and how do you know? A Chinese immigrant murders his supposedly unfaithful wife and says this is the way we do things back home ... The cultural rights argument works best for cultures that most Americans [or Australians] know comparatively little about: cultures that in our ignorance we can imagine as stable, timeless, ancient, lacking in internal conflict, premodern. (1999: 28-29)

Individuals from such cultures, by virtue of their difference, are attributed a group rather than individual identity. This ensures that the individual agency of Others is subordinated to the apparent responsibility of entire cultural groups for their individually (deviant) actions: 'the individual is read off the culture and the culture off the individual in turn' (Phillips 2003: 516). Cultural defence then becomes a move to diminish the subjectivity of individuals 'from minority cultural groups by mis-representing their cultures, and mis-representing the individuals as less than autonomous beings' (Phillips 2003: 517).

The second point is that culturally inflected cases of gendered and sexual violence demonstrate a striking intersection of gender and culture in which men and women of visible cultural groups must conform to stereotypical, Orientalist understandings of gender performance in those cultures, in order to be considered as *authentic* cultural Others (Said 1978). As Phillips (2003) says, cultural defences that are invoked to mitigate violence in criminal cases are gendered in ways that diminish either the responsibility of defendants or the severity of their actions. The differential treatment of men and women who are identified as culturally Other functions to reinforce gender stereotypes attached to those cultures, while maintaining and legitimating the patriarchal status quo.

Referencing the criminal trials of women who had claimed 'honour' as a reason for killing their husbands after years of physical and sexual abuse, Phillips (2003) argues that women of Other

cultures must conform more stringently to cultural stereotypes of subservience in order to successfully use culture as a potential mitigating factor. Drawing on British examples of murder cases among mostly Pakistani ('Asian') women, Phillips observes:

A woman portrayed as entirely under the control of male family members may draw on beliefs about non-Western cultures to make a claim for diminished responsibility, but if she is sullied by past sexual encounters or over-qualified by virtue of a degree, she no longer fits the prevailing image. There is little room here for the complexity of most people's lives, and we are left with a rather one-dimensional and static representation of the 'typical' Asian woman (2003: 525).

This reference to the 'typical Asian [Pakistani] woman' is consistent with stereotypes of Muslim women across the Western world, echoing also the anthropological portrayal of all women in NWFP as 'legal minors' (Odgers 2005) in MSK's sentencing appeal submissions. Interestingly, the stereotypes that abound around men and women of the dominant culture carry similar weight in legal determinations within intimate partner homicide and provocation cases where culture is not specifically invoked (see Maher et al. 2005). Such cases trade on either the diminished responsibility or otherwise of female defendants, and the perception of men as 'understandably incensed by the sexual waywardness of "their" women' (Phillips 2003: 530). This leads Phillips to conclude that the culture of Others is accommodated to the extent that it 'fits into familiar patterns ... Culture operates on a terrain already defined by mainstream gender assumptions, and the gender inequities that have been associated with the cultural defence need to be understood within this context' (2003: 530-531).

Phillips' observations highlight the fact that cultural influence underpins individual violent transgressions across all cultures, regardless of whether the cultural backdrop is rendered invisible through its taken-for-granted, hegemonic status, or highly visible in its Otherness. It is just that individual agency appears to either be conferred or taken away from individuals who come before the courts in line with their gender and cultural difference. In the examples outlined in this paper, a dichotomous approach emerges in which the offenders are either seen as individual agents, fully responsible for their actions because they were deemed sufficiently versed in the (non-sexist) norms of Australian society, or they were irrational dupes who were blindly conditioned by the dictates of a culture that remains timeless in its oppression of women. While the successful persuasion of the courts by the latter argument may suit racialised defendants for the purposes of securing a more lenient sentence, it constitutes a denial of their subjectivity as free agents while entrenching damaging cultural stereotypes more widely. Dominant and reductive understandings of a cultural Other which are mobilised in law to explain criminal behaviours reinforce the liberal/illiberal, civilised/uncivilised dichotomies that characterise conservative arguments about non-white immigration, selective multiculturalism and anti-Muslim racism.

It is worth also raising questions about the status of defences or assessments on the basis of 'good character'. For example, how is an offender's commitment to education and employment viewed by the courts and could these factors be seen as driven by culture? In one of the judgments relating to the K brothers' cases, Justice Sully commented, in his sentencing of the youngest brother MRK, on 'the promise shown by MRK in attaining his HSC [Higher School Certificate] in such unpromising circumstances' (Sully 2004 at 175). Since MRK's educational promise is not articulated as expressly 'cultural', it is presumably a byproduct of his enculturation to the dominant cultural norm, while his sexual transgressions, both related and unrelated to the sexual offences in which he took part, are evidence of his cultural Otherness.

The point is that all defences and character assessments are in fact informed by culture. We cannot eliminate cultural defences or assessments from legal discourse, even if we label such defences as something else. In addition, removing any factors of mitigation in weighing up the

criminality of accused persons would result in a system in which all criminal acts would attract the maximum possible penalty. While this paper has not sought to comment on whether maximum penalties should be imposed on all sex offenders (or indeed anyone who perpetrates violence against vulnerable groups), there is little point in eliminating culture as a potentially mitigating factor when a multitude of other mitigating factors are raised in law that are not labelled as 'cultural'. Whether these factors are raised opportunistically or otherwise is beside the point: factors of mitigation must be considered in any democratic justice system. What is problematic is the way in which culture is exclusively associated with racialised individuals while failing to acknowledge the invisible hegemonic cultural backdrop that generates a dominant, stereotypical narrative about the (negative) norms of Other cultures and the degree of influence that these norms purportedly have on individuals who fall within their scope.

A more measured approach might be for legal and judicial narratives to acknowledge that people's choices are both constrained and enabled by any cultural framework that affords differential power to individuals within different structural circumstances. Cultural attitudes are informed by and filtered through a mix of many different structural factors such as class, gender, age and disability. Nobody, whether they identify with a minority culture or not, belongs to one discrete culture by which they are *solely* influenced. This is an obvious assertion yet it is one that appears to elude some elements of legal discourse, even where judges have remarked, in these examples, on Australian culture (rather than not mentioning it at all) in contrast to Other cultures. Those who identify with a particular ethnic culture lead more complex lives than that which is assumed in legal and political discourses. Individuals identifying with foreign cultural norms are not automatons blindly following cultural norms that are unchanging and trapped in time. Individuals from ethnic minority groups may remain attached to their cultural identities while, to quote Phillips again, 'simultaneously challenging the external disparagement of "their" culture or community and the internal representations of that culture or community that reproduce inequalities and injustices' (2002: 24).

Furthermore, cultural identities and practices are more fluid and dialogic in their development rather than fixed or solid. Benhabib stresses a 'narrative view of identity [which] regards individual as well as collective identities as woven out of tales and fragments belonging both to oneself and to others' (2002: 152). She argues, drawing on a concept coined by Charles Taylor, that we are thrown into context specific 'webs of interlocation' and that 'our agency consists in our capacity to weave out of those narratives and fragments of narratives a life story that makes sense for us, as unique individual selves' (Benhabib 2002: 146). This is not to say that culture does not constrain or influence individual narratives and dialogues that create identities: 'Certainly, the codes of established narratives in various cultures define our capacity to tell the story in very different ways; they limit our freedom to "vary the code"' (Benhabib 2002: 146).

Returning to MSK as an example, his choices may be seen as influenced by a confluence of cultures; a patriarchal culture, whether that is the culture of his birthplace in NWFP or the culture of the society in which the attacks took place, or the misogynistic culture that was cultivated between himself and his brothers as part of a response to their marginal status in a new country. Regardless of the numerous structural and cultural contexts and circumstances in which the K brothers' misogynistic attitudes took shape, MSK remains individually responsible for the sexual assaults. His misogyny was shaped through an interlocation with various patriarchal normative frameworks on a micro and macro scale, while his choices were shaped and influenced through the intersection of a specific set of cultural influences that came to bear on his actions. This applies no more to MSK than it does to any other sex offender who is *not* identified as a product of any particular culture.

A different narrative on difference?

While there are no easy solutions that might generate a more nuanced perception of cultural difference before the courts, a more palatable approach to cultural defence might be taken in two potential ways. First, a more reflexive approach to culture might need to be taken in the commentary of judicial officers and other legal actors in sexual assault and other gendered violence cases. Granted that some cultural frameworks may be more patriarchal than others, legal narratives, sentencing judgments in particular (in which moralising commentary is *de rigueur*), need to acknowledge that our culture as much as any other generates the normative framework for sexual and other violence against women and any other vulnerable members of society. Such judgments also need to acknowledge that the culture of Others is as heterogeneous as the culture of the hegemonic framework from which the law operates, and that the lives of individuals are often marked by similar structural constraints and struggles within any cultural framework.

Legal and judicial recognition of the complexities that mark individual lives might prompt an important change in the narratives that pertain to cultural Others. Rather than subordinating cultural difference to an invisible and hegemonic cultural norm, this type of recognition would be more amenable to understanding that perpetrators of sexual and other gendered violence share a culture of misogyny that does not vary greatly between ethnicities and religious backgrounds. Here, legal judgments might perform an important pedagogical function. As Coates et al. (1994: 189) argue:

Written judgments ... express the state of the particular law at any given time ... they affect not only the litigants but also the future shape of the law and society at large ... Indeed a judge's language may be drawn from counsel, witnesses, previous judgments or broader social discourse. It is this public discourse ... that has an impact and is acted upon. Language affects events and creates versions of reality.

Another suggestion is that the parties to any gendered violence case engage, as potential 'expert witnesses', women and men from the same ethnic groups as the offenders who are active in the struggle for a more robust women's and human rights agenda in their own countries. The same sort of agenda may be useful in relation to Indigenous cultural defence claims in cases of extreme violence against women and children in remote Australian-Indigenous communities. While this suggestion might attract criticism for its utopian and potentially impractical nature, it seeks to address the problem of minorities within minorities, namely women and children, as being particularly disadvantaged by the claims of culture. It is also a way of giving voice to different political interests within the cultures of Others that do not simply and homogeneously subscribe to – but actively struggle against – the patriarchal majority. Though such testimonies might be open to contestation from more traditional voices within those cultures, or even the voices of 'experts' who have conducted anthropological research into the cultures in question, they represent not only the humanitarian aims of Others – which Western discourses have long claimed as their own (Bumiller 2008) – but also the mutability of cultural norms and moral frameworks that characterise any ethno-cultural group.

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¹ Indeed, Indigenous cultural defences might be said to carry even more weight in post-colonial settler societies than those that are mobilised in relation to ethnic minority groups (see Howe 2009; Razack 1994). However that discussion lies beyond the scope of this paper.

² There was also evidence that there were up to a dozen more victims than the four that came forward as the brothers had videotaped all of their victims in a non-sexual context before attacking them.

³ Despite such criticisms of the atomistic and universalised liberal individual and the hostility to difference that is said to exist in liberal scholarship (see for example Barry 2001) some liberal theorists, notably Will Kymlicka, insist that liberalism properly interpreted 'is sensitive to the way our individual lives and moral deliberations are related to, and situated in, a shared social context. The individualism that underlies liberalism isn't valued at the expense of our social nature or our shared community. It is an individualism that accords with, rather than opposes, the undeniable importance to us of our social world' (Kymlicka 1989: 2-3).

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References

- Abbas H (2014) *The Taliban Revival: Violence and Extremism on the Pakistan-Afghanistan Frontier*. New Haven, Connecticut: Yale University Press.
- Australian Human Rights Commission (AHRC) (2012) *Review of the Treatment of Women in the Australian Defence Force*. Phase 2 Report. Sydney: AHRC.
- Barry B (2001) *Culture and Equality*. Cambridge: Polity Press.
- Benhabib S (2002) Sexual difference and collective identities: The new global constellation. In James S and S Palmer (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*: 137-158. Portland, Oregon: Hart Publishing.
- Bumiller K (2008) *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham, North Carolina: Duke University Press.
- Coates L, Bavelas JB and Gibson J (1994) Anomalous language in sexual assault trial judgments. *Discourse & Society* 5(2): 189-206.
- Commonwealth of Australia (2014) *Royal Commission into Institutional Responses to Child Sexual Abuse, Interim Report, Volume 2*. Barton, ACT: Commercial and Administrative Law Branch, Attorney General's Department.
- Cover R (2013) Suspended ethics and the team: Theorising team sportsplayers' group sexual assault in the context of identity. *Sexualities* 16(3-4): 300-318.
- Cripps K and Taylor S (2009) White man's law, traditional law, bullshit law: Customary marriage revisited. *BALAYI: Culture, Law and Colonialism* 10: 59-72.
- Dagistanli S (2007) Like a pack of wild animals: Moral panics around 'ethnic' gang rape in Sydney. In S Poynting and G Morgan (eds) *Outrageous! Moral panics in Australia*: 181-196. Hobart, Tasmania: ACYS Publishing.
- Delgado R and Stefancic J (2000) *Critical Race Theory: The Cutting Edge*. Philadelphia, Pennsylvania: Temple University Press.
- Devine M (2005) Absent father who bred a gaggle of monsters. *Sun-Herald*, 24 July: 15.

- Flood M (2008) Men, sex, and homosociality how bonds between men shape their sexual relations with women. *Men and Masculinities* 10(3): 339-359.
- Fowler TK (Chairman) et al. (2003) *Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy*. Arlington, Virginia: Secretary of Defense.
- Hall S (1992) New ethnicities. In Donald J and Rattansi A (eds) *'Race', Culture and Difference*: 252-259. London: Sage.
- Howe A (2009) R v Wunungmurra: 'Culture' as usual in the courts. *Australian Feminist Law Journal* 30: 163-169.
- Hudson B (2006) Beyond white man's justice: Race, gender and justice in late modernity. *Theoretical Criminology* 10(1): 29-47.
- Humphrey M (2007) Culturalising the abject: Islam, law and moral panic in the west. *Australian Journal of Social Issues* 42(1): 9-25.
- Johns R, Griffith G and Simpson, R (2001) Sentencing 'gang rapists': The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001. *Parliamentary Briefing Paper*, 12/2001.
- Kymlicka W (1989) *Liberalism, Community and Culture*. Oxford: Oxford University Press.
- Maher J, Segrave M, Pickering S and McCulloch J (2005) Honouring white masculinity: Culture, terror, provocation and the law. *Australian Feminist Law Journal* 23: 147-175.
- Naffine N (1987) *Female Crime: The Construction of Women in Criminology*. Sydney, New South Wales: Allen and Unwin.
- Naffine N (1990) *Law and the Sexes: Explorations in Feminist Jurisprudence*. Sydney, New South Wales: Allen and Unwin.
- Narayan U (1998) Essence of culture and a sense of history: A feminist critique of cultural essentialism. *Hypatia* 13(2): 86-106.
- Narayan U (2000) Undoing the 'package picture' of cultures. *Signs* 25(4): 1083-1086.
- Odgers S (2005) Supreme Court of NSW, R v S, Written Submission on Behalf of the Offender. Unpublished.
- Okin SM (1999) *Is Multiculturalism Bad for Women?* Princeton, New Jersey: Princeton University Press.
- Perveen R (2010) *Violence against Women in Pakistan: A Qualitative Review of Statistics for 2009*. Islamabad, Pakistan: Aurat Publication and Information Service Foundation.
- Philadelphoff-Puren N (2004) Dereliction: Women, rape and football. *Australian Feminist Law Journal* 21(1): 35-51.
- Phillips A (2002) Feminism and the politics of difference: Or, where have all the women gone? In James S and Palmer S (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*: 11-28. Portland, Oregon: Hart Publishing.
- Phillips A (2003) When culture means gender: Issues of cultural defence in the English courts. *Modern Law Review* 66(4): 510-531.
- Phillips A (2007) *Multiculturalism without Culture*. Princeton, New Jersey: Princeton University Press.
- Pollitt K (1999) Whose culture? In Cohen J, Howard M and Nussbaum M (eds) *Is Multiculturalism Bad for Women?*: 27-30. Princeton, New Jersey: Princeton University Press.
- Poynting S, Noble G, Tabar P and Collins J (2004) *Bin Laden in the Suburbs: Criminalising the Arab Other*. Sydney: Sydney Institute of Criminology.
- Razack S (1994) What is to be gained by looking white people in the eye? Culture, race, and gender in cases of sexual violence. *Signs* 19(4): 894-923.
- Razack S (1999) *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*. Toronto, Ontario: University of Toronto Press.
- Renteln A (2004) *The Cultural Defense*. New York: Oxford University Press.

- Said E (1978) *Orientalism*. London: Penguin.
- Sanday PR (2007) *Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus*. New York: New York University Press.
- Sandel MJ (1982) *Liberalism and the Limits of Justice*. Cambridge, UK: Cambridge University Press.
- Savell K (2002) The mother of the legal person. In James S and Palmer S (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*: 29-68. Portland, Oregon: Hart Publishing.
- Sheehan P (2006a) Dad dies but his sons' evils go on. *Sydney Morning Herald*, 4 December. Available at <http://www.smh.com.au/news/opinion/dad-dies-but-his-sons-evils-go-on/2006/12/03/1165080811056.html> (accessed 26 June 2015).
- Sheehan P (2006b) *Girls Like You: Four Young Girls, Six Brothers and a Cultural Time Bomb*. Sydney, New South Wales: Pan Macmillan.
- Threadgold T (1991) Legal practice in the courts: Discourse, gender and ethics. *Australian Journal of Law and Society* 7: 39-70.
- Tully J (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge, UK: Cambridge University Press.
- Volpp L (2001) Feminism and multiculturalism. *Columbia Law Review* 101(5): 1181-1218.
- Wallace N (2005) Gang rapist claims right to assault. *Sydney Morning Herald*, 10 December: 5.
- Young IM (1990) *Justice and the Politics of Difference*. Princeton, New Jersey: Princeton University Press.

Cases

- Regina v MSK, Regina v MAK, Regina v MRK, Regina v MMK* [2004] NSWSC 319
- Regina v MAK, Regina v MSK, Regina v MMK* [2005] NSWCCA 369
- Regina v MSK, Regina v MAK, Regina v MMK* [2006] NSWSC 237